

IN THE MATTER OF:
ROLAND ENSOR, JR.
Employees Retirement System

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO: CBA-17-038

* * * * *

OPINION

This matter comes before the Board as an appeal on the record from an opinion of Administrative Law Judge John E. Beverungen dated May 23, 2017. Mr. Ensor sought to change the beneficiary for a remainder portion of his County pension should he pass away. Judge Beverungen upheld the decision of the Employee Retirement System (ERS) that Mr. Ensor could not change the beneficiary, and it is that ruling from which Mr. Ensor appeals. We reverse, and find in Mr. Ensor's favor.

As indicated above, this appeal is on the record. Accordingly, the Board (CBA) defers to any factual findings made by Judge Beverungen. In this instance, however, there are virtually no material facts in contention. As Judge Beverungen indicated, the matter turns on the meaning and interpretation of one section of the Baltimore County Code. Because the issue is solely a matter of law, the CBA owes no deference to Judge Beverungen's ruling.

The uncontested facts can be summed up simply. Mr. Ensor was a Baltimore County employee in the Highway Division of the Department of Public Works. He retired in 1991. He elected Option 6 which permits a reduced pension to him but a portion of that pension will be paid to his beneficiary after his death. He named his wife, Janet L. Ensor as his beneficiary.

The language of Option 6 indicates that the beneficiary can only be changed upon the divorce from or death of the beneficiary.

In April of 2011, Mr. and Mrs. Ensor divorced. Mr. Ensor filed a certification with ERS documenting the divorce and removing his ex-wife as beneficiary. At the time, Mr. Ensor was involved with a woman named Darlene Ruth Wentz. Apparently Ms. Wentz promised to care for Mr. Ensor if he named her as his beneficiary. Mr. Ensor designated Ms. Wentz under Option 6. Ms. Wentz thereafter refused to abide by her agreement. Mr. Ensor attempted to remove Ms. Wentz as the beneficiary, but ERS refused to allow that to occur citing the language in Option 6 which recites that the beneficiary cannot be changed except by "divorce or death".

Mr. Ensor sought relief from Judge Beverungen who ruled that as inequitable as it may be under these circumstances, the plain language of Option 6 prevents removal of Ms. Wentz except by "divorce or death". Because they are not married, the only basis to eliminate Ms. Wentz is for her to pass away. This appeal followed.

THE STATUTORY LANGUAGE

The resolution of this matter turns on the meaning of the language in BCC Section 5-1-231. As Judge Beverungen correctly noted, this provision "is not a model of clarity". It permits a retiree to take less than 100 % of his retirement benefit and then leave to a beneficiary an amount actuarially determined based on the portion of the pension that the retiree is not receiving. In other words, the retiree can accept less than his full pension and leave some portion of his pension to an heir. There are seven separate options. Mr. Ensor selected Option 6. It provides:

Option 6. Upon the death of the retired member, fifty (50) percent of the reduced retirement allowance shall be continued throughout the life of and paid to the designated beneficiary, with the further provision that should the retired member become divorced

from the designated beneficiary or should the designated beneficiary predecease the retired member, upon notice to the Board of Trustees, the retired member's reduced retirement allowance shall thereafter increase to the amount that would be payable had no option been chosen.

This option enables a retiree to receive a pension during his life that is less than he would otherwise receive, and in return, an individual so designated by the retiree shall receive a pension payment for the remainder of that person's life. It is akin to a life estate.

We note that if Option 7 were at issue here, several key definitions are available under that Option. For example, Subsection (d)(2)(v) defines the term "original beneficiary" as the employee's spouse who is designated at the time the retiree retires. Subsection (d)(2)(vi)(1) defines "substitute beneficiary" as a new beneficiary designated following the divorce from or death of the original beneficiary. Subsection (d)(2)(vi)(2) states that the Substitute Beneficiary is not required to be the spouse. In contrast to Option 7, neither "original beneficiary" nor "substitute beneficiary" are used in Option 6. The term "designated beneficiary" is the only term used in Option 6, and there is no definition for that term. The term "Beneficiary" is defined in BCC 5-1-201 (g) as "any person in receipt of a pension, an annuity, a retirement allowance, or other benefit as provided by this subtitle." Apparently a "designated beneficiary" can be the original beneficiary or a substitute beneficiary or any other type of beneficiary.

Finally, Section 5-1-231 states that a retiree "who has elected an optional benefit may not change such election after the first payment becomes normally due, except as provided below". What is "below" are the seven available options. As indicated above, Mr. Ensor chose Option 6 which states that upon election of a beneficiary following the removal of a beneficiary by death or divorce, that beneficiary cannot be changed.

To some extent, the language seems to be clear. But, as the Court said in *Employees Retirement System v. Bradford*, 227 Md. App. 75, 90 (2016), “[t]he ‘plain meaning’ of a statute can only be assessed in the context in which it appears.” (quoting *Patton v. Wells Fargo Financial Maryland Inc.*, 437 Md. 83, 96-97 (2014)). Indeed, in *Bradford*, the Court found that what appeared to be plain and unambiguous language in Option 7 of the Baltimore County Retirement System, was in fact ambiguous once the context of that retiree’s situation was examined.

Here the language is similarly ambiguous. First, the phrase “divorce or death”, linked as they are, seems to refer to a beneficiary who is a spouse. If it was intended to be more inclusive, it would read “divorce of a spouse or death of a beneficiary”. This ambiguity is underscored because the provision does not use the special definitions available in Option 7. “Original beneficiary” specifically refers to a spouse, and “substitute beneficiary” specifically includes a non-spouse. Yet the language in Option 6 does not use the words “original” or “substitute”. The failure to use the specific definitional language generates confusion as to the meaning. In interpreting the provision, we cannot simply add in the words “original” or “substitute” and pretend that they were included implicitly.

As discussed in *Bradford*, statutory interpretation must comport with the legislative intent. The CBA asked the County repeatedly what the purpose was behind the limitation in Option 6. There was no satisfactory answer. It was suggested that it was intended to support marriage, confusedly so by building in an almost permanent selection of a non-spouse beneficiary. This is a huge assumption on a silent record. It means that a retiree can more easily remove a spousal beneficiary (by divorce, even against the spouse’s wishes), than the retiree can remove a non-spouse beneficiary. Further, as Mr. Ensor’s counsel very aptly noted,

under the ERS interpretation, if Mr. Ensor should now re-marry, his new wife could not be designated as a beneficiary until Ms. Wentz passes away. This hardly supports the institution of marriage. Consequently, the CBA has been provided with no legislative rationale for this justification.

As the CBA noted at oral argument, these are Mr. Ensor's retirement benefits, supported in part by his own contributions. For the County to limit his control in this fashion not only makes no sense, but could actually be viewed as abusive. It means that it has assumed responsibility for the funds in an area where it has no expertise. While it makes sense for ERS to control how the monies are invested – it has special knowledge and responsibility to manage the total pool of funds -- it has no insight into how a retiree utilizes the funds once received back from ERS. Indeed, the only basis we can conjure up for the restriction at issue here is for the administrative ease of the ERS staff. If that is indeed the logic of the restriction – and we hasten to add that we do not know that it is - it would be shameful treatment of a retiree for the sake of bureaucratic convenience.

The ERS interpretation conflicts with common sense for all of the reasons recited above. An administrative agency's interpretation of its own statute does receive some deference. However, where the question is one of statutory interpretation, the review is *de novo*. *Coomes v. Maryland Insurance Administration*, 232 Md. App. 285, 296-97 (2017) and cases cited therein. While not perfect, the most rational meaning of the Option 6 phrase “divorced from the designated beneficiary or should the designated beneficiary predecease the retired member” must refer to a beneficiary who is a spouse. Divorce and death are linked together as two conditions and “divorce” – which only applies to a spouse – modifies and limits “death”, which in this context must be referring to the death of a **spouse**. Otherwise, the Option 6 reference to

death as eliminating the beneficiary would have undoubtedly used the term “substitute beneficiary” which explicitly embraces the situation of a non-spouse beneficiary. This means that a spouse is deservedly protected from random removal. It also means that removal of a non-spouse beneficiary, who deserves no special protection, is simply not addressed in Option 6. This interpretation effectuates the difference of using the term “designated beneficiary,” as opposed to “original” or “substitute,” harmonizes the proffered rationale with common sense, accounts for the context of the statutory framework, and eliminates the irrationality and violence otherwise caused by ERS’ interpretation.

CONCLUSION

For these reasons, we reverse the decision of the Administrative Law Judge and find that Mr. Ensor is free to remove Ms. Wentz as his retirement beneficiary.

ORDER

THEREFORE, IT IS THIS 6th day of October, 2017 by the Board of Appeals of Baltimore County

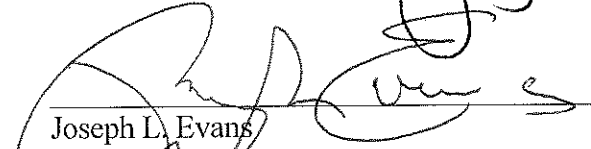
ORDERED, that upon Mr. Ensor presenting acceptable documentation to the Employment Retirement System (ERS) that he wishes to eliminate Ms. Wentz as his retirement beneficiary, ERS shall duly and accordingly remove Ms. Wentz as the designated beneficiary; and

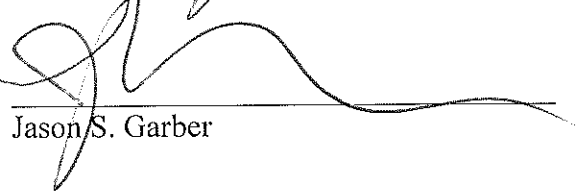
IT IS FURTHER ORDERED that upon the removal of Ms. Wentz as the designated beneficiary, Mr. Ensor’s retirement allowance shall increase to the amount that would be payable had no option been chosen.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**


Maureen E. Murphy, Panel Chairman


Joseph L. Evans


Jason S. Garber



Board of Appeals of Baltimore County

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October 6, 2017

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RE: *In the Matter of: Roland Ensor, Jr.*
Case No.: CBA-17-038

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington" followed by a small mark.

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Duplicate Original Cover Letter

c: Roland Ensor, Jr.
Lawrence M. Stahl, Managing Administrative Law Judge
Katherine V. Limpert, Retirement Benefits Administrator
George E. Gay, Director/Office of Human Resources
Keith A. Dorsey, Director/Office of Budget and Finance
Michael E. Field, County Attorney/Office of Law