

ATTACHMENT C

RESPONDENT'S ARGUMENT

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Sent via E-mail: Board@CalPERS.ca.gov and Fax: (916) 795-3972

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RE: In the Matter of the Appeal of Lifetime Monthly Benefit Payable Upon the Death of Michael A. Garcia by ESTEBAN A. RAMIREZ, Respondent.

CalPERS Ref. No. : 2022-0990
OAH Case No. : 2023030199

Respondent's Argument Against Proposed Decision

This letter shall respectfully serve as Respondent's, Esteban E. Ramirez's, Argument Against the Proposed Decision for consideration by the Board of Administration at its September 20, 2023, meeting. The primary issue in this matter is whether CalPERS correctly determined that Respondent, Esteban E. Ramirez, is not an Option 4 lifetime beneficiary for deceased CalPERS member Michael A. Garcia as a result of CalPERS member, Michael A. Garcia, inadvertently and mistakenly not having his Modification of Original Election Retirement form prepared and submitted with either a notarized signature and/or a signature witnessed by a CalPERS representative at any CalPERS office.

This letter is timely submitted on August 29, 2023, in response to correspondence from CalPERS dated July 19, 2023, which provided the Proposed Decision of Sean Gavin, Administrative Law Judge, which was rendered on July 17, 2023, and provided Respondent the opportunity to submit written opposition argument.

The Proposed Decision rests upon an improper determination and improper application of case law relating to the authority of excluding certain evidence being presented during, and at the administrative hearing held on June 15, 2023. The ALJ's Proposed Decision was rendered without the benefit of all available, competent, and appropriate evidence being before the court.

Respondent, Esteban E. Ramirez, believes that the administrative law judge ("ALJ"), Sean Gavin, violated Mr. Ramirez's due process rights to a fair hearing by excluding specific witness testimony from being presented. Witness, attorney, Charles Prickett, Esq. attended the administrative law hearing to present oral testimony as to his former client, deceased CalPERS

member, Michael A. Garcia's intent to elect Respondent as his new lifetime beneficiary and provide substantial evidence that his submitted Modification of Original Election at Retirement form naming Respondent as a new beneficiary replacing his deceased sister did not have a notarized signature and/or was not signed in the presence of a witnessing CalPERS representative.

ALJ, Sean Gavin, incorrectly cited attorney-client privilege barring Mr. Charles Prickett, Esq. from testifying as to the intent and affirmative steps of deceased CalPERS member, Michael A. Garcia. Michael A. Garcia submitted a change to his beneficiary without a notarized signature as a result of inadvertence, mistake, surprise or excusable neglect. Under well-settled and understood California law, there are several exceptions to the attorney-client privilege after the client's death. In particular, one exception provides that the privilege does not apply to a communication if it is relevant to an issue concerning the validity or intended meaning of a deceased client's writing purporting to affect a property interest. See Cal. Evid. Code §§ 960-61. This exception seeks to permit disclosures that a deceased client presumably would have wanted, to help ensure that the client's property is transferred as intended. Because a client presumably would want such disclosures, there is a diminished danger that this exception would interfere with the goal of encouraging candid attorney-client communication. Due to that diminished danger, disclosure of a communication pursuant to this exception would appropriately give expression to the public's interest in having the evidence before the factfinder. As such, the ALJ, Sean Gavin, did not have the authority to bar the witness testimony of Mr. Charles Prickett, Esq.. The aforementioned exception to attorney-client privilege set forth in Cal. Evid. Code 957, 960-61 unequivocally applies in that, without this exception, it would be much harder for the factfinder, here, ALJ, Sean Gavin, to decide correctly an issue relating to the intent or validity of a client's writing transferring property. The evidence contained in the communications relevant to the deceased member's wishes may not be available from any other source. Accordingly, there is no authority barring Charles Prickett, Esq.'s testimony where the testimony by his client, who is deceased, is not available.

ALJ, Sean Gavin, as the factfinder, should have heard the testimony presented by Charles Prickett, Esq. that establishes beyond dispute that deceased CalPERS member, Michael A. Garcia, intended that his CalPERS pension be paid upon his death to both his sister and Respondent, Esteban Ramirez. Furthermore, the record in this matter establishes that deceased CalPERS member, Michael A. Garcia, communicated his intention repeatedly to PERS staff, the PERS staff understood his request, and issued directions, and that before he could correct the unnotarized signature he died.

Respondent is entitled to relief based on Government Code section 20160. The barred testimony of deceased member's attorney Charles Prickett, Esq. would, and could, illuminate the advancement of the deceased member's illness due to the worsening progression of cancer as well as his immunocompromised status forcing him to be ultra-weary of potential COVID-19 exposure. Due to Michael Garcia's illness, and his concern about contracting COVID-19, he forbid any public outsider from entering into his home or making close personal contact with him because he was battling aggressive cancer. Contracting Covid-19 could have been instantaneously fatal to him. The unprecedented global pandemic further retarded the deceased

member's reasonable accessibility to execute a notarized signature. This failure is the result of mistake, inadvertence, surprise or excusable neglect.

The board has the power required to postpone, continue and/or delay the final PERS decision so that Mr. Charles Prickett, Esq.'s witness testimony may be appropriately presented as evidence to the ALJ. The applicable rules are clear, and the cases interpreting those rules are clear. PERS has a legal responsibility to administer its resources fairly and consistently to preserve the availability of funds. As such, the purpose of PERS plan provisions is to provide a method of ascertaining the desire and intent of the member with reference to the payment of death benefits. Here, where the intention of the Decedent is known, then to the extent possible, such intention must be given effect where doing so doesn't penalize the fund. "The statute should be construed to give effect to an executed designation when there is a clear manifestation of intent by the member to make the change and the designation is filed promptly after death so as to prevent any prejudice to the retirement system." *Watenpaugh v. State Teacher's Retirement System* (1959) 51 Cal.2d 675, 680; *Gallagher v. State Teacher's Retirement System* (1965) 237 Cal.App.2d 510.

Both Respondent and witness, Charles Prickett, Esq. establish and no one seriously disputes whatsoever that CalPERS member did not intend to designate Respondent as beneficiary. In both *Watenpaugh and Gallagher, Id.*, the courts considered evidence of ineffective attempts by the retiree to change beneficiaries. In each case, the intended beneficiary came to court after the pensioner's death seeking the court's power to direct the pension fund administration to give effect to the beneficiary change consistent with, and to give effect to, the manifested intention of the decedent. In each case, the courts looked for evidence of intent coupled with manifest action demonstrating such intent. The courts upheld the claim of beneficiaries where there was evidence that the deceased both intended to make the change and took some affirmative step to do so, even if the deceased's action did not satisfy the strict requirements of the fund administrator.

Moreover, Courts understand that people being people some pensioner may trip over the rules so they should be interpreted liberally to do justice with earned money. "It is more reasonable to assume that all the government intended to require was satisfactory evidence of the intent to change the beneficiary, together with satisfactory evidence showing positive action on the pensioner's part to effectuate such intent, and that when once this is shown, legal technicalities relating to ministerial acts or perfunctory acts will be brushed aside in order to carry out the expressed will and intent..."[of the deceased] *Wicktor v. Los Angeles County*, supra 177 Cal.App.2d 390, at 398.

Respondent has provided, and PERS admits, that deceased member attempted and expressed his intention to change his beneficiary from his deceased sister to Respondent. The evidence supports a finding that the deceased member took affirmative steps to do so. Furthermore, the testimony of deceased member's counsel, Charles Prickett, Esq. who served as a close friend and confidant to the deceased member as such having personal knowledge of relevant facts could and would testify competently to the truth of the facts as stated therein, which was incorrectly barred from presenting testimony by ALJ, Sean Gavin.

Accordingly, the only alternative to doing justice is for the Board to accept that it is just "tough luck" for Respondent when PERS blindly enriches a beneficiary with money that does not belong to them. With all due respect, it is not reasonable for the Board to prematurely accept the Proposed Decision without all evidence having been presented. Respondent hereby requests that the Board either reject the Proposed Decision in its entirety or in the alternative, there exist more than sufficient grounds to remand the case back to the Office of Administrative Hearings for the taking of further evidence to hear the witness testimony of Charles Prickett, Esq. to appropriately fashion a remedy that does not compel CalPERS to pay benefits without the opportunity of all possible evidence being presented as to the intent and affirmative actions of deceased member.

There is ample evidence of Michael A. Garcia's intention to change his Lifetime Monthly Benefit from his deceased sister to his partner coupled with objectively discernable manifestations of this intent permits the Board to fairly and equitably hear this evidence by remanding the case back to the Office of Administrative Hearings.

For the reasons set forth above, Respondent, Esteban Ramirez, respectfully requests the Board not adopt the Proposed Decision, but that it enter a different Decision pursuant to the principles of equity and good faith including disregarding the improper application of case law barring key witness testimony from being presented at the June 15, 2023, Office of Administrative Hearing, conducted by ALJ, Sean Gavin. The ALJ's Proposed Decision was rendered without the benefit of all available, competent, and appropriate evidence being before the court.

Yours truly,



Esteban Ramirez, Respondent