ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)

(Submitted)

ATTACHMENT C

Alfred L. Smith, Jr.

[redacted]

March 25, 2013

Received

MAR 29 2013

CalPERS Board Unit

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM
CalPERS Executive Offices
PO BOX 942701
SACRAMENTO CA 94229-2701

Ref. No. 2010-0823 RESPONDENT'S ARGUMENT

Subject: In the Matter of the Application for Payment of Benefits
Upon the Death of [redacted] by [redacted], Respondent,
and [redacted], Respondent

Greetings

Thank you for this opportunity to object to the proposed decision of the Administrative Law Judge denying me as sole beneficiary for Option 1 Death Benefit and to request that the Board will amend the decision to make it a correct finalization of this administrative appeal process. I am sending my response to you early as it may be that some members of the board may wish to see the transcript of the hearing and/or refer to the basic arguments set forth in my original Appeal document dated September 10, 2010.

It is clear that the Administrative Law Judge has sought to mitigate his legal responsibility by rendering a decision he feels will please all parties. The primary job of the Administrative Law Judge is to ferret out the truth and make a decision that is based on the law and not on feelings and appeasement. Based on your review, you will find that either this appeal process needs to be repeated or in the interest of justice, an amended decision needs to be made by the Board.

First, a review of the entire proposed decision DOES NOT INCLUDE EVEN ONE REFERENCE to established case law involving similar legal cases that have already been heard by the California Appellant Courts. This is because the Administrative Law Judge has gone out of way to skirt around the key issue of fraud in this appeal process. You will find that this happened because he admitted his inadequacy in dealing with matters involving family law. Therefore we see no vestige of his even reading any of the established legal precedents of cases referenced in my written appeal and during the hearing itself. This has led to a flawed decision on his part.

Second, there were numerous other legal errors committed that likewise led to this unjust decision.

SERIOUS LEGAL ERRORS ALLOWED DURING MY APPEAL HEARING:

1. CalPERS did not follow its own stated process for handling this case in the instance of a respondent's objection. If an objection were raised, then a determination would have to be made and a court order would have come from a family law court or a probate court.

2. The original Administrative Law Judge assigned QUASHED all six of my legally issued subpoenas! Subsequently, although I detailed my objections to this action in writing, substitute Administrative Law Judge would not even allow me to comment on this because I refused to participate in telephone conference call. Accordingly, the insurance company, the banks, credit union, executor of estate and former attorney did not provide documentation critical to proving non-disclosure of finances.

3. Apparently, someone picked up on this serious breach of my legal rights and took the original Administrative Law Judge off this case/hearing at the very last minute. Why was she taken off without any notice to anyone? Evidently something serious happened, because the new Administrative Law Judge walked in Wednesday morning and admitted he knew absolutely nothing about the case at hand or the purpose of the hearing.

4. Next, presiding Administrative Law Judge had an "off the record" session immediately after the first morning break and confessed he did not feel capable of handling this hearing. More on this on page three.

5. In "off the record" session, two issues arose which further prejudiced my case. CalPERS counsel tactfully told Administrative Law Judge that if he did not continue to be Officiating Hearing Officer, she would have to file some type of negative report on him. Afterward, Administrative Law Judge acknowledged his long standing relationship with CalPERS and present CalPERS representative. Did coercion and favoritism prevail?

6. The presiding Administrative Law Judge would not allow me to cite case law that applied to my case during my testifying, although the case already decided upon by California Appellant Court was the very same as mine. He said he would read case law on his own time. Yet, check his 11-page "Proposed Decision" and you will not find ONE reference to any case law!!!

7. Two key witnesses (two youngest daughters, [redacted]) called by CalPERS did not appear for the hearing although the original Administrative Law Judge made it crystal clear that everyone was to appear in person and that no phone conferencing would be allowed. Not a word of reprimand or censure, nor was CalPERS ever questioned as to why their two key witnesses were not present. My opinion is that they all realized that the testimony of Ginger and Marie would prove my case arguments to be true.

The basic real problem with this particular appeal hearing is that CalPERS failed to execute its own anticipated legal process. In CalPERS initial determination (see page 3. Par.2 of Proposed Decision) it is plainly stated: "*If one of them files an objection, CalPERS will require a court order that determines your community property interest* *<u>from the family law court or the probate court</u>*." (Italics and underlining is mine) When the Administrative Law Judge discovered this anticipated outcome, he agreed with it and expressed his opinion that this case should indeed be determined by the family law or probate court.

You need to be aware that when the Administrative Law Judge walked into the Hearing Room, he had not been briefed and had no idea about anything to do with this case. He was replacing the original Administrative Law Judge assigned who was removed at the last minute for some very important reason. For your own appreciation of the complications involved, please inquire as to why this last minute change in Administrative Law Judges took place. None of the participating parties were informed of any changes. Why? I suggest the answer will help you to better understand what went on.

Nevertheless, our new Administrative Law Judge had an "off the record" discussion with all the principals in which he explained his misgiving with handling this case on the administrative hearing level. He expressed that this, technically, was "over his head" as far as his experience in family or probate law. He even suggested that he remove himself, but wanted to get our feedback. What did I know? This was my very first Administrative hearing. However, counsel for CalPERS was adamant that he should not step down, that her department felt this was the proper venue for this case (which was not true because of the above quoted statement issued by her very own department) and she added a very thinly veiled comment to the effect that if he stepped down, she would be forced to record some type of negative report on him (which would probably affect his future assignments and possible retirement plans). Please consult with both the Administrative Law Judge and the representing CalPERS counsel for their versions of the "off the record" session held immediately after our first break of the morning. You will probably find that he should not have officiated the hearing. But he gave in and agreed to continue after hearing CalPERS counsel's position. Both respondents really didn't have a say. I explained that my position was that this administrative hearing was not necessary as CalPERS had taken their stand with which I disagreed, and that the only reason I was present was because in my consultation with an attorney I was going to hire to take this directly to Superior Court advised me that the Superior Court would look unfavorably on my case because I had not exhausted all possible remedies before bringing it to them. I was ready to go to Superior Court then and now I am even more ready to go to Superior Court now. The Administrative Law Judge admitted that he had lots of history working with CalPERS and present counsel and partially made decision to continue hearing the case because desiring to continue in the good graces of CalPERS.

Now, let's move on to the Administrative Law Judge's "Discussion" beginning on page 4. This is when the Administrative Law Judge dodges the real issue of fraud, deceit and misrepresentation. Everyone knows that "ignorance of the law is no excuse." Evidently my wife DID NOT KNOW that she did not need my signature on June 5, 2005 when she convinced me to sign over the $2,000 lump sum death benefit. I did not know either. What I do know is that she deliberately lied to me, asking me to sign this over to our oldest daughter, because she had NOTHING to leave if and when she would die. The life insurance for $100,000 taken out in 2002 was in effect in 2005 for three years! Laws are partially predicated on what a reasonable person would think or do. Would you, as a reasonable person agree to sign over a $2,000 death benefit if you knew your spouse had already arranged for that person to receive $25,000? Fraud enters the picture at this point. My wife's frame of mind is being revealed. She didn't know that she did not have to lie to me; in her mind the death benefit of $2,000 would go to me upon her death and so in order to circumvent me from getting it, she deceived me into signing. CalPERS argument is that my signature in there on the paper in 2005 and again my signature is there on the paper on March 15, 2006. Their position is they do not care HOW my wife maneuvered me into signing; they say that is not important. Yet your very retirement policies say otherwise; state and federal law on the matter of retirement say otherwise. Cases already decided by California appellant courts say otherwise. One's spouse cannot deliberately act to deprive sole surviving spouse of retirement benefits.

Sorry, but Administrative Law Judge's conclusion stated as item 13 on page 5 is NOT TRUE. Based on State and Federal laws, I have every right to dispute any decision to convey this balance to the four children instead of to myself as the sole surviving spouse beneficiary. **Why? Because my wife conspired and did deliberately concealed her financial standing from me.** So, again in 2006 she came to me with the same lie "I have nothing to leave our children, so would you please sign over a portion of what you would get to each of them." So, when I signed on March 15, 2006, I was signing over $1,000 each to each of the children. This was our agreement at lunch before going to the San Diego CalPERS office to sign. It wasn't until 2010 when CalPERS sent me copies of the paperwork that it showed that I had signed over everything I was supposed to receive as sole surviving spouse to the four children. Again, what would you have done as a reasonable spouse? In 2006, all four of our children were full grown adults (respectively, [redacted] was 36 years old[redacted] 32, [redacted] 30 and [redacted] was 28 year old). [redacted] was married, living with her husband in [redacted]., [redacted] was married, living in [redacted], [redacted], and [redacted] and [redacted] still lived in the house I brought for them here in [redacted]. [redacted] was nationally certified [redacted] earning $40 - $50 per hour and [redacted] was [redacted] for over 10 years. Accordingly, my intended allotment of $1,000 each was reasonable. If my wife had properly disclosed about the $100,000 life insurance policy and the fact that she had over $50,000 in cash, I would have NEVER signed over anything. CalPERS says all this is immaterial. And guess what, the Administrative Law Judge decided all this was immaterial also. He states in item 22 on

page 8 ***"Respondent contends..."*** It was not a matter of what I contended. It was for him to find out the truth. Did my wife hide her financial standing from me or not? Either she did or did not. He should plainly state his findings, not what I "contended." And in the same paragraph (page 9) he states ***"He avers..."*** What? The whole purpose of the Hearing is so the Administrative Law Judge can decide the truth. Either my wife knowingly withheld this information or she didn't. What do the facts show? Then Administrative Law Judge concludes in same paragraph ***"The merits of such contentions need not be addressed here."*** What is he talking about? This is the WHOLE REASON FOR THE HEARING. And, so, he excuses himself from making the hard decisions. But we cannot be too hard on him, because he told us in the "off the record" session that this case was out of his league. But you cannot let him get away with failing to consider the issue of guilt due to concealment, fraud and deceit, not once, but twice!!! The Administrative Law Judge chided me for using case law in my defense during the hearing, stating that it was unnecessary as he would read all the case law on his own before deciding. Obviously, he did not read any. On page 10 (item J) of my 16-page Appeal Document dated 09/10/10 I stated and quoted case law, to wit: "Yes, it would be nice to take the emotional solution, allowing sentiment to rule, and ignore all the evidence of misrepresentation and intent to defraud. However, this would circumvent our body of laws. In Knight v Board of Administration, 1983, the Court lamented: (1a)' *"Respondent's argument that the position taken by PERS frustrates the intent of the member has some facial merit and we are aware of the apparent inequity which will ensue in adopting appellant's position since decedent's plan was clearly to leave her benefits to her grandchildren. Blake took nothing under decedent's will nor was he ever a designated beneficiary for her death benefits. HOWEVER, UNDER THE CURRENT STATE OF THE Law WE HAVE NO CHOICE BUT TO REVERSE THE COURT'S DECISION."* This is case law that Administrative Law Judge refused to consider. And if he refused to consider this one case, it is apparent that he "excused" himself from considering any other case law with the statement *"The merits of such contentions need not be addressed here."* If not here, then where is he suggesting that "the merits of such contentions" be addressed? Remember, CalPERS counsel made it clear that they wanted him to decide on this case, I assume she meant to decide the case on its merits, not on the basis on his past or future relations with CalPERS. So, Administrative Law Judge took the easy way out, by simply dividing the benefits between both respondents. This decision is not based on law, as you will quickly find out when we go to Superior Court and Appellant Court. On page six I am clearly setting forth the case law from California Appellant Courts which sets the precedent for this case. Hopefully you will acknowledge the clear application of such decisions to this case/hearing now.

Based on the above, I venture to say that, if he could have found a way to circumvent it, the Administrative Law Judge would have not decided in my favor relative to the MSA (Page 9, par. 1). Quote: "*The above matters having been considered, the November 26, 20001 MSA did not operate as a valid alternative disposition for division of the community property within the meaning of Government Code section 21490."*

CALIFORNIA CASE LAW REFERENCES:

1. Knight v Board of Administration, 144 Cal.App.3d 973; 196 Cal.Rptr. 423 (Nov. 1983)
2. Lee v Board of Administration (1982) 130 Cal.App.3d 122 {181 Cal.Rptr. 754}
3. Beck v Board of Administration ((1982) 136 Cal.App.3d 1031 [186 Cal.Rptr. 574]
4. Ruster v. Ruster (1974) 40 Cal.App.3d 379, 383 [114 Cal.Rptr. 812]

CASE LAW ON FRAUD

1. Richardson v. Weatherford, 997 So. 2d 1254 (Fla. Dist. Ct. App. 5th Dist. 2009)
2. Sparks v. Guaranty State Bank, 182 Kan. 165, 318 P.2d 1062 (1957)
3. CA State Gov Code Section 20085 (Fraud Unlawful)
4. AMJUR Fraud & Deceit Sec. 109
5. AMJUR Concealment Sec.233

Therefore, in the interest of justice and in accordance with legal precedents already in the body of California law and Federal law, it would be in the best interests of all parties concerned for the CalPERS Board of Administration to amend their final decision in favor of the legal husband of Elsie M. Smith as the sole surviving spouse and sole beneficiary of decedent's Option 1 Contribution of Benefits.

Unlike the Administrative Law Judge who presided, you do have to consider case law before making your final decision. Please give attention to the above cited cases and others that your attorneys will share with you. Then you will have a basis for making a decision that will finalize this matter or one that will take us to court where all the legal errors made in this hearing will not be made, where the witnesses will be forced to appear, where the subpoenas will not be quashed, where there will be no professional ties between CalPERS and the Judge/Jury, and where you will end up paying twice plus all court costs and attorney fees.

Respectfully yours,

Alfred L. Smith, Jr.
Appellant/Respondent