

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION FOLLOWING REMAND**

CalPERS member Philip Timothy Wilson ("Member Wilson"), was a state safety member of CalPERS, employed by the Department of Corrections and Rehabilitation, at the time that he died in 2008. At the time of death, he was married to Antipas Johnlang Konou ("Respondent Konou").

Member Wilson and Respondent Konou initially registered as domestic partners on May 17, 2006. Eight days before registering as domestic partners, they signed an agreement entitled "Pre Registration Domestic Partnership Agreement" (hereinafter "Partnership Agreement"). Under paragraph 2.3 of the Partnership Agreement, Respondent Konou "specifically waives any interest in the CalPERS pension." Under paragraph 14 of the Partnership Agreement, the parties agree to waive "the right to receive any property or rights upon the death of the other party unless that right is created or affirmed by the other party in a living trust, last will and testament or other written document." Paragraph 18 of the Partnership Agreement is titled "Entire Agreement" and reads as follows:

"This agreement contains the entire agreement of the parties on these matters, superseding any previous agreement between them. This agreement may not be amended or terminated except in a written instrument signed by both parties."

After registering as domestic partners, Member Wilson filed with CalPERS a form "PERS BSD-241 Beneficiary Designation," dated July 3, 2006, signed by himself and by Respondent Konou, as spouse/domestic partner. The beneficiary designation form named Respondent Konou as the primary beneficiary for 100% of benefits payable on account of death. The beneficiary designation contains language above the signature box that reads: "I understand that my marriage or registered domestic partnership...subsequent to the date I file this form with CalPERS, will automatically void this designation."

On June 20, 2008, Member Wilson and Respondent Konou were married. Member Wilson died on November 6, 2008. He was survived by his spouse, his parents and four siblings.

### **Claim by Respondent Siblings**

Several months after Member Wilson's death, CalPERS received correspondence dated July 31, 2009, from an attorney representing his brother Stephen Wilson (acting as administrator of the estate), and enclosing a CalPERS form "PERS-BSD-1167 Application for Active Member/Non-Member Survivor Benefits" signed on behalf of himself and his siblings, David, Peter and Wendy Wilson (hereafter collectively referred to as "Respondent siblings"). Respondent siblings also enclosed a disclaimer of

interest signed by Respondent Konou on May 20, 2009, and a declaration dated July 24, 2009, that Respondent Konou had signed.

CalPERS staff responded to the attorney, advising that CalPERS would not accept the disclaimers because they did not reflect the specific amounts of the benefits that Respondent Konou had disclaimed, nor to whom CalPERS should pay the disclaimed benefits. CalPERS informed the attorney that it would write to Respondent Konou directly, to provide him with a form "BAS-140 Disclaimer of CalPERS Benefits" showing the amounts and type of benefits that he would be disclaiming, should he desire to do so.

#### Claim by Respondent Konou

CalPERS staff wrote to Respondent Konou on October 22, 2009, to explain the CalPERS benefits payable due to the death of his spouse. The letter enclosed forms that Respondent Konou could use to apply for death benefits as a surviving spouse. However, it also explained that, if Respondent Konou chose to disclaim benefits, he must complete the Disclaimer of CalPERS Benefits form to do so. The Disclaimer of CalPERS Benefits form reflected that the benefits payable as a result of the death of Member Wilson were as follows: Group Term Life Insurance of \$5,000 and either 1) a lump sum Basic Death Benefit of \$660,408.57, or a monthly Pre-Retirement benefit of \$8,558.35 (Option 2).

On November 6, 2009, Respondent Konou filed form "PERS-BSD-1167A Application for Pre-Retirement Death Benefits" with CalPERS. CalPERS thereafter informed the Respondent siblings that CalPERS had determined that Respondent Konou was entitled to receive benefits because he was the surviving spouse.

#### Proceedings at Hearing

The Respondent siblings timely filed an appeal of CalPERS determination. At hearing, Respondent siblings and Respondent Konou were represented by counsel. Respondent Konou testified by telephone.

CalPERS presented testimony by a Death Benefits Unit staff specialist, who explained that CalPERS recognizes the surviving spouse as the beneficiary for death benefits unless there is evidence that the spouse has disclaimed or waived his interests. CalPERS did not consider the Partnership Agreement to be a waiver of death benefits because it was signed before Member Wilson and Respondent Konou were married. CalPERS staff explained that, for purposes of paying death benefits, CalPERS does not accept pre-nuptial or pre-domestic partnership agreements where doing so would circumvent public policy or contravene statutory enactments. CalPERS also considered the beneficiary designation signed by Member Wilson and Respondent Konou after they registered as domestic partners, to reflect their intent for disposition of their CalPERS benefits upon death.

The CalPERS staff specialist further explained that CalPERS did not consider the 2009 disclaimers submitted by the Respondent siblings to be valid because, under California Probate Code 277(d), and the case of *Hittle v. Santa Barbara County Employees Retirement Association* (1985) 39 Cal.3d 374, a disclaimer must identify the member, describe the benefit to be disclaimed and specify to what extent the benefit is being disclaimed. She said that the CalPERS disclaimer form provides sufficient detail for a person disclaiming benefits to make an informed choice. However, the disclaimer offered by Respondent siblings was not specific enough to make it clear to CalPERS that Respondent Konou was fully aware of the interest he was waiving and disclaiming.

The Administrative Law Judge (ALJ) concluded that the Partnership Agreement signed by Member Wilson and Respondent Konou must be followed. The ALJ reasoned that the beneficiary designation was extinguished by operation of law, under Government Code section 21492, when the parties became married. He agreed with the Respondent siblings that, once the beneficiary designation was extinguished by virtue of the parties' marriage, the Partnership Agreement continued to govern the disposition of their property. Additionally, the ALJ stated an opinion that CalPERS did not present any legal authority for its policy to decline to accept pre-nuptial or pre-domestic partnership agreements to modify the rights of a spouse for the purpose of payment of death benefits. The ALJ did not address the validity or invalidity of the disclaimers signed by Respondent Konou in 2009.

At its June 13, 2012, meeting, the Board of Administration declined to adopt the ALJ's Proposed Decision dated May 8, 2012, and instead voted to remand the case to the ALJ to receive and consider additional evidence on two questions: 1) "whether the member's beneficiary designation amended the Partnership Agreement executed by the member and his surviving spouse"; and 2) "whether CalPERS properly rejected the disclaimers that Respondent Konou signed in May and July 2009 at the request of decedent's siblings."

The ALJ heard the matter again on December 12, 2012, and permitted the parties to file additional briefs on both issues. The ALJ issued a Proposed Decision Following Remand dated March 8, 2013.

In his Proposed Decision Following Remand, the ALJ concluded that although the Government Code provides that CalPERS deems a beneficiary designation void by operation of law when parties marry, the beneficiary designation had survived for other purposes, such as amending the Partnership Agreement. The ALJ reasoned that the beneficiary designation thus reflected Member Wilson's intent to override the provisions in the Partnership Agreement that waived payment of CalPERS benefits to Respondent Konou. As a result, Respondent Konou is entitled to receive death benefits under the CalPERS pension plan as Member Wilson's surviving spouse.

The ALJ also upheld the determination by CalPERS staff to reject the disclaimers that Respondent Konou signed at the request of Respondent siblings. He concluded that the siblings failed to demonstrate that the disclaimers that they provided to Respondent

Konou in 2009, met the requirements of *Hittle v. Santa Barbara County Employees Retirement Association*. The ALJ agreed with CalPERS staff that the disclaimers were invalid and denied the appeal.

The Proposed Decision is supported by the law and the facts. Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The siblings may still file a Writ in Superior Court if they do not agree with the adoption of the Proposed Decision Following Remand by this Board.

April 17, 2013



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