ATTACHMENT E

THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for Death Benefits Payable on Account of Catherine Atkinson: JAMES C. ATKINSON, DANIEL W. ATKINSON, and AMANDA S. SCHMITT Respondents, and CHARLENE MOTA, Respondent.	Case No. 2013-0458 OAH No. 2013070202

PROPOSED DECISION

This matter was heard before Administrative Law Judge Dian M. Vorters, Office of Administrative Hearings, State of California, on March 17, 2014, in Sacramento, California.

Preet Kaur, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS or Board).

Charlene Mota (respondent Mota) appeared on her own behalf.

Ellen L. Holloway, Attorney at Law,[1] appeared on behalf of James C. Atkinson, Daniel W. Atkinson, and Amanda S. Schmitt (respondent Children); who were not present.

Evidence and testimony were received and the record remained open through April 18, 2013, to allow leave for the filing of closing briefs and declarations. Oral argument was heard on April 29, 2013, and the matter was submitted for decision on that date.

[1] Ellen L. Holloway, Attorney at Law, Wagner Kirkman Blaine Klomparens & Youmans LLP, 10640 Mather Blvd., Suite 200, Mather, California 95655.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 27 May 14

ISSUE

In the absence of a beneficiary designation on file on the date of Catherine Atkinson's death; whether survivor benefits should be paid to the decedent's children, James Atkinson, Daniel Atkinson, and Amanda Schmitt, pursuant to the statutory order of payment set forth in Government Code section 21493; or to her sister Charlene Mota, pursuant to a holographic will recognized by CalPERS as a writing filed with the Board and determined by CalPERS to demonstrate the decedent's intent.

FACTUAL FINDINGS

1. The Statement of Issues was made and filed on February 12, 2014, by Anthony Suine, Chief of the Benefit Services Division of CalPERS. He did so in his official capacity.

Background

2. On June 18, 1997, Catherine Atkinson was employed as a law enforcement dispatcher with the City of Oakdale. By virtue of her employment, she was a local agency miscellaneous member of CalPERS with 15 years of service credit. Ms. Atkinson died on July 13, 2012, at the age of 55. At the time of her death, Ms. Atkinson was an active working member of CalPERS, divorced, and had not filed a Beneficiary Designation form (PERS-BSD-241) with CalPERS.

3. The natural born children of Ms. Atkinson were James C. Atkinson, Daniel W. Atkinson, and Amanda S. Schmitt. Respondent Mota is one of Ms. Atkinson's four surviving sisters.

CalPERS' Initial Determination

4. After Ms. Atkinson's death, all four claimants submitted to CalPERS their Applications for Active-Member/Non-Member Survivor Benefits.[2] Nina Ramsey is an analyst in the Pre-Retirement Death Benefit Unit. This unit handles benefits when a member dies before they retire. Ms. Ramsey generated a letter to respondent Mota on September 15, 2012, informing her that Ms. Atkinson had no valid beneficiary designation in effect at the time of her death, and "therefore, benefits are payable to the statutory beneficiary(ies) in accordance with section 21493 of the Government Code." The letter set forth the order of statutory beneficiaries as follows:

1) Spouse or registered domestic partner; or, if none,
2) Natural or adopted children; or, if none,
3) Parents; or, if none,
4) Brothers and sisters; or, if none,

[2] The Applications for survivor benefits were filed in September and October 2012.

5) Estate if probated

Applying this statutory order, respondent Children would be entitled to equal shares in the lump sum Basic Death Benefit.

5. On or about September 24, 2012, respondent Mota mailed several documents to CalPERS to establish that she was Ms. Atkinson's intended beneficiary.

A. One hand-written document, purportedly drafted by Ms. Atkinson, was addressed to "Char," lists several assets and their estimated dollar values, and provides burial instructions. This document was not dated or signed. Included on the list of assets was a "PERS policy" from James Atkinson's retirement (Ms. Atkinson's ex-husband) and "My PERS funds - You are beneficiary." After bequeathing $5,000 to each of several individuals, none of whom are respondent Children, the draft states: "The rest is yours – including my belongings – you are the only one who deserves it as you have always been a GOOD person to everyone – you deserve the best – Love you." It is not clear where, when, or by whom this draft was found.

B. Another document purportedly hand-written by Ms. Atkinson was found by the Coroner in Ms. Atkinson's night stand on the morning of July 13, 2012. It was dated November 7, 2011, addressed to "Char," and signed, "Love you Big Sister - Cathy." It begins,

> If your [*sic*] reading this – then I guess this is my last goodbye – As you know – I changed all my life insurance policies and made you beneficiary. Here is a list of my policies - 1) New York Life - $100,000, 2) Financial Center Credit Union - $15,000, 3) City of Oakdale - $25,000, 4) Operating Engineers - $25,000, 5) My ICMA Account – approx. $60,000, 6) My PERS Account - $50-60,000 "not sure", and 7) My payout (monthly) from Jim's PERS account – about 1,500 a month.
>
> I am sure none of my kids will cooperate or even care for that matter...Just make sure my wishes to be buried in Turlock are carried out – Please bury me in my long sleeve uniform and pants – belt and all- headset too! Also, I want a coffin like Mommy's!
>
> Here is a breakdown of where I want some of my money to go -

The letter then bequeaths $5,000 to each of several individuals, none of whom are respondent Children and states, "The rest is yours to do something nice for yourself – you are the most loving, deserving sister I have..."

C. A copy of a letter from New York Life to Ms. Atkinson dated October 17, 2011. The letter confirms Ms. Atkinson's "recent request for a change of beneficiary" on the policy to her sister, Respondent Mota, 100 percent.

D. A copy of a letter from CUNA Mutual Group to respondent Mota, dated July 18, 2012. The letter notified respondent Mota that Ms. Atkinson had named respondent Mota as the beneficiary of the policy.

E. A copy of the ICMARC 457 Deferred Compensation Plan Employee Enrollment Form (457 form) that Ms. Atkinson signed on December 30, 2011, and a letter from ICMARC acknowledging her choices. Ms. Atkinson named respondent Mota as the primary beneficiary to receive 100 percent of the payout. She named no contingent or secondary beneficiaries.

F. An uncertified and incomplete copy of a family court order in the matter of *In re the Marriage of James A. Atkinson and Catherine S. Atkins,* from the Superior Court of California, County of Stanislaus, in Case No. 43738.[3] The order, entitled "Stipulated Qualified Domestic Relations Order Re: Division of California Public Employees Retirement System Benefits," was filed on October 16, 2011, after a Judgment of Dissolution of Marriage was entered on April 11, 2011. The parties were married for 32 years and Mr. Atkinson was receiving a monthly service retirement benefit of $2,910.77. The Stipulation allocated 50 percent of value of Mr. Atkinson's CalPERS retirement benefit to Ms. Catherine Atkinson. The Stipulation further provided that "If benefits are still payable to the Member at the time of the Nonmember Spouses death, the Administrator shall continue to pay the Nonmember Spouse's System Interest by separate warrant directly to the beneficiaries named below. The named beneficiary was respondent Mota.

G. Respondent Mota's handwritten statement to CalPERS, dated September 24, 2012, concerning conversations she had had with Catherine Atkinson over the prior one and one-half years. Respondent Mota testified at hearing to essentially the same information contained in this statement. In summary, that Ms. Atkinson asked respondent Mota for her social security number for the purpose of "changing all of her policies and retirement accounts for [respondent Mota] to be her beneficiary." One conversation occurred during dinner in the presence of respondent Mota's son-in-law and daughter, Lisa Rebensdorf. A few months later, Ms. Atkinson told respondent Mota that "she had taken care of all of the changes." According to respondent Mota, Ms. Atkinson specifically named life insurance, funeral expenses, her ICMARC, her CalPERS account, and her ex-husband's CalPERS account as stated in the divorce settlement.

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[3] The exhibit was incomplete in that only four of seven pages of this family court order were submitted at hearing. However, according to CalPERS analyst Daniel Schofield, CalPERS received and reviewed the complete document.

H. A letter from Lisa Rebensdorf, dated September 24, 2012, stating that she was present when her aunt, Ms. Atkinson, asked her mother, respondent Mota, for her social security number. Ms. Rebensdorf testified at hearing to essentially the same information contained in the written statement. She recalled that these conversations regarding beneficiary changes occurred in late 2010 and early 2011.

6. By letter dated November 6, 2012, CalPERS notified respondent Mota that her request to be recognized as the statutory beneficiary entitled to the lump sum Basic Death Benefit had been received and was being reviewed. By separate letters on the same date CalPERS also notified respondent Children that their requests to be recognized as statutory beneficiaries entitled to equally share the lump sum Basic Death Benefit had been received and were being reviewed. CalPERS calculated the approximate lump sum Basic Death Benefit at $71,000.

CalPERS' Revised Determination

7. After reviewing all documents, CalPERS determined that respondent Mota was the proper beneficiary of Ms. Atkinson's "Pre-retirement lump sum Basic Death Benefit" in the amount of $71,943.29.

8. By letters dated January 23, 2013, CalPERS advised respondent Children of their decision. The letter explained that their mother had two accounts with CalPERS: one was the accumulated contributions she earned as a CalPERS member and the other was the monthly community property allowance she received after her divorce from James Atkinson. CalPERS had followed the court order as to the latter and paid the "designated beneficiary." As for the lump sum Basic Death Benefit, there was no valid beneficiary designation in effect. The letter further explained: "You and your siblings would ordinarily be payable as the statutory beneficiaries in accordance with section 21493 of the Government Code. But your mother's handwritten will was submitted for our consideration to accept as a beneficiary designation." CalPERS cited the following provision of Government Code section 21490:

> ...a member may at any time, including, but not limited to, at any time after reaching retirement age, designate a beneficiary to receive the benefits as may be payable to his or her beneficiary or estate under this part, by a writing filed with the board.

CalPERS accepted the document as "a writing filed with the Board" because Ms. Atkinson "specifically named CalPERS as a benefit she wanted her beneficiary to receive. Thus, PERS' interest is to carry out the member's intent, as indicated in her writing." CalPERS also acknowledged receipt of respondent Children's Affidavit for Collection of Personal Property (Probate Code, § 13100), but determined not to recognize this affidavit for payment of death benefits, based on having accepted Ms. Atkinson's holographic will. The letter was signed by Anthony Suine, Chief, Benefit Services Division.

9. By letter dated February 28, 2013, CalPERS advised respondent Mota that they had "accepted your sister's will as a 'writing filed with the Board'...By accepting your sister's will we have recognized you as the designated beneficiary entitled to the lump sum Basic Death Benefit" in the amount of $71,943.29. The letter also advised respondent Mota that CalPERS had received an appeal of their decision and the matter had been forwarded to the Legal Office.

10. Per the Statement of Issues, the appeal is limited to the issue of whether "there is sufficient evidence of decedent's intent to designate respondent Mota as her beneficiary, such that respondent Mota is the valid beneficiary and should be paid and receive the lump sum death benefit."

CalPERS' Review Process

11. Gloria Rhyme was the CalPERS retirement program specialist who determined that respondent Mota was the valid beneficiary of Ms. Atkinson's benefits. She is no longer with CalPERS and did not testify. Julie Watson was the manager who reviewed the case file. She is retired and did not testify. Daniel Schofield, CalPERS Retirement Program Specialist II, was subsequently assigned to this case in approximately January 2014.

12. Mr. Schofield testified to the case review process in the Benefit Services/Death Benefits Program. When a file comes to the Death Benefits Unit, it contains a statement prepared by another CalPER analyst. Mr. Schofield reviews this statement and then reads all notes and phone records in the computer file. He then reads all documents in the member's paper file. He looks for evidence of a beneficiary designation which can be in the form of a letter, note, will, or trust, filed for purposes of making a beneficiary determination pursuant to Government Code section 21490.

If there is no beneficiary designation on file, then CalPERS proceeds according to the order of payment as outlined in Government Code section 21493. That is, to the spouse and if no spouse, to the member's children, and so on. Every decision is reviewed and approved by management. The analyst then sends letters to the beneficiaries requesting their desired form of payout.

13. Though the decision in this case had already been signed off by Ms. Watson, Mr. Schofield followed his normal steps in reviewing the file and preparing to testify in this matter. He read all memoranda, letters, computer file notes, call logs, and documents to confirm whether anything had been missed. He reviewed all of the documents identified at Factual Finding 5. Mr. Schofield stated that the letters from New York Life and CUNA Mutual Group were supportive documents only and not writings that he would use to make a beneficiary determination. He reviewed the complete family court order granting a community property share of James A. Atkinson's CalPERS benefits to Ms. Atkinson.

14. Mr. Schofield did not find a Beneficiary Designation form (CalPERS form PERS-BSD-241) on file for Ms. Atkinson. He did find a document submitted by Ms. Mota that indicated that benefits should be distributed to her. He testified that CalPERS "internal

guidelines" allowed for distribution of a retirement account via a will not filed by the member. He authenticated the document by looking at the handwriting and content. Mr. Schofield noted that this document was dated (November 7, 2011), signed, and specifically bequeathed (distributed) "PERS" benefits in the amount of "$50,000 - $60,000," which Mr. Schofield stated was a reasonable account balance at the time Ms. Atkinson wrote the will. He also noted that the document listed names that only the member would know including "Jim", her ex-husband.

Respondent Mota's Evidence

15. Respondent Mota testified about learning of her sister's death. On July 13, 2012, at 6:30 a.m., respondent Mota received a call from the Oakdale Police Department after her sister failed to arrive at work. Officers called respondent Mota again from her sister's home to inform her of Ms. Atkinson's passing. Respondent Mota drove to her sister's home. While respondent Mota waited outside, the Stanislaus County Coroner found the holographic will in Ms. Atkinson's night stand. The Coroner brought the letter outside and allowed respondent Mota to read it. That was the first time respondent Mota had seen the document purporting to distribute Ms. Atkinson's personal property to friends and family.

16. Ms. Mota's daughter, Lisa Rebensdorf, testified that she was standing outside with her mother when the Coroner handed the letter to respondent Mota. Ms. Rebensdorf recalled that when the Coroner handed it to respondent Mota, respondent Mota said, "Oh no." The Coroner responded, "It is not that kind of letter, it is a good letter. It is her wishes." The Coroner told respondent Mota that she could not let her have the letter, but she could allow respondent Mota to read it. The Coroner took the letter back from them after "a couple of minutes." This evidence indicates that the Coroner read the letter before temporarily giving it to respondent Mota, and adds to the authenticity of the document. Respondent Mota later obtained the original document and produced it at hearing for review by the ALJ and counsel. A review of the original document demonstrated that the copy in evidence is a true and correct copy of the original which remains in respondent Mota's possession.

17. Respondent Mota recalled that about a year and a half before her sister's death, Ms. Atkinson spoke to her about making respondent Mota her beneficiary. They had a couple of conversations about a month apart. In early 2011, Ms. Atkinson asked respondent Mota for her social security number (SSN), but Ms. Mota forgot to follow-up with the requested information. A month later, over dinner, Ms. Atkinson again asked her sister for her SSN stating she wanted to "get this taken care of." Respondent Mota gave her SSN to her sister this time. Respondent Mota stated that her sister "had a good frame of mind" when she asked for this information. Respondent Mota stated Ms. Atkinson had just gone through a divorce and was sad about how her children had treated her.

18. After Ms. Atkinson's death, Respondent Mota found a folder in her sister's home with copies of her life insurance policies and other financial assets. She acknowledged that even though Ms. Atkinson listed Respondent Mota as the beneficiary of her ICMARC

and City of Oakdale payouts, this money went to respondent Children and her ex-husband James A. Atkinson, respectively. Respondent Mota did receive the New York Life payout in the amount of $100,200. She has not distributed the funds as per Ms. Atkinson's instructions and none of it remains. Respondent Mota did not lodge her sister's writing with the probate court because she never considered it to be a "will." Respondent Mota assumed that Ms. Atkinson had notified CalPERS of her desired beneficiary designation and only contacted CalPERS after receiving the letter from Ms. Ramsey stating that the money would be distributed to "statutory beneficiaries."

19. Ms. Mota disputed allegations made by respondent Children that their mother was not of sound mind, was mentally ill, and/or was addicted to pain medication. She acknowledged that according to the death certificate, Ms. Atkinson died of hydrocodone intoxication on Friday, July 13, 2012. However, she does not believe her sister overdosed. She received information that Ms. Atkinson died of elevated toxicity levels due to poorly functioning kidneys.

20. Colleen Sanderson, another sister of respondent Mota and Ms. Atkinson, testified that she was in weekly communication with Ms. Atkinson from November 2011 forward, especially during the holidays. She conceded that they were not close growing up but had been on "really good terms" over the last few years. In her opinion, Ms. Atkinson was of sound and stable mind and "finally happy" having purchased a new house and car. Ms. Sanderson stated that Ms. Atkinson hosted functions at her home including a Fourth of July party that she and respondent Mota attended, but none of respondent Children did. It is noted that Ms. Atkinson, Ms. Sanderson, and respondent Mota all lived in Stanislaus County, whereas respondent Children live out of the area/state. Ms. Sanderson was aware of more recent communication between Ms. Atkinson and her daughter Amanda Schmitt.

21. Ms. Mota believes that the November 7, 2011 holographic will was still current at the time of her sister's death. It is noted that at some time after the will was drafted, the name "Katrina Gallardo" was excised from the list of individuals to receive $5,000 each from Ms. Atkinson's estate. Rebecca Tanner is the niece of Ms. Atkinson and Ms. Mota by their brother, James Tanner. She provided background about Ms. Gallardo at hearing. Ms. Gallardo had been living with Ms. Atkinson but there was a "falling out." On June 19, 2012, Ms. Atkinson informed Ms. Tanner that she had asked Ms. Gallardo to leave and invited Ms. Tanner to move into her home. Ms. Tanner did not move in.

22. Ms. Mota submitted an email purportedly written by Ms. Atkinson on June 15, 2012, approximately one month before her sister's death.[4] In it, Ms. Atkinson explained that

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[4] This June 15, 2012 email was admitted as state of mind evidence pursuant to Evidence Code section 1251. (See *Watenpaugh v. State Teachers' Retirement System* (1959) 51 Cal.2d 675, 679 [Declarations have thus been admitted in cases involving mental condition at the time of executing a will...[w]hen intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule.].)

Ms. Gallardo had been renting a room but the arrangement had gone poorly. Ms. Gallardo had not paid her rent and had refused to maintain a clean room and bathroom. Consequently, Ms. Atkinson had evicted Ms. Gallardo. Ms. Atkinson believed that Ms. Gallardo had returned "yesterday" (June 14, 2012), and stolen her house keys. In the email, Ms. Atkinson expressed her frustration and sadness with events, especially since being "turned down by all three of my kids when I asked if I could come and visit them...that really hurt." This email supports Ms. Tanner's testimony and explains why Ms. Gallardo's name was struck from the list of beneficiaries in the holographic will. It also reflects Ms. Atkinson's state of mind with respondent Children one month before her death.

23. Ms. Mota also submitted copies of emails from two of Ms. Atkinson's co-workers to support her testimony that Ms. Atkinson was of sound mind.[5]

Sofia M. Robinette is an Oakdale Police Department dispatcher who had worked with Ms. Atkinson since Ms. Atkinson began working there in 1997. In her March 15, 2014 email, she identified Ms. Atkinson as "Catherine (Cathy) Sue Tanner Atkinson." It is noted that the middle name matches that on the birth certificate. Ms. Robinette described Ms. Atkinson as "very smart and very well organized" with "amazing" knowledge of the legal system. She worked with Ms. Atkinson on an eight-hour graveyard shift, the day of her passing. She recalled Ms. Atkinson to be happy about her home, garden, pool, and plans for entertaining friends and family. She was also looking forward to a Christmas visit from her children that year.

Another email from colleague Michael Shaw, sent March 16, 2014, described the need for police dispatchers to be of sound mind for safety reasons. He worked with Ms. Atkinson on her last night with the police department. He described her as "aware of everything going on...not altered in any way." He described her mind and decision making as "clear and concise."

Respondent Children's Evidence

24. Respondent Children (J. Atkinson, D. Atkinson, and A. Schmitt), did not testify or call any witnesses at hearing. However, all three filed declarations after hearing which were received into evidence prior to closing argument. They also filed copies of email exchanges between themselves and their mother, Ms. Atkinson. Their declarations support a finding that their parents, Ms. Atkinson and James A. Atkinson, were married for 35 years, separated in December 2009, and divorced in July 2011. This separation/divorce was difficult for all three respondent Children. The process negatively affected their relationship with Ms. Atkinson and led to a break-down in communications.

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[5] These emails were admitted as administrative hearsay pursuant to Government Code section 11513, subdivision (d), which states in pertinent part, "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. ..."

Respondents J. Atkinson and A. Schmitt admitted to blaming their mother for leaving the marriage and both also alluded to her alleged drug problem. The record reflects that their father, James A. Atkinson was the "petitioner" in divorce proceedings (Superior Court of California, County of Stanislaus, Family Court Case No. 437380). The existence of a drug problem by Ms. Atkinson is contested by respondent Mota and there is no direct evidence to support a finding of addiction or that Ms. Atkinson was impaired when she effected beneficiary changes, and drafted and edited letters regarding the handling of her funeral and estate.

Beginning in the fall of 2011 into 2012, communication resumed between Ms. Atkinson and respondent Children. According to their declarations, respondent D. Atkinson visited Ms. Atkinson in March 2012, Ms. Atkinson chose the name for respondent A. Schmitt's unborn child, and Ms. Atkinson was planning to visit respondent A. Schmitt in the fall of 2012. There were also plans for all three respondent Children to visit their mother at Christmas 2012.

Respondent Children's Argument

25. Respondent Children contend that as statutory beneficiaries they are entitled to their mother's CalPERS lump sum retirement benefit. They argue that Government Code section 21493 must be strictly complied with and any effort to interpret the "alleged will" is unfounded. They point to legislative history to support their conclusion that the Legislature specifically contemplated and declined to allow "wills and trusts" to qualify as "writings" filed with the retirement Board.

Respondent Children also question the validity of the "purported will." They note that CalPERS is not in possession of the original document, it has not been lodged, admitted to probate, or authenticated, and is contested by respondent Children. They further argue that only the Probate Court has jurisdiction to determine the validity of a will. As such, CalPERS should not rely on the purported will as evidence.

Respondent Children conceded that "it is the law that to effect a change of beneficiary of a retirement fund there must be a clear manifestation of intent of the member to make such a change." (*Hudson v. Posey* (1967) 255 Cal.App.2d 89.) However they argue that even if the purported will is considered as evidence, it does not "make a specific behest," or manifest Ms. Atkinson's clear intent for respondent Mota to be the designated beneficiary of the PERS Account. Further, in their opinion, Ms. Atkinson "did not take *any* positive action to effectuate her alleged intent." She did not mail the will to her sister, or mail a beneficiary designation form to CalPERS, though she had several months after writing the letter in November 2011 to do so. (*Wicktor v. County of Los Angeles* (1960) 177 Cal.App.2d 390 [beneficiary change form had been signed and mailed but apparently lost, court gave effect to the new designation].)

CalPERS' Argument

26. Ordinarily, if a member has not filed a beneficiary designation prior to death, CalPERS will follow the statutory order of payment. (Gov. Code, § 21493.) However, in this case, CalPERS received the holographic will from respondent Mota two months after Ms. Atkinson's death. The will was found by the coroner at Ms. Atkinson's home. CalPERS cited case law that supports their effort to ascertain and fulfill Ms. Atkinson's intent as to the proper recipient of her retirement benefits. (*Lyles v. Teachers Retirement Board* (1963) 219 Cal.App.2d 523; *Hudson v. Posey, supra,* 255 Cal.App.2d at p. 89; *Gallaher v. State Teachers' Retirement System* (1965) 237 Cal.App.2d 510.) Because the letter was dated, signed, and directed to "Char" (respondent Mota), CalPERS argues that it should be accepted as "a writing filed with the board" for purposes of determining the proper beneficiary. (Gov. Code, § 21490; Cal. Code Regs., tit. 2, § 582.).)

CalPERS contends that there is no statutory support for respondent Children's position that CalPERS cannot consider a holographic will that has not been "lodged" and admitted to probate court. (*Lyles, supra* 219 Cal.App.2d at p. 525.) CalPERS determined that Ms. Atkinson's holographic will, which purported to bequeath retirement benefits, is a clear manifestation of her intent to name respondent Mota as the primary beneficiary. Ms. Atkinson performed affirmative acts in furtherance of her intent by placing the letter in an envelope with her sister's name on it and placing the envelope in a folder with other policies and financial statements. (*Gallaher, supra* 237 Cal.App.2d at p. 518; *Watenpaugh, supra* 51 Cal.2d at p. 681.) CalPERS also considered oral declarations of Ms. Atkinson prior to her death to demonstrate the state of mind of the decedent. (*Watenpaugh, supra* 51 Cal.2d at p. 680; Evid. Code, §§ 1250, 1251.)

CalPERS rejected respondent Children's' argument that Government Code section 21493 must be strictly followed. CalPERS acknowledged that Government Code sections 21490 and 21491 set forth the method for members to change or designate beneficiaries. However, CalPERS argued that strict compliance with retirement statutes is not mandatory and cited supporting authority that distinguishes the compulsory nature of retirement systems from life insurance policies. (*Watenpaugh v. State Teachers' Retirement System* (1959) 51 Cal.2d 675, 681.)

Respondent Mota's Argument

27. Respondent Mota is aligned with CalPERS in the above arguments. She produced the original will at hearing which was reviewed by the parties and ALJ. The document relied upon by CalPERS and admitted into evidence appeared to be a true copy of the original held by respondent Mota. She asserted that her sister, Ms. Atkinson, was of sound mind and body during relevant conversations between herself and Ms. Atkinson and that those discussions lend support to the writing. (Factual Finding 17.) Respondent Mota also argued that the June 15, 2012 email from Ms. Atkinson to respondent Mota provides timely information (one month before Ms. Atkinson's death), of her change of mind as to Katrina Gallardo (whose name is crossed off the holographic will), and ongoing state of

mind as to respondent Children (whose names are not mentioned in the holographic will). (Factual Finding 22.)

Legal Analysis

28. A writing filed after the death of a member is properly considered by the retirement body. In *Watenpaugh, supra*, the member had an earlier designation on file with the Teacher's Retirement Board, naming his late wife and children. He had subsequently remarried and completed a new beneficiary designation form naming his new wife. He brought the form home where it remained in a file until after his death. His wife offered evidence of the member's statements to her that he desired for her to receive his retirement benefits. The court ruled that the decedent's declarations were relevant to state of mind and admissible as an exception to the hearsay rule. The court further ruled that the retirement statute should be construed to give effect to an executed designation when there is a clear manifestation of intent to make the change and the designation is filed promptly after death so as to prevent prejudice to the retirement system. (*Watenpaugh, supra*, 51 Cal.2d at p. 681.) The court held that literal compliance with retirement regulations is not necessary to obtain a change of beneficiary where it is established that there was an "intention to change and there was some affirmative action evidencing the exercise of the right to change." (*Ibid.*)

29. A holographic will may serve as a "writing filed with the Board." Several cases support this fact. In *Lyles, supra*, the member had earlier filed a beneficiary designation with the Teacher's Retirement Board. One year before her death, she created a holographic will purporting to change aspects of her earlier designation. The case involved a similar statute requiring the member to file her beneficiary designation on a specific form. The court gave effect to the member's holographic will filed after her death. While acknowledging that life insurance policies generally require strict compliance with prescribed methods of changing the beneficiary for death benefits, such is not the same for distribution of retirement benefits. (*Lyles, supra* 219 Cal.App.2d at p. 528.)

Additionally, though the will in *Lyles* contained some inaccuracies, the court found that the member's intent as to where she wanted her benefits to go was clear. The court stated that the prime purpose of the retirement system is to enable a member to protect herself for her years of retirement and to nominate "anyone she so desires or her estate as beneficiaries upon her death." (*Lyles, supra* 219 Cal.App.2d at p. 530.) "The State of California has no interest in whom such a [member] may so designate, in spite of its own contributions. Its prime interest is to be sure that it does not pay any retirement benefits to the wrong person or to pay the benefit twice." (*Ibid.*)

30. No beneficiary designation was on file at the time of Ms. Atkinson's death on July 13, 2012. However, a document purporting to distribute her assets and explain her wishes for her burial outfit and location was found by the Coroner in her room. This "holographic will" was dated November 7, 2011, and mailed to CalPERS two months after Ms. Atkinson's death. As such, it was necessary for CalPERS to ascertain Ms. Atkinson's intent at the time she wrote the holographic will.

The writing is signed and addressed to "Char," also known as her sister, respondent Mota. Ms. Atkinson's November 7, 2011 holographic will named respondent Mota as the primary beneficiary and listed several other individuals to receive $5,000 each. An earlier draft of the will was also admitted at hearing and specifically states: "My PERS funds – you are beneficiary." Both documents instruct respondent Mota on Ms. Atkinson's desired burial place and clothing, as well as distribution of assets. Respondent Children are not named in the holographic will other than a reference that "none of them will cooperate or care." Ms. Atkinson placed a copy in her nightstand but did not give a copy to her sister, respondent Mota. She notified some of the entities, including ICMARC, New York Life, CUNA, and the family court (for her ex-husband's PERS account), that respondent Mota was her intended beneficiary. She placed copies of her accounts and policies along with the holographic will in a file in her nightstand.

In 2011, Ms. Atkinson told respondent Mota of her intention to name respondent Mota as beneficiary of her assets. She requested respondent Mota's social security number for this purpose. At least one of these conversations was witnessed by respondent Mota's adult daughter, Ms. Rebensdorf. These earlier declarations as well as Ms. Atkinson's subsequent actions are "manifestations of intent." (*Watenpaugh, supra*, 51 Cal.2d at p. 681.) The question is whether these manifestations were sufficiently "clear." The evidence supports a finding that Ms. Atkinson's clear intent was to make respondent Mota the beneficiary of her estate consisting of various assets including the PERS account, and to have respondent Mota arrange her burial and administer her estate.

31. Any other assertions put forth by CalPERS or respondents at the hearing, and not addressed above, are found to be without merit and are rejected.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198.) The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) "final compensation" (Gov. Code, §§ 20037, 21350, 21352 and 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.) Members are afforded an opportunity to elect retirement payment options and to make beneficiary designations. This includes designation of beneficiaries to receive lump sum Death Benefit.

2. Government Code section 21490, subdivision (a), provides:

> Except as provided in subdivision (b), a member may at any time, including but not limited to, at any time after reaching retirement age, designate a beneficiary to receive the benefits as

may be payable to his or her beneficiary or estate under this part, by a writing filed with the board.

3. Government Code section 21493, subdivision (a), provides, in relevant part, that if a person had no beneficiary designation in effect on the date of death, any benefit payable shall be paid to the survivors of the person in the following order:

(1) The decedent's spouse.
(2) The decedent's natural or adopted children.
(3) The decedent's parents.
(4) The decedent's brothers and sisters.

4. California Code of Regulations, title 2, section 582 states, in relevant part: "A member may designate as beneficiary to receive any benefit payable to a member's designated beneficiary upon death before or after retirement, any person or persons, including a corporation; ...The designation must be in writing, except as otherwise provided in this section, must give the name of the person and his address, and must be filed in the office of the board in Sacramento, California. The right of a beneficiary to receive payment of a benefit is contingent on his survival at the time of the member's death, and the member may designate a beneficiary or beneficiaries on the contingency that the first beneficiary does not so qualify."

Legal Conclusions

5. CalPERS correctly determined that the full Pre-Retirement Lump Sum Basic Death Benefit is payable to respondent Mota. The evidence supports a finding that Ms. Atkinson intended for her sister, Charlene Mota, to receive the bulk of her assets including her PERS benefits. Her holographic will is dated November 7, 2011. The same instrument makes clear that Ms. Atkinson specifically did not intend for her children to receive assets from her estate.

6. Eight months passed between the writing and Ms. Atkinson's death on July 13, 2012, and there is evidence that her relationship with her children was changing. However, there is also evidence that in June 2012, approximately one month before she passed, her relationship with one of the individuals she had previously named to receive $5,000 from her estate changed. This explains the alteration to the holographic will striking the name of Katrina Gallardo. Hence, Ms. Atkinson had the opportunity to discard or further amend her will to include her natural children, but did not. (Factual Finding 22.)

7. The matters set forth in the Factual Findings and Legal Conclusions as a whole have been considered. Respondent children did not meet their burden of establishing that they should be recognized as joint beneficiaries of Ms. Atkinson's Pre-retirement Lump Sum Basic Death Benefit. Respondent Mota met her burden to establish that she is the designated beneficiary of Ms. Atkinson's CalPERS benefits.

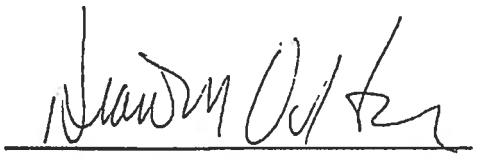
ORDER

1 CalPERS' determination to recognize Charlene Mota as the designated beneficiary of Catherine Atkinson's PERS account, based upon a "writing filed with the Board" on September 24, 2012, is AFFIRMED.

2. The appeal of James C. Atkinson, Daniel W. Atkinson, and Amanda S. Schmitt, to be recognized as joint beneficiaries of the $71,943.29 Pre-Retirement Lump Sum Basic Death Benefit is DENIED.

3. The appeal of Charlene Mota to be recognized as the sole designated beneficiary of the $71,943.29 Pre-Retirement Lump Sum Basic Death Benefit is GRANTED.

DATED: May 22, 2014



DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings