

ATTACHMENT C
RESPONDENT'S ARGUMENT

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DATE: February 5, 2016

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**Re: In the Matter of the Appeal Regarding Monthly Benefits Payable Upon the
Death of Donald Caughey by Jolie Caughey
CalPERS Case No. 2011-0953; OAH Case No. 2015050083**

Respondent's Argument

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February 4, 2016
By Email and U.S. Mail

Board of Administration
CalPERS
400 Q Street
Sacramento CA 95811

Re: Respondent's Argument for Jolie Caughey

To the Board of Administration:

The errors and omissions of CalPERS and/or the errors and omissions of Donald Caughey are both correctable, and they must be corrected under several alternative but mandatory sections of *Government Code* section 20160.

The Proposed Decision wrongly finds that the communications were not ambiguous and that Caughey failed to elect Jolie as beneficiary. The evidence in the administrative record does not support the ALJ's Proposed Decision, and therefore the Board should not adopt the Proposed Decision, and either hold a full hearing or return the matter to the ALJ with direction.

The administrative record is clear that Donald Caughey clearly attempted to secure the Option 2 benefit for Jolie Caughey several times, including in hand-written statements, on Form 580, and otherwise. The record shows that Donald Caughey actually did make the Option 2 election to the best of his ability given the information that CalPERS provided to him.

There is nothing in the record to indicate that Donald knew that he had not secured the Option 2 benefit for Jolie. In fact, everything in the record indicates that Donald thought that he had secured those 2 benefit for Jolie. Even though it told Caughey that it would follow up with him, CalPERS never informed him that he did not secure the Option 2 benefit.

The administrative record shows that CalPERS "knew" that Donald had not properly secured the Option 2 benefit for Jolie, but did not inform Donald.

In other words,

1. CalPERS knew that CalPERS had told Caughey that it would follow up with him,
2. CalPERS knew that Caughey had the right to rely on CalPERS assertions,
3. CalPERS knew that Donald was "mistaken",
4. CalPERS knew that Donald did not know that he was mistaken,
5. yet CalPERS did nothing to inform him.

As a result, Caughey did not correct his error *because he did not know that he erred*.

Under Section 20160, I was CalPERS' error to not follow up and to inform him under these circumstances, so as to give Caughey the chance to correct.

There are no facts to support the assertion that Donald made a conscious choice to forego the Option 2 benefit for Jolie. There is no mention of Option 2 in the "pop up" letter, the only exhibit that CalPERS says gives Donald notice. (Notice of what?) The language, timing, and circumstances surrounding the "pop-up" letter are so inherently ambiguous and unclear as to be tantamount to constructive fraud under *Hittle*. Clearly, it is not a knowing waiver by Donald, (much less by Jolie as the spouse entitled to the ongoing benefit). Neither CalPERS' argument nor its math adds up to impute knowledge or intention to Donald.

Moreover, the Proposed Decision ignores that Jolie as the spouse also had an interest in the Option 2 benefit. CalPERS has made no argument that either Jolie was not entitled to spousal information or that Jolie intentionally waived the Option 2 benefit.

The Proposed Decision finds that Caughey did not elect an Option 2 benefit for his

spouse but fully-informed waiver, decision, or election as required by *Hittle v. Santa Barbara Cnty. Employees Ret. Assn.* (1985) 39 Cal.3d 374. Even under CalPERS' hypothesis, the law would not support a waiver, imputation of a choice, or other election against the Option 2 benefit in these circumstances. (See generally *Hittle, supra.*)

The testimony is clear that Donald was concerned about his CalPERS benefits. In his first marriage, Donald believed he took a reduction of \$400 in 1993 to provide an Option 2 to his then-current wife Susan. CalPERS did not enter any contradictory evidence.

Since Donald thought that he had taken a reduction of \$400 for the Option 2, how can CalPERS argue that an increase of \$146.96 in a pop-up (one that does not mention Option 2) several years later places Donald on notice that he had not selected the Option 2?

The facts in Respondent's *Closing Brief* clearly show that Donald elected the Option 2 benefit originally for Susan in 1992, told CalPERS in writing to maintain the Option 2 election, requested any form to provide the Option 2 benefit to Jolie, and received Form 580 from CalPERS. The undisputed sequence of events shows that Donald signed and returned Form 580 almost immediately upon receipt, thinking and acting under the impression that he signed the forms to make Jolie the Option 2 beneficiary.

To the extent that it is relevant, Donald made a correctable ministerial mistake in failing to complete the correct form, but Donald's mistake was actually caused by CalPERS' giving him the wrong form and failing to make clear that the Form 580 did not transfer the Option 2 benefit as he believed and relied upon. CalPERS' other mistakes include failing to inform Donald and then subsequently failing to follow up.

Importantly, CalPERS told Donald that it would follow up, but CalPERS knew Donald made an error and did *not* follow up. CalPERS did not inform him that the Form 580, his clear

written instruction, or the application to provide the Option 2 benefit for Jolie was not in effect. Therefore, the lack of a signature on the correct form was CalPERS' error or omission, not Donald's.¹

CalPERS' errors, which are required to be corrected in Donald's and Jolie's favor under *Government Code* section 20160, are described in more detail in the record and in the *Closing Brief* Opening Brief and include:

1. CalPERS failed to inform Donald.
2. CalPERS failed to provide Donald with the correct form. CalPERS wrongly provided him the Form 580.
3. CalPERS wrongly failed to follow up.
4. CalPERS failed to provide the spousal information form, "Statement of Reason for Absence of Spouse's Signature on Beneficiary Designation Form", as part of the application.
5. CalPERS failed to get Jolie's signature on the "Statement of Reason for Absence of Spouse's Signature on Beneficiary Designation Form", as part of the application.

The law requires CalPERS to correct the errors of CalPERS and the errors of Donald Caughey.

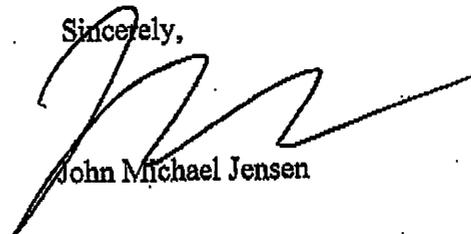
LAW

CalPERS owes the Caugheys a substantive right and duty to correct its errors which continues throughout the life of the Member and beneficiary under *Government Code* sections 20160 and 20164 and *City of Oakland v. Pub. Employees' Ret. Sys.* (2002) 95 Cal.App.4th 29, 45.

In conclusion, the Proposed Decision should not be adopted.

¹ If CalPERS had followed up and informed Donald, then CalPERS might have some kind of argument, but under the existing facts, CalPERS' hypothesis simply fails on all accounts.

Sincerely,



John Michael Jensen