

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

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BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding Death
Benefits Payable Upon the Death of
GRANTLAND LEE JOHNSON by

LEE TURNER JOHNSON,

Respondent.

Case No. 2015-0373
OAH No. 2015081045

**RESPONDENT'S ARGUMENT AGAINST
ADOPTION OF THE PROPOSED
DECISION**

Board Meeting Date: March 16, 2016

Meeting Location: CalPERS Headquarters,
Robert F. Carlson Auditorium

1 **I. INTRODUCTION**

2 The Proposed Decision consists of a mere recitation of statutory requirements and procedures
3 for changing a life option beneficiary, and then finds that Respondent Lee Turner Johnson
4 ("Respondent" or "Mrs. Johnson") did not satisfy them. In doing so, the Proposed Decision succeeds
5 in rigidly applying formal requirements under Government Code section 21462¹ while disregarding the
6 practical realities of this case. Mrs. Johnson does not contest the applicable statutory framework.
7 Rather, she argues that the underlying facts and applicable law dictate a different outcome, and they are
8 largely ignored by the Proposed Decision.

9 There can be no question that Grantland Johnson who managed significant governmental
10 bureaucracies, including as an elected official, regional director for the U.S. Department of Health and
11 Human Services and as Secretary of the Health and Human Services Agency for the State of
12 California—intended to designate Mrs. Johnson, who is seventy years old, as his beneficiary for health,
13 dental and lifetime Option 2 benefits. The only reason that the process was not completed was because
14 he died prior to submitting a final confirmatory form. However, she should not be deprived of these
15 benefits, and Grantland Johnson's hopes for his wife should not be ignored, on that basis.

16 For the reasons described below, in documents and testimony presented at the October 6, 2015
17 hearing and in Respondent's Closing Brief, the Proposed Decision should not be adopted.²

18 **II. ARGUMENT**

19 **A. The Proposed Decision Ignores Grantland Johnson's Intent and the Substantial
20 Compliance Doctrine**

21 Perhaps the most significant error in the Proposed Decision is that it deems "[w]hether Mr.
22 Johnson clearly intended to name [Mrs. Johnson] as his life option beneficiary" to be irrelevant.
23 (Proposed Dec. at p. 7.) In rote fashion, the Proposed Decision largely repeats requirements for
24 designating a new beneficiary for life option benefits (*id.* at pp. 4-5) then swiftly concludes that Mrs.
25 Johnson should be denied them because Grantland Johnson "was unable to complete the process . . .
26 prior to his death." (*Id.* at p. 7.) However, that is an improper analysis; case law demonstrates that

27 ¹ All statutory references herein are to the California Government Code unless otherwise indicated.

28 ² Due to the page limit, Respondent reserves the right to raise additional objections to the decision in further proceedings should it be adopted.

1 intent cannot be ignored, and should be effectuated, under these circumstances.³

2 **1. The Proposed Decision Ignores *In re Marriage of Cooper***

3 The California Court of Appeal, in *In re Marriage of Cooper* (2008) 160 Cal.App.4th 574 [73
4 Cal.Rptr.3d 71] ("*Cooper*"), looked to a CalPERS member's *intent* in determining whether he should
5 be permitted to revoke his former wife's interest in his Option 2 benefits. The member's former wife
6 was initially found to have an interest in his CalPERS benefits and was later awarded the entirety of the
7 Option 2 benefit based on a domestic relations order. (*Id.* at pp. 577-78.)

8 However, the court held that such an outcome was contrary to the member's *intent* and
9 permitted a solution *outside of the statutory framework* for designating a new beneficiary for Option 2
10 benefits. The court allowed the member to buy out his former wife's share of the Option 2 benefit (*id.*
11 at p. 578) and designate his daughter in her place (*id.* at p. 579). It did so because there was "no evidence
12 that . . . [the member] *intended* to forever relinquish his community property interest in the option 2
13 survivor benefit, . . ." (*Id.* at p. 581, italics added.) Furthermore, CalPERS agreed that it would not
14 receive a windfall in part because after buying his former wife out, the member would name a different
15 beneficiary. (*Ibid.*, citing Gov. Code § 21462.) In addition, the court held that "discretion here may be
16 reasonably exercised" by allowing the buyout. (*Ibid.*)

17 Discretion should also be exercised here. The Proposed Decision fails to analyze *Cooper* and,
18 remarkably, cites it to show the irrevocability of Grantland Johnson's prior beneficiary designation.
19 (Proposed Dec. at p. 8.) Of course, that is exactly the opposite outcome in *Cooper*.

20 **2. The Proposed Decision Ignores *Pimentel***

21 The Proposed Decision also altogether ignores the California Supreme Court's decision in
22 *Pimentel v. Conselho Supremo De Uniao Portuguesa Do Estado Da California* (1936) 6 Cal.2d 182
23 [57 P.2d 131] ("*Pimentel*"), which was based on facts similar to this case. In *Pimentel*, a policyholder
24 told his friend that he wanted to change his beneficiary and who the new beneficiary should be. (*Id.* at
25 p. 184.) The policyholder had a change of beneficiary form prepared and signed it before a notary.

26
27 ³ In addition, section 20164, subdivision (a) makes it clear that the "obligations of th[e] system to and in
28 respect to retired members continue throughout the lives of the respective retired members, *and thereafter*
until all obligations *to their respective beneficiaries* under optional settlements have been discharged."
(Gov. Code, § 20164, subd. (a), italics added.)

1 (*Ibid.*) However, only two of several requirements for changing a beneficiary were satisfied and the
2 policyholder died before the form was mailed. (*Id.* at pp. 185, 187 and 189.) The California Supreme
3 Court held that “where the [policyholder] makes every reasonable effort under the circumstances . . .
4 and there is a *clear manifestation of intent to make the change*, which the insured has put into execution
5 as best he can, *equity should regard the change as effected.*” (*Id.* at p. 189, italics added.)

6 The Proposed Decision appears to acknowledge *Pimentel* by stating that “[~~it~~here may have
7 been a *different outcome* [in this case] had [Grantland Johnson] passed away after signing the election
8 form, but before returning it. Or even if he had received the settlement option estimates and election
9 form, but passed away before he could consider them.” (Proposed Dec. at p. 7, fn. 7, emphasis added.)

10 That statement is significant because it recognizes that strict adherence to section 21462 is not
11 required. The Proposed Decision, on the one hand, states that a member must, for example, “elect the
12 desired settlement option (or re-elect the same one) and/or name a new life option beneficiary [on the
13 election form, then] have his signature notarized . . . and return the form within 30 days, or his
14 application would be cancelled.” (Proposed Dec. at p. 5.) On the other hand, it acknowledges a
15 potentially “different outcome” if Grantland Johnson had received the form but passed away *even*
16 *before considering the estimates*, much less signing and returning it within thirty days.

17 The discussion demonstrates the arbitrary significance that the Administrative Law Judge
18 (“ALJ”) assigned to whether Grantland Johnson died before or after receiving a confirmatory election
19 form. It also evinces a misapplication of *Pimentel*, to the extent it is analyzed at all. The ALJ ostensibly
20 argues that *Pimentel* is distinguishable because, unlike the policyholder in that case, Grantland Johnson
21 did not have nor sign a beneficiary change form before he died. But that misses the point. First, that
22 comparison, as with the entirety of the Proposed Decision, fails to account for *intent*, which was critical
23 to the holding in *Pimentel*. In addition, it ignores the overwhelming similarities between the cases.
24 Like the policyholder in *Pimentel*, Grantland Johnson took reasonable steps to change his beneficiary
25 but died before he could submit a final form. (*See, e.g., Resp’t Closing Br.* at pp. 3-6, 10-14, 16-17.)

26 3. The Proposed Decision Fails to Apply the Substantial Compliance Doctrine

27 The Proposed Decision describes the procedures for designating a new Option 2 beneficiary
28 and simply concludes that because Grantland Johnson “never received an election form . . . [he] did

1 not substantially comply with . . . section 21462.” (Proposed Dec. at p. 7.) Such a statement is not only
2 void of any legal analysis, it shows a complete failure to apply the substantial compliance doctrine.

3 Substantial compliance means that “[w]here there is compliance as to all matters of substance
4 *technical deviations are not to be given the stature of noncompliance. Substance prevails over form.*”
5 (*Cal-Air Conditioning, Inc. v. Auburn Union Sch. Dist.* (1993) 21 Cal.App.4th 655, 668 [26 Cal.Rptr.2d
6 703], italics added; *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1017, fn. 24 [39 Cal.Rptr.3d 470]
7 [“each *objective or purpose* of a statute must be achieved” but not “‘actual compliance’ with every
8 specific statutory requirement”], italics added.)

9 CalPERS does not and cannot argue that intent, affirmative acts in furtherance of that intent,
10 and substantial compliance principles do not apply to section 21462.⁴ It represents that the purpose
11 behind section 21462 is to confirm the intentions of the member. CalPERS’ Closing Brief refers to
12 “death-bed elcctions” and states that it “cannot assume which option benefit [Grantland Johnson] would
13 [have] select[ed].” (CalPERS Closing Br. at 11.) However, these remarks ignore the plain facts of the
14 case. There can be no question what Grantland Johnson was trying to accomplish: he contacted
15 CalPERS in February 2013 to inquire about changing his beneficiary; in November 2013, he removed
16 his former wife from his CalPERS health plan; on December 12, 2013, he informed CalPERS of his
17 marriage to Mrs. Johnson, that he wanted to add her to the health plan, and she was added to his medical
18 and dental plans within the next few months; he repeatedly communicated his intention to designate
19 Mrs. Johnson as his beneficiary for medical, dental and Option 2 benefits to Mrs. Johnson and his close
20 friend, Herb Anderson, among others; he sent a letter to CalPERS on June 23, 2014 expressly requesting
21 that Mrs. Johnson be added as the beneficiary for “all of [his] retirement benefit[s] and all death
22 benefit[s]” previously named for his former wife, which would include his CalPERS medical, dental
23 and Option 2 benefits; he called CalPERS from the ICU for guidance on how to correctly fill out the
24 Application to Modify Option and/or Life Option Beneficiary form (“Modification Form”) and
25 confirmed that he was selecting “Option 2” benefits and wanted to designate Mrs. Johnson as his
26 beneficiary; he signed and submitted the Modification Form naming Mrs. Johnson as his new
27 beneficiary consistent with an election of Option 2 benefits; and he entered into a marital settlement

28 ⁴ CalPERS notes in its Closing Brief that “courts have not yet to address [sic] option settlements, particularly
in the context of death benefits.” (CalPERS Closing Br. at p. 10.)

1 agreement in which he was awarded the entire interest of his CalPERS benefits, revoking his former
2 wife as beneficiary. (Resp't Closing Br. at pp. 10-11.)

3 The Proposed Decision fails to consider any of these facts for purposes of determining whether
4 the objective of the election form was satisfied under the substantial compliance doctrine.

5 **B. The Proposed Decision Recognizes that a Qualifying Event Arose For Designating
6 a New Beneficiary But Misapplies the Statutory Exception**

7 The Proposed Decision confirms that a "statutory exception" allowing Grantland Johnson to
8 change his life option beneficiary arose when he was awarded full interest in his CalPERS pension.
9 (Proposed Dec. at pp. 6-8.) It also recognizes that, by virtue of the marital property settlement, his
10 former wife was no longer entitled to any of his CalPERS benefits. (*Id.* at 6, fn. 5.)

11 However, the ALJ is incorrect that the "family law court's December 31, 2014 judgment was a
12 *prerequisite* to Mr. Johnson being able to change his life option beneficiary." (*Id.* at p. 8, original
13 italics.) There is nothing in section 21462 that requires such a determination prior to submitting a
14 Modification Form, election form or a member's death. Indeed, there is no reason why a member's
15 efforts to designate a new beneficiary cannot be perfected by a later community property determination,
16 as opposed to initiated by it. The relevant statutory framework does not prevent such a scenario.⁵

17 There is no question that Grantland Johnson satisfied the statutory exception for revoking his
18 previous beneficiary and designating a new one. His only incomplete step was submitting a
19 confirmatory election form. However, that omission is more than adequately addressed by Grantland
20 Johnson's clear intent and substantial and reasonable efforts to effectuate it.

21 **C. The Proposed Decision Fails to Analyze section 20160**

22 The Proposed Decision's analysis of section 20160 is equally scant, and altogether confusing.
23 The only form that Grantland Johnson did not receive and submit was a final election form; it is the
24 basis for the correctable "omission" under section 20160. However, the Proposed Decision states that
25 omission cannot be claimed because the form was never received. (Proposed Dec. at p. 7.) But claiming
26 that the requirements for correctable omission were not met or do not apply because the very form that
27 was omitted was never received makes no sense. ⁶

28 The Proposed Decision also entirely ignores the extreme circumstances under which Grantland

⁵ For this reason, the ALJ's breach of fiduciary duty analysis is also incorrect. (Proposed Dec. at p. 8.)

1 Johnson and Mrs. Johnson attempted to navigate and complete the process for designating her as his
2 beneficiary for health, dental and Option 2 benefits. For example, there is no mention of the fact that
3 Grantland Johnson had a series of debilitating health problems, including congestive heart failure and
4 diabetes, which required constant medical attention over the last few years of his life. For the last five
5 years of his life, he was dependent on dialysis three times a week and, in the last year of his life, four
6 times a week. He also experienced kidney failure and underwent major surgeries in each of the last five
7 years of his life. (Resp't Closing Br. at p. 12.)⁶ In addition, Grantland Johnson's vision was poor and
8 he was in the ICU when he sought guidance from CalPERS on how to properly complete the
9 Modification Form. These severe health problems delayed Grantland Johnson's marriage to Mrs.
10 Johnson and significantly hindered his ability to properly and efficiently complete the process for
11 changing his life option beneficiary. (*Id.* at pp. 12-13.)

12 Furthermore, key dates and facts in the Proposed Decision and CalPERS' Closing Brief related
13 to Grantland Johnson's diligence and the reasonableness of his efforts are incorrect. For example,
14 CalPERS represents that Grantland Johnson did not submit a Modification Form until "November
15 2014," which is after he died. (CalPERS Closing Br. at 16.) In fact, he submitted that document over
16 three months earlier. It is also incorrect that Grantland Johnson initiated the process for changing his
17 life option beneficiary only "[f]our months" prior to being awarded full interest in his CalPERS pension.
18 (Proposed Dec. at p. 1.) To be sure, he expressly requested that CalPERS name Mrs. Johnson as his
19 beneficiary for health, dental and Option 2 benefits in a letter to CalPERS on June 23, 2014. As a result,
20 the ALJ's analysis under section 20160 is inaccurate and incomplete.

21 **D. The Proposed Decision Should Not Be Precedential, If Adopted**

22 The Proposed Decision, if adopted, should not be designated as precedent as it is based on an
23 incorrect or inadequate analysis of the underlying facts and applicable law.

24 **III. CONCLUSION**

25 For the reasons described above, the Board should not adopt the Proposed Decision, and it will
26 not withstand close judicial scrutiny.

27
28 ⁶ Indeed, the evidence, severity and frequency of Grantland Johnson's health issues readily distinguishes
this case from the cases cited in CalPERS' Closing Brief. (CalPERS Closing Br. at pp. 16-17.)

1 Date: March 4, 2016

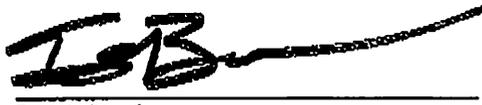
Respectfully submitted,

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● **COMMENTS:** See attached Respondent's Argument.

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