

**ATTACHMENT A**  
**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

At its March 16, 2016, meeting, the CalPERS Board of Administration (Board) declined to adopt the Proposed Decision in this matter and granted a full Board Hearing in connection with the appeal of Respondent Lee Turner Johnson (Respondent Johnson).

CalPERS staff requests that the Board adopt the Proposed Decision and deny Respondent Johnson's appeal of the staff determination that Respondent Johnson is not entitled to lifetime monthly option benefits or continued enrollment in employer sponsored health insurance and dental insurance through CalPERS.

### I. INTRODUCTION

Upon retirement, Decedent Grantland Johnson (Decedent Johnson), elected Option 2 benefits and named his wife the beneficiary. Decedent Johnson later divorced and married Respondent Johnson. Decedent Johnson sent CalPERS the dissolution document and a letter, removing his first wife as beneficiary and designating Respondent Johnson as the beneficiary of all his death benefits. CalPERS complied with Decedent Johnson's request and changed the beneficiary for purposes of Decedent Johnson's *lump-sum death benefits*. CalPERS could not, and did not, however, change Decedent's *life option benefits* because the Public Employees' Retirement Law (PERL) specifically states that the designation of a new beneficiary shall not be construed to cause the selection of an optional settlement. "An optional settlement shall be selected by a member in a writing filed by the member with the board." (Government Code section 21462.) The law further specifies that the member's election becomes effective on the date specified on the election. This is important because the effective date is the date the member's own retirement benefits are recalculated by CalPERS' actuary and reduced to provide the optional benefits to the new beneficiary. Here, Decedent Johnson's designation of Respondent Johnson as the beneficiary of all death benefits was insufficient to modify his optional benefits because Decedent Johnson never elected a new optional settlement and did not specify the effective date of that option. Ignoring the clear language of the law, Respondent insists CalPERS use the beneficiary designation to modify the life option benefits.

CalPERS' determination that Decedent Johnson did not modify his life option benefits prior to his death was not based on a mere technicality or a formality, but was based on compliance with a specific statutory mandate, Government Code section 21462. CalPERS cannot ignore the intent of the Legislature, as clearly expressed in Government Code section 21462, to provide a benefit to Respondent Johnson.

Furthermore, a member's election of an optional settlement allowance triggers a calculation, based on actuarial assumptions, of the amount by which the member's retirement allowance will be reduced. The actuarial assumptions are based upon groups of members; and the "gains" that result when members die earlier than expected offset the "losses" that result when members live longer than expected. Elections are irrevocable unless certain limited life changes have occurred, such as marital

dissolution or separation or death of the beneficiary. Upon such an occurrence, the member may elect to change his or her optional settlement; however a change will trigger a new actuarial calculation of the member's retirement allowance and the amount of the optional benefit. CalPERS must strictly enforce this process to protect the System from after-the-fact selection of option benefits. Allowing members or beneficiaries to change selections with the benefit of hindsight and additional information would subvert CalPERS' calculation of the member's benefits. Here, if Decedent Johnson had followed the requirements of Government Code section 21462 before his death and had elected optional settlement 2 for Respondent Johnson, Decedent Johnson's retirement allowance would have been recalculated and reduced. The reduction would have been calculated based on an assumption about both Decedent Johnson's and Respondent Johnson's life expectancies. To allow the change after Decedent Johnson had already died creates an unanticipated cost to the System that cannot be recovered.

The Proposed Decision is in compliance with the express provisions of the PERL and properly held:

- I. Decedent Johnson failed to substantially comply with the requirements of Government Code section 21462 in that he failed to obtain a court order or Marital Settlement Agreement (MSA) granting him the entire interest in his retirement benefits. The Proposed Decision correctly explained that such an order or MSA was a prerequisite to Decedent Johnson being able to change his life option beneficiary, and should have been provided to CalPERS along with the Application, demonstrating his eligibility to modify his option.
- II. Relief cannot be granted under the mistake statute because Decedent Johnson was fully informed of the process for modifying his life option beneficiary.
- III. Equitable estoppel is not available to provide Respondent Johnson a benefit otherwise unavailable under the California Public Employees' Retirement Law (PERL).

Staff recommends the Proposed Decision upholding CalPERS determination be adopted by the Board because a contrary decision will be in direct conflict with Government Code section 21462 and inconsistent with the Board's prior decision, *In the Matter of Jolie Caughey*, OAH No. 2015050083, adopted by the Board on February 18, 2016.

## II. ISSUE PRESENTED

Whether Respondent Johnson is eligible for the lifetime monthly option benefits as a result of the death of her spouse, Decedent Johnson.

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### III. FACTUAL BACKGROUND

Decedent Johnson submitted his application for service retirement on November 12, 2003, and elected Option 2 as his option benefit and designated his then-spouse Ms. Bolton, as the beneficiary of the option benefits. (CalPERS Exh. 6.) In the same application, Decedent Johnson designated his daughter, Patrice Bolton-Johnson as the beneficiary of the Lump Sum Retired Death Benefits.

On December 4, 2003, CalPERS sent a First Payment Acknowledgement Letter (Acknowledgement Letter) to Decedent Johnson, informing Decedent Johnson that:

[i]f a former spouse was named, you must have a court order that awards you the entire interest in your CalPERS benefits before you can name a new spouse as beneficiary. You may modify your election upon divorce, annulment or legal separation if you have a court order that awards you the entire interest in your CalPERS benefits. To request a modification of election to name a new beneficiary for a lifetime option allowance, please contact the Benefit Services Division for information about a recalculation of allowance and the required documentation. (CalPERS Exh. 7).

On February 15, 2013, Decedent Johnson contacted CalPERS and requested information concerning a change of beneficiary. (CalPERS Exh. 8, p. 8.) In response to his request, CalPERS mailed Decedent Johnson Publication 98, Changing Your Beneficiary or Monthly Benefit After Retirement. (CalPERS Exhs. 9W, p. 73, & 11; Tr. 131:11-25; 132:1-11.)

Publication 98 includes a copy of an Application (CalPERS Exh. 11.), and clearly states that the Application and necessary documents must be submitted to CalPERS to change the option or name a new beneficiary. (CalPERS Exh. 11 p. 21; Tr.179:10-22.). Further, Publication 98 states that within 60 days of receipt of the completed Application, CalPERS will mail the member the "Modification of Original Election at Retirement" document (Election Document), specifying the recalculated retirement allowance choices. (*Id.*) The member must elect an option and return the Election Document to CalPERS within the specified timeframe. (*Id.*)

Section 5 of the Application, "Certification of the Member", notifies the member that this Application "is a request for an election form to modify my option and name a new beneficiary(ies). I further understand that my new option/beneficiary change will not be processed until the properly completed election form is submitted to CalPERS." (CalPERS Exh. 9H, p.23; CalPERS Exh. p. 21 & 23.) Publication 98 also specifies that the member and the new beneficiary "must be alive on the effective date." (CalPERS Exh. 11 p. 22.)

On August 8, 2013, CalPERS received a Summons Joinder on behalf of Ms. Bolton, a written notice claiming a portion of Decedent Johnson's retirement allowance due to the marriage dissolution with Decedent Johnson. (CalPERS Exh. 9S, p. 59.) CalPERS

informed Decedent Johnson that one-half of his allowance would be withheld, as a result of the Summons Joinder filed by Ms. Bolton, until CalPERS received a "court order resolving the community property claim." (CalPERS Exh. 9Q, p. 57.)

Decedent Johnson's divorce with Ms. Bolton was finalized on October 21, 2013, and became effective on November 9, 2013. (Transcript of October 6, 2015 Hearing (Tr.), p. 23:7-10; CalPERS Exh. 90, p. 47.)

On October 24, 2013, Decedent Johnson and Respondent Johnson contacted CalPERS and Decedent Johnson requested a copy of the December 4, 2003 Acknowledgement Letter. (CalPERS Exh. 8, p. 5.)

On November 15, 2013, Decedent Johnson and Respondent Johnson were married.

On June 23, 2014, Decedent Johnson wrote a letter to CalPERS naming Respondent Johnson the beneficiary of all death benefits and removing Ms. Bolton and Patrice Bolton Johnson as beneficiaries. (CalPERS Exh. 9M, p. 42; received by CalPERS on July 3, 2014.) In the letter, Decedent Johnson specifically stated that "[a] court judgment or marital agreement will soon be filed and sent to you . . ." (*Id.*)

On July 25, 2014, CalPERS sent a letter to Decedent Johnson rejecting the June 23, 2014 letter beneficiary designation, and informing him that an incorrect or invalid form had been submitted. (CalPERS Exhs. 8, p. 5; 9L, p. 41; Tr. p. 140:4-12.) CalPERS mailed Decedent Johnson the Post Retirement Lump Sum Beneficiary Designation form and requested the form be completed and submitted to CalPERS. (CalPERS Exhs. 9K, p. 37 & 9L, p. 41; Tr. pp. 140:13-25; 141:1-12.) Previously, in 2013, CalPERS had sent Decedent Johnson Publication 98, "Changing Your Beneficiary or Monthly Benefit after Retirement", which explains how to change the lifetime benefit.

On August 6, 2014, Respondent Johnson contacted CalPERS and was assisted by Kevin Abram, CalPERS' employee at the Member Contact Center, on how to complete the Application which had been included in Publication 98, in order to change his benefit option and/or designate a new life option beneficiary. (CalPERS Exh. 8, p. 5; Tr. pp. 100:17-25; 101; 102:1-3.) Respondent Johnson was also advised about the amount of time it takes CalPERS to process the Application. (*Id.*) Mr. Abram was called as a witness by Respondent Johnson and Mr. Abram testified that it is his practice to inform the caller concerning the required documents that must be submitted with the Application. (Tr. pp. 106:9-12; 107:1-6.)

On August 7, 2014, CalPERS received Decedent Johnson's completed Post Retirement Lump Sum Beneficiary Designation Form (Lump Sum Beneficiary Form), designating Respondent Johnson the beneficiary of the lump sum benefits. (CalPERS Exh. 91, p. 32; Tr. p. 141:13-21.) The Lump Sum Beneficiary Form included an information and instructions page, which stated:

The death benefits paid to your beneficiary depend on the retirement option you selected when you retired and the benefits contracted by your former employer. Please order or download *What You Need to Know About Changing Your Beneficiary Or Monthly Benefit after Retirement* for a description of the benefits. The Post Retirement Lump Sum Beneficiary Designation form is used to designate beneficiary(ies) for your lump sum benefits only. (CalPERS Exh. 91, p. 35).

Thereafter, Decedent Johnson was notified by CalPERS' Forms Department that the Lump Sum Beneficiary Form had been processed and the lump sum beneficiary designation was accepted. (CalPERS Exh. 9G, p. 20; Tr. 151:1-13.)

On August 7, 2014, CalPERS also received Decedent Johnson's Application, signed August 3, 2014, with a copy of the Notice of Entry of Judgment, terminating the marriage of Decedent Johnson and Ms. Bolton effective November 9, 2013. (CalPERS Exh. 9H, p. 21.) The Application submitted by Decedent Johnson was the same version of the form included in Publication 98, which was sent to Decedent Johnson, by CalPERS, on February 15, 2013. (Tr. 157:4-6.) A court order concerning the community property interest in pension benefits was not attached to the Application submitted by Decedent Johnson.

On September 9, 2014, Respondent Johnson notified CalPERS of Decedent Johnson's death. CalPERS's reviewed the Application received from Decedent Johnson but did not process it because he had failed to submit a court order awarding Decedent Johnson the entire interest in his CalPERS pension benefits. (Tr. 178:13-23.)

On September 19, 2014, Respondent Johnson submitted an application for Post Retirement Survivor Benefits of Decedent Johnson to CalPERS, requesting benefits as a beneficiary of Decedent Johnson. (CalPERS Exh. 3.)

On February 11, 2015, five months after Decedent Johnson's death, Respondent Johnson sent CalPERS the Certified Final Judgment on Property and the MSA for Decedent Johnson. (CalPERS Exh. 10.) The MSA had been approved by the court on December 31, 2014, approximately three months after Decedent Johnson's death. (CalPERS Exh. 10.) Under the MSA, Decedent Johnson was awarded the entire interest in his CalPERS pension benefits.

On February 17, 2015, CalPERS informed Respondent Johnson that the Community Property hold was being removed because Decedent Johnson had been awarded the entire interest in his CalPERS pension benefits. (CalPERS Exh. 9B, p. 7). This was of significance to Respondent Johnson because she would receive the released amount of \$5867.10.

On March 4, 2015, CalPERS notified Respondent Johnson of its final determination stating that Respondent Johnson was not entitled to the monthly option benefit because Decedent Johnson had not completed the process electing an optional settlement or

designating Respondent Johnson as the beneficiary of the optional benefit. (CalPERS Exh. 4.) More specifically, Decedent Johnson had not provided CalPERS with a copy of the final MSA, which would have resulted in CalPERS sending Decedent Johnson the election documents, with recalculated benefits, from which Decedent Johnson could elect a new life option. (Attach. F, CalPERS Exh. 4.) Because Decedent Johnson did not *elect* a settlement option in writing and did not state the *effective* date of the election, as mandated by Government Code section 21462, the option benefit could not be modified to name Respondent Johnson as the beneficiary.

CalPERS explained that pursuant to the Lump Sum Beneficiary Form, Respondent Johnson was entitled to 100% of the lump sum death benefits in the amount of \$2,000.00, Decedent Johnson's accumulated contributions at retirement in the amount of \$2,858.71, a one-time prorated allowance for the last month of Decedent Johnson's life, and the community property allowance which was being withheld, in the amount of \$5867.10. (CalPERS Exh. 4 p. 2-3.) However, CalPERS had determined that Respondent Johnson was not entitled to the lifetime monthly option benefits, which included the linked health benefits. (CalPERS Ex. 4) Under the Public Employees' Medical and Hospital Care Act (PEMHCA), health benefits are only available to retired annuitants or a surviving family member receiving an allowance in place of a retired annuitant, as set forth in Government Code section 22760.

On August 1, 2015, Respondent Johnson appealed CalPERS' determination that she is ineligible to receive the monthly option benefit. (CalPERS Exh. 11.)

On August 26, 2015, CalPERS issued a Statement of Issues (SOI) in this case. (Attach. F, CalPERS Exh. 1.) The sole issue presented by the SOI was whether Respondent Johnson is eligible for the lifetime monthly option benefits.

The hearing in this matter included testimony of Respondent Johnson, CalPERS staff and Herbert Anderson, Decedent Johnson's friend.

At the hearing, Respondent Johnson testified concerning Decedent Johnson's intent and attempt to name her the beneficiary of all death benefits. (Tr. p. 20-24.) Respondent Johnson also argued that the process for changing the life option and/or the life option beneficiary was not clear and CalPERS breached its fiduciary duty by failing to provide accurate information regarding the process. (Respondent's Exh. P, p. 19.)

A Proposed Decision was issued on January 8, 2016, denying Respondent Johnson's request for lifetime monthly option benefits and employer sponsored health and dental benefits. (Attach. D, p. 10.)

The ALJ held that CalPERS' denial of the lifetime option benefits was proper. The ALJ noted that "[w]hether Mr. Johnson clearly intended to name [Respondent Johnson] as his life option beneficiary was not the issue." (Attach. D, p. 12) Instead, the issue was whether Decedent Johnson substantially complied with section 21462 by completing the

process for changing his beneficiary prior to his death. The ALJ held that Decedent Johnson failed to substantially comply with the requirements of section 21462. (Id.)

The ALJ also held that Respondent Johnson's reliance on the mistake statute, Government Code Section 20160 was misplaced because she failed to "articulate what the alleged 'error' or 'omission' was." (Attach. D, p. 12.) The ALJ explained that Decedent Johnson understood the process as he "certified his understanding of the process for making the change when he signed the Application."

As to the equitable estoppel argument, the ALJ found there was no evidence demonstrating CalPERS breached its fiduciary duty. The ALJ held that "whether CalPERS breached its fiduciary duty by not providing [Respondent Johnson] timely, complete, and accurate information about the process for changing a life option beneficiary would not be outcome determinative." The ALJ reasoned that the MSA was a "...prerequisite to Mr. Johnson being able to change his life option beneficiary." Decedent Johnson, however, passed away prior to signing the MSA. (Attach. D, p. 13.)

#### IV. ARGUMENT

##### **A. Decedent Johnson Failed To Substantially Comply With Section 21462. The Applicable Statute.**

###### **A. Statutory Scheme**

The Legislature has set different rules for CalPERS members changing beneficiary designations based on the type of retirement benefits involved and the retirement status of the member.

Pursuant to Government Code Section 21490(a), the member may change a beneficiary designation for lump sum death benefits, at any time, simply through a "writing filed with the board." Pursuant to Government Code Section 21462, the member may change the optional settlement or beneficiary to provide the beneficiary with monthly benefits. The requirements for making the change under Government Code Section 21462, however, are more stringent as Government Code section 21462 specifies that merely filing a beneficiary designation is not sufficient to modify and optional settlement. Government Code Section 21462 provides in pertinent part that:

(a) (1) Notwithstanding any other provision of this part, a **member** who elected to receive optional settlement 2, 3, or 4, involving a life contingency of the beneficiary, **may**, ... if a former spouse was named, in the event of a dissolution ... in which the judgment dividing the community property awards the total interest in the retirement system to the retired member, **elect** to have the actuarial equivalent reflecting any selection against the fund resulting from the election as of the date of election of the allowance payable for the remainder of the member's lifetime under the optional settlement previously chosen **applied to a lesser allowance during the member's remaining lifetime** under one of the

optional settlements specified in this article and name a different beneficiary.

(b) The election shall be made within 12 months following the death of the Beneficiary who predeceased the member or within 12 months of the date of entry of the judgment dividing the community property of the parties, or within 12 months following marriage if the spouse is named as beneficiary. **The election shall become effective on the date specified on the election, provided that this date is not earlier than the day following receipt of the election in this system pursuant to this section.**

(c) A member who has a qualifying event ... on or after January 1, 1988, and who fails to elect within 12 months, shall retain the right to make an election under this section. However, this election shall become effective no earlier than 12 months after the date it is filed with the board, provided that neither the member nor the designated beneficiary die prior to the effective date of the election.

(d) **This section shall not be construed to mean that designation of a new beneficiary causes the selection of an optional settlement. An optional settlement shall be selected by a member in a writing filed by the member with the board.** (Emphasis added.)

#### B. Substantial Compliance with a Statute

The courts have stated that "[s]ubstantial compliance with a statute is dependent on the meaning and purpose of the statute." (*Freeman v. Vista De Santa Barbara Associates LP*, 207 Cal.App.4th 791, 793.) Thus, pursuant to Government Code Section 21462, the requirements for changing a beneficiary designation for monthly benefits are significantly different and more stringent than changing a lump sum beneficiary under Government Code Section 21490 or 21453. Although there is much case law addressing Government Code Section 21490 and lump sum benefits, the courts have yet to address option settlements, particularly in the context of death benefits. However, the plain text of Government Code section 21462 makes it clear that a designation of a new beneficiary is not sufficient to change an optional settlement; rather the member must select an optional settlement in writing and file it with the Board. (Government Code section 21462.) The member must also specify the date the election is to become effective, triggering the modification and an adjustment of the member's retirement allowance. (Government Code section 21462.) Thus, while designating a new beneficiary for the lump sum benefit may be sufficient under Government Code Section 21490 or 21453, Government Code section 21462 requires more.

##### 1. The Member Must Select the Option Settlement and be Living on the Effective Date.

Ambiguity or uncertainty in the meaning of pension legislation may not be resolved in favor of a member if it would be inconsistent with the clear language and purpose of the statute. Thus, "courts must not blindly follow such rule of construction where it would eradicate the clear language and purpose of the statute and allow eligibility for those for whom it was obviously not intended." (*Barrett v. Stanislaus County Employees*

*Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1608-1609; *Hudson v. Board of Admin. of Public Employees' Retirement System* (1997) 59 Cal.App.4th at p. 1310, 1324-25.)

From the plain language of Government Code Section 21462, it is apparent that it is the member who must make the election. In citing Government Code Section 21462, the court in *In Re Marriage of Cooper*, 160 Cal.App.4th 574, 579 also stated that " ... *the member* may select a new optional settlement and "name a different beneficiary." (Emphasis added.) Here, Decedent Johnson failed to submit any writing with CalPERS electing a new option benefit and CalPERS cannot assume which option benefit he would have selected or what the effective date of the option benefit would be.

## 2. The Member Must Submit the Necessary Documents.

Government Code Section 21462 requires the member to submit a court order or MSA demonstrating he or she has full interest in his or her retirement benefits and an Election Document to change his or her election. Government Code Section 21462 is very clear, and does not provide for any exceptions. Decedent Johnson's failure to submit a court order or MSA in a timely manner was more than a mere technicality. Decedent Johnson failed to submit the necessary documents allowing CalPERS to move forward, process his Application and provide him the Election Document.

The Election Document form which Decedent Johnson did not submit is the agreement between the member and CalPERS by which both parties indicate their irrevocable agreement to modify the option benefit. It must be signed by the member and notarized. (Tr. p.119: 18-24.) Once accepted by CalPERS, Decedent Johnson's retirement allowance would have been recalculated, probably resulting in the reduction of his retirement benefits from the effective date of the modification. (Government Code section 21462.) Once effective, the agreement is irrevocable. The failure to submit a timely and complete Application not only prevented CalPERS from removing the community property hold, but also omitted the actual and most critical component of the election process, the Election Document itself, whereby Decedent Johnson could then elect a new option of his liking, and sign and agree the modification would be irrevocable.

Even if accompanied by the necessary documents, the mere submission of an Application is not sufficient to change Decedent Johnson's option benefits. The Application does not notify CalPERS which option Decedent Johnson selected. (Tr. p. 175:7-10.) It is also important to note that more than half of the members who submit Applications choose not to change their elections after they find out the monetary impact to their monthly benefits. (CalPERS Exh. 14.)

Here, the ALJ correctly held that Decedent Johnson failed to substantially comply with Government Code section 21462 by failing to submit a document changing the option benefits. The ALJ properly reasoned that the Application was not approved and Decedent Johnson died without returning a signed, notarized election form, naming Respondent Johnson the new beneficiary. (Attach. D, p. 11.) The ALJ correctly found

that the "Application was merely Mr. Johnson's request for settlement option estimates based on his and Ms. Turner Johnson's respective ages, and was insufficient in and of itself to make her his beneficiary." (Attach. D, p. 11.)

**B. Relief Cannot Be Granted Under The Mistake Statute.**

Respondent Johnson failed to establish that Decedent Johnson's failure to timely submit a completed Application and an Election Document changing his option benefit was a result of mistake, inadvertence, surprise, or excusable neglect under Government Code Section 20160(a). From the very start, Decedent Johnson and Respondent Johnson were informed that the process for modifying the option benefit requires necessary documents and could take months to complete.

The Acknowledgement Letter, which was sent to Decedent Johnson on December 4, 2003, and then again on October 24, 2013, specifically informed Decedent Johnson of the requirement of obtaining a court order or MSA awarding him the entire interest in his CalPERS benefits. (Exhibit 7.) Publication 98, which was sent to Decedent Johnson in February 2013, upon his request, included the Application, listed the required documents, set out the step by step procedure and stated the specific time limits involved in the process. (Exhibit 11 pp. 21-22.) Furthermore, Section 5 of the Application, signed by Decedent Johnson, notified him that the Application was merely a request for an Election form and the option would not be modified until a completed Election form was submitted. (Exhibit 9H, p. 21.) Respondent Johnson was also advised by Mr. Abram concerning the amount of time it takes CalPERS to process the Application. (Exhibit 8, p. 5; Tr. pp. 100:17-25; 101 ; 102:1-3.)

Despite being fully informed by CalPERS, as late as February 2013, and receiving multiple advisements concerning the time frame to process the Application and the documents required, Decedent Johnson never obtained a MSA and did not submit an Application until November 2014. (Exhibit 9H, p. 21.) Therefore, the ALJ correctly held that the relief cannot be granted under the mistake statute.

**C. Respondent Johnson Cannot Rely On Equitable Estoppel.**

Respondent Johnson claims CalPERS breached its fiduciary duty by failing to provide timely, complete and accurate material information to Decedent Johnson. (Respondent's Exh. P, p. 19.) In making this argument, Respondent Johnson invokes the equitable estoppel argument by asking CalPERS to correct its error. Respondent Johnson, however, is not entitled to relief under this doctrine.

A party asserting the doctrine of equitable estoppel must establish: (1) the party to be estopped was apprised of the facts; (2) the party to be estopped intended or reasonably believed that claimant would act in reliance on its conduct; (3) the claimant was ignorant of the true state of facts; and (4) the claimant actually and reasonably relied on the conduct of the party to be estopped to his detriment. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) In addition, where estoppel is sought to be asserted against

a governmental entity, a fifth element must be established: the interests of a private party must outweigh the effect on public interests and policies. (*Id.* at 496-97.) It is the burden of the party asserting estoppel to affirmatively establish each of its elements. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

The evidence presented in this case demonstrates that at all times CalPERS provided timely, complete and accurate information to Respondent Johnson and Decedent Johnson. As noted above, Decedent Johnson was timely and accurately informed concerning the process to change his life option and/or the option beneficiary. Decedent Johnson timely received the Acknowledgement Letter, Publication 98, and advice from CalPERS staff, Mr. Abram, about how to change his life option and/or the option beneficiary. Respondent Johnson failed to present evidence demonstrating any delay or error on the part of CalPERS. Rather, the evidence and testimony demonstrates the opposite.

Estoppel is unavailable here as a matter of law. Estoppel cannot provide Respondent Johnson a benefit otherwise unavailable under the express provisions of the PERL. (*Chaidez v. Board of Administration of California Public Employees' Retirement System* (2014) 223 Cal.App.4th 1425, 1432, review denied (May 14, 2014).) CalPERS has authority to "correct errors or omissions of members, contracting agencies, or itself, but not to provide the party seeking correction with a 'status, right, or obligation not otherwise available' under the PERL." (*City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 544.)

Relevant case law also provides that "estoppel will not be applied where it is based on surmise or questionable inference." (*Lee v. Bd. of Admin.* (1982) 130 Cal.App.3d 122, 135.) Providing Respondent Johnson the option benefits would require CalPERS to assume Decedent Johnson would have elected an option after receiving the Election Document, assume which option benefit Decedent Johnson would elect, arbitrarily pick an effective date (the election is effective on the date specified on the election, provided this date is no earlier than the day following receipt of the election), then apply a reduction to allowance until the date of Decedent Johnson's death. Here, Government Code Section 21462 only allows Decedent Johnson to elect a new option or designate a new beneficiary. Allowing Respondent Johnson to make an election after Decedent Johnson's death would provide Respondent Johnson a right contrary to what is allowed under Government Code Section 21462.

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## V. CONCLUSION

Pursuant to legal authority, CalPERS correctly determined Respondent Johnson is not entitled to the lifetime option benefits, including health and dental coverage. Decedent Johnson failed to re-select an option benefit and name Respondent Johnson the new beneficiary. The AJL agreed. CalPERS respectfully urges the Board adopt the Proposed Decision denying Respondent Johnson the monthly lifetime death benefits and the employer-sponsored health benefits.

May 18, 2016

A handwritten signature in blue ink, appearing to read "Preet", is written over a horizontal line. The signature is stylized and extends to the right of the line.

PREET KAUR  
Senior Staff Attorney