ATTACHMENT B

RESPONDENT'S ARGUMENT

ATTACHMENT B

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Re:	*Case No. 2015-0373; OAH No. 2015081045*		

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May 6, 2016

VIA FACSIMILE AND U.S. MAIL

Board Secretary
Board of Administration
California Public Employees' Retirement System
P.O. Box 942701
Sacramento, California 94229-2701

Re: RESPONDENT LEE TURNER JOHNSON'S ARGUMENT
In the Matter of the Appeal Regarding Death Benefits Payable Upon the Death of GRANTLAND LEE JOHNSON

To the Members of the Board of Administration of the California Public Employees' Retirement System ("Board"):

This law firm represents Respondent Lee Turner Johnson in the above-referenced matter. We are submitting this argument to the Board pursuant to the notice dated March 21, 2016.

I. SUMMARY OF THE CASE

Grantland Johnson had completed every step for designating his wife, Lee Turner Johnson ("Respondent" or "Mrs. Johnson"), as the beneficiary for his CalPERS medical, dental and lifetime option 2 benefits ("Benefits"), but died before he could submit a final confirmatory election form. Based on this omission, Mrs. Johnson was denied the Benefits that Grantland Johnson sought to confer to her upon his death. They Benefits are being denied because Grantland Johnson did not live long enough to confirm what CalPERS already knew—who Grantland Johnson sought to designate as his new beneficiary and what Benefits he wanted her to have. His intentions are clear, based on his express statements to CalPERS and when considering the totality of the underlying facts in this matter. Furthermore, no one except CalPERS is contesting that these Benefits should be provided to Mrs. Johnson as Grantland Johnson's beneficiary.

On March 4, 2015, CalPERS notified Mrs. Johnson that she was not entitled to any monthly Benefits from CalPERS. (CalPERS Ex. 4.)[1] Mrs. Johnson submitted a notice of appeal on April 1, 2015 (Resp't Ex. B) and the parties participated in an administrative hearing on this matter on October 6, 2015.

The record makes it clear that, except for submitting a final election form due to his untimely death, Grantland Johnson and Mrs. Johnson did everything required of them by CalPERS to complete the process for designating her as his new beneficiary for medical, dental and option 2 benefits. Lee Turner Johnson was already on dental/medical benefits from CalPERS as of December 2013/April 2014. Grantland Johnson expressly informed CalPERS in writing that he wanted Mrs. Johnson to be named as the beneficiary for all of his CalPERS retirement and death benefits as soon as it received a judgment and final settlement agreement resolving marital property disputes with his former wife. Mrs. Johnson submitted those documents to CalPERS as soon as they became available. Indeed, the judgment and marital property agreement would have been available and submitted sooner but for delays in the court and refusal by Grantland Johnson's former wife to sign the proposed settlement. His former wife ultimately signed the agreement awarding Grantland Johnson full interest in his

[1] References to "Resp't" and "CalPERS" exhibits relate to the exhibits attached to the transcript of the October 6, 2015 hearing.

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retirement benefits on September 4, 2014, a little over two weeks after he died. Grantland Johnson's significant and persistent health problems, including those related to kidney failure and congestive heart failure, also significantly hindered his ability to complete the process more expeditiously.[2]

Grantland Johnson and Mrs. Johnson called CalPERS while Grantland Johnson was in the ICU to request guidance on how to properly complete forms for designating Mrs. Johnson as his beneficiary for CalPERS Benefits. On August 3, 2014, Grantland Johnson completed and signed an Application to Modify Option and/or Life Option Beneficiary form ("Modification Form") consistent with the selection of "option 2" benefits and expressly named Lee Turner Johnson under "New Beneficiary Information." Thereafter, CalPERS sent Grantland Johnson a letter stating that his "Beneficiary Designation form" had been accepted.

Basic principles of equity and fairness, and the unique and extenuating circumstances of this case dictate that Mrs. Johnson should receive the Benefits that Grantland Johnson set out to provide for her. Furthermore, Grantland Johnson's intent, issues such as excusable neglect and inadvertence, and the doctrine of substantial compliance, among other legal theories[3] require that Mrs. Johnson should be designated as Grantland Johnson's beneficiary for medical, dental and option 2 benefits. The administrative law judge disagreed and entered a Proposed Decision on January 11, 2016, upholding the denial of Benefits for Mrs. Johnson.

At its March 16, 2016 meeting, the Board considered the Proposed Decision and decided not to adopt it, and instead voted to consider the matter as part of a full Board hearing.

Indeed, this matter is a tragic example of literally form over substance. Grantland Johnson's hopes for his wife, who is 70 years old, and his final efforts to help care for her through these Benefits, should not be ignored simply because he was not able to live long enough to provide final confirmation on an election form. For the reasons described below, in the underlying record and previous written argument, Respondent Lee Turner Johnson urges the Board not to adopt the Proposed Decision.

II. FACTUAL BACKGROUND

Grantland Johnson and Lee Turner Johnson first met professionally in 1996 and developed a personal relationship in 2004. (Tr. at 18:6-19:5.) Their relationship grew closer over the years. By the time Grantland Johnson and Lee Turner Johnson were engaged, Grantland Johnson had been separated from his estranged wife, Charlot Bolton, for nearly a decade. (*Id.*, Ex. J.) In March 2012, Grantland Johnson gave Lee Turner Johnson power of attorney and named her executor of his will. (Tr. 19:19-21; 20:7-20; Resp't Ex. C.)

In February 2013, Grantland Johnson contacted CalPERS about changing his CalPERS

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[2] CalPERS raised for the first time in its Closing Brief and after the administrative hearing had concluded the notion that Grantland Johnson's attempted Benefits election was a "deathbed election" rendered as part of a "deathbed marriage." (CalPERS Closing Br. 11.) Accordingly, Mrs. Johnson has submitted a Request for Introduction of Evidence Which is Not Contained in the Administrative Record. The Request attaches a subpoenaed declaration from federal district court judge Honorable Kimberly Mueller, who presided over the marriage between Grantland Johnson and Lee Turner Johnson. Judge Mueller's declaration is being submitted for purposes of providing the Board with additional facts or clarification regarding the validity of their marriage and Grantland Johnson's intent to designate Mrs. Johnson as his new beneficiary for medical, dental and option 2 benefits. The Request also attaches declarations from former Executive Secretary of the Sacramento Central Labor Council and close friend of Grantland Johnson, Bill Camp; Robert Slobe, who served as a witness to the marriage between Grantland Johnson and Lee Turner Johnson and was also a close friend of Grantland Johnson; and lifelong friend Leron Lee. All of the declarants attest to the legitimacy of Grantland Johnson's marriage to Lee Turner Johnson.

[3] Respondent incorporates previous factual and legal arguments submitted in this matter and reserves the right to raise additional objections to the Proposed Decision in further proceedings should it be adopted.

beneficiary designation (Tr. 52:7-18) and a short time after that, on April 8, 2013, he initiated divorce proceedings from Ms. Bolton. (Resp't Ex. J.) However, division of property was initially contested and a judgment of dissolution as to marital status only was entered on November 9, 2013. (*Ibid.*)

Less than a week after his divorce, Grantland Johnson took formal steps to remove his former wife as a beneficiary of his CalPERS benefits; he wrote a letter to CalPERS on November 13, 2013 requesting that CalPERS remove Charlot Bolton from his CalPERS Health Plan and provided CalPERS with a copy of the divorce judgment. (CalPERS Ex. 9o.) He married Lee Turner Johnson on November 15, 2013. (*See, e.g.*, Tr. 26:4-8.) A few weeks later, on December 12, 2013, Grantland Johnson sent another letter to CalPERS requesting that CalPERS add Lee Turner Johnson to his CalPERS Health Plan, and included a copy of their marriage certificate. (Resp't Ex. D.) These would be among the first in a series of efforts with CalPERS to ensure that Mrs. Johnson was designated as the named beneficiary for his CalPERS benefits.

Grantland Johnson had significant health problems, related primarily to congestive heart failure for which he had quintuple bypass in the 1980s and kidney failure which ensued in 2010 after a serious operation related to Charcot disease. (Tr. 21:18-22:22.) As a result, a series of annual surgeries followed, including a high-risk surgery related to diabetes to save one of his legs in December 2013. He was bedridden and wheelchair bound for months following the surgery. He was also forced to undergo a series of wound debridement procedures between March and May 2014, and was dependent upon an around-the-clock wound debridement machine. (Tr. 23:25-24:3; 70:1-3; 72:8-18.) In addition, Grantland Johnson was in the hospital "through June and July" due to a decline in heart and kidney functions, on top of [undergoing] four dialysis [treatments] a week . . ." (Tr. 58:9-12.)

On June 23, 2014, Grantland Johnson wrote another letter to CalPERS requesting that CalPERS designate Mrs. Johnson as the new beneficiary for all of his CalPERS benefits—including medical, dental and lifetime option 2 benefits—which were previously designated for his former wife. He stated in no uncertain terms that he wanted his

> wife Lee Anne Turner Johnson, to be named as the *beneficiary [of] my CalPERS retirement and all death benefits* [previously named for his former spouse and daughter].
>
> As of November 15, 2013, we were legally married. A court judgment or marital agreement will soon be filed and sent to you, finalizing all property with my former wife . . . *Upon receipt of this final settlement agreement, please immediately change all of my retirement benefit[s] and all death benefit[s] to my wife, Dr. Lee Turner Johnson.*

(Resp't Ex. E, italics added).)

CalPERS responded over a month later. On July 25, 2014, CalPERS informed Grantland Johnson that his request had been submitted on an "incorrect or invalid form" and provided him with a single "new form" to "re-submit," the Post Retirement Lump Sum Beneficiary Designation form ("Lump Sum Form"). (Resp't Ex. F; *Id.*, Ex. G; Tr. 31:5-8.) The July 25 letter made no reference to the Modification Form or any Modification of Original Election at Retirement form ("Election Form"). (Resp't Ex. F; Tr. 29:8-16.) By the time CalPERS sent its July 25 response letter, Grantland Johnson was in the Kaiser Intensive Care Unit ("ICU"). (Tr. 28:12-13.)

While in the ICU, Grantland Johnson told Mrs. Johnson and his childhood friend, Herb Anderson, who was with them in the ICU, that he wanted to complete the forms for designating Mrs. Johnson as his option 2 beneficiary. (Tr. 35:6; Resp't Ex. N.) Grantland Johnson called CalPERS with Mrs. Johnson in early-August 2014 to discuss the Modification Form. (Tr. 33:19-20.) While speaking with a CalPERS representative, Grantland Johnson gave permission for Mrs. Johnson to speak to CalPERS on his behalf. (Tr. 33:19-23.) They called because the Modification Form was complicated and wanted to be certain that it was completed correctly. (Tr. 33:19; 33:24-34:3.) Mrs. Johnson expressly informed CalPERS that Grantland Johnson sought to designate her as his new

beneficiary for his Benefits and, as part of that call, Grantland Johnson clearly re-affirmed that the option that he wanted to select was "option 2." (Tr. 35:19-21; 37:9-12; 84:15-20.) The CalPERS representative walked them through the Modification Form and at the end of the call told Mrs. Johnson not to worry, and that her "husband's wishes will be honored no matter what." (Tr. 36:10-11; 86:23-87:1.)

Grantland Johnson signed the Modification and the Lump Sum Forms. Mrs. Johnson was designated as the beneficiary on both of these forms. (Resp't Exs. G and H.) Mrs. Johnson sent the forms to CalPERS by certified mail on the same day that they were signed. (Tr. 39:15-19.) The forms were received by CalPERS on August 7, 2014. (Resp't Exs. G and H.)

On August 14, 2014, CalPERS sent a letter to Grantland Johnson confirming that his "Beneficiary Designation form" had been accepted and described Mrs. Johnson as the primary "100.00%" beneficiary. (Resp't Ex. I.) At this point, they believed that there were no other forms or steps that Grantland Johnson had to take to complete the process. (Tr. 41:19-22.)

Five days later, on August 19, 2014, Grantland Johnson died. Up until that time, his former wife had refused to sign the marital property settlement which would have awarded him full interest in his CalPERS benefits. She signed the agreement a little over two weeks after his death. (Resp't Ex. J.) The agreement was submitted in October 2014, and judgment on the property division and marital settlement agreement was filed on December 31, 2014. (Tr. 43:3-5; Resp't Ex. J.) Due to a backlog in the courts, a copy of the judgment was not available until January 2015. (Tr. 43:5-7.) Mrs. Johnson immediately provided CalPERS with copies of the final judgment and marital settlement documents. (Tr. 43:8-10.) She submitted a certified copy to CalPERS on February 11, 2015. She also provided copies of Grantland Johnson's will designating her as executor, grant of power of attorney and referencing the verified marriage certificate that CalPERS had on file for her and Grantland Johnson. (Resp't Ex. K.)

On March 4, 2015, CalPERS informed Mrs. Johnson that Grantland Johnson's request to recalculate his option 2 benefit was denied because "(b)oth the member and the new beneficiary must be alive on the effective date. Unfortunately, Mr. Johnson passed away before he was awarded full interest in his retirement benefits and before a recalculation election document could be provided to him." (CalPERS Ex. 4 at p. 3.)

III. LEGAL STANDARD

"Pension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved. Pension provisions in our law are founded upon sound public policy and with the objects of protecting, in a proper case, the pensioner and his dependents against economic insecurity. In order to confer the benefits intended, such legislation should be applied fairly and broadly." (*Bowen v. Bd. of Retirement* (1986) 42 Cal.3d 572, 577, citing *Cordell v. City of Los Angeles* (1944) 67 Cal.App.2d 257, 266; *accord, Gorman v. Cranston* (1966) 64 Cal.2d 441, 444; *Eichelberger v. City of Berkeley* (1956) 46 Cal.2d 182, 188.) Furthermore, the "obligations of th[e] system to and in 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.)

IV. ARGUMENT

A. Grantland Johnson Clearly Intended To Designate Mrs. Johnson As His Beneficiary For CalPERS Medical, Dental and Option 2 Monthly Benefits

The California Court of Appeal has previously analyzed the CalPERS member's *intent* in allocating option 2 benefits. (In *In re Marriage of Cooper* (2008) 160 Cal.App.4th 574 [73 Cal.Rptr.3d 71] ("*Cooper*").) In *Cooper*, the member's former wife was initially found to have an interest in his

CalPERS benefits and was later awarded the entirety of the option 2 benefit based on a domestic relations order. (*Id.* at pp. 577-78.) However, the court held that such an outcome was contrary to the member's *intent* and permitted a solution *outside of the statutory framework* for designating a new beneficiary for option 2 benefits. The court allowed the member to buyout his former wife's share of the option 2 benefit and designate his daughter as beneficiary in her place. (*Id.* at p. 578-79.) The court found that there was "no evidence that . . . [the member] *intended* to forever relinquish his community property interest in the option 2 survivor benefit, ..." (*Id.* at p. 581, italics added.) In addition, the court held that "discretion here may be reasonably exercised" by allowing the buyout. (*Ibid.*)

Similarly, the California Supreme Court analyzed whether *intent* should matter in attempting to effectuate a beneficiary change in *Pimentel v. Conselho Supremo De Uniao Portugueza Do Estado Da California* (1936) 6 Cal.2d 182 [57 P.2d 131] ("*Pimentel*"). The *Pimentel* court held that

> where the [policyholder] makes every reasonable effort under the circumstances, complying as far as he is able with the rules, and there is a *clear manifestation of intent to make the change*, which the insured has put into execution as best he can, *equity should regard the change as effected.*

(*Id.* at p. 189, italics added.) The Supreme Court found that, having "complied so far as he was able with the rules . . . it must be held, under the equitable principles . . . there was an effective change of beneficiary." (*Ibid.*)[4]

Grantland Johnson's intent in this case is clear, and the Board should exercise its discretion to effectuate his clear and uncontroverted intent. For example, Grantland Johnson:

- Contacted CalPERS in February 2013 to inquire about changing his beneficiary designation (Tr. 52:7-18);
- Initiated dissolution of his marriage to Ms. Bolton on April 8, 2013 (Resp't Ex. J);
- Sought to enter into a marital settlement agreement that would award him full interest in his CalPERS benefits (*Ibid.*);
- Married Lee Turner Johnson after a friendship of approximately 17 years and a personal relationship of approximately 9 years (Tr. at 18:6-19:5);
- Sent a letter to CalPERS on November 13, 2013 requesting that CalPERS remove Charlot Bolton from his CalPERS health plan and informing CalPERS of his divorce. He sent another letter on December 12, 2013 informing CalPERS that he wanted to add Mrs. Johnson to his CalPERS health plan and of his marriage to Mrs. Johnson (Tr. 54:14-16; CalPERS Ex. 9o; Resp't Ex. D);
- Told Mrs. Johnson that he wanted to help take care of her through his CalPERS medical, dental and option 2 benefits (Tr. 21:1-3; 81:1-3; Resp't Ex. N);
- Sent a letter to CalPERS on June 23, 2014 expressly requesting that Mrs. Johnson be added as the beneficiary for "all of [his] retirement benefit[s] and all death benefit[s]" that were previously named for his former spouse and daughter, which would include his CalPERS medical, dental and lifetime benefits under option 2, and instructed that CalPERS make

[4] The Proposed Decision recognizes that strict adherence to Government Code section 21462 is not required. It acknowledges that "*[t]here may have been a different outcome*" in this case under circumstances where Grantland Johnson had simply "received the settlement option estimates and election form, but passed away before he could consider them." (Proposed Decision at p. 7, fn. 7, italics added.)

the change immediately upon receiving a final marital property settlement agreement with his former wife (Resp't Ex. E);

- Expressed that he wanted to fill out the forms for designating Mrs. Johnson as his new beneficiary and instructed his long-time friend, Herb Anderson, to immediately retrieve the forms from his home (Tr. 35:6; 38:9-11);

- Called CalPERS from the ICU with Mrs. Johnson in early-August for guidance on how to correctly fill out the Modification Form and as part of that call re-iterated that he wanted to select "option 2" benefits (Tr. 35:19-22; 37:9-12; 58:24-59:2; 84:2-3); and

- He signed the Modification Form consistent with designating Mrs. Johnson as his new beneficiary for his CalPERS medical, dental and option 2 monthly benefits and urged that the form be mailed that day (Tr. 36:5-6; 39:19.)

Mrs. Johnson submitted a certified copy of the final judgment and marital property settlement agreement as soon as it was available. Grantland Johnson's *only* incomplete step was to submit the Election Form before he died. Based on these facts and the underlying law, it is readily determinable which option benefit Grantland Johnson would have selected had he survived to submit an Election Form; CalPERS is incorrect that his intent was "speculati[ve]" and "unascertainable from the record." (CalPERS Closing Br. at pp. 11, 21.) The Proposed Decision was also incorrect in finding that "[w]hether Mr. Johnson clearly intended to name [Mrs. Johnson] as his life option beneficiary" to be irrelevant. (Proposed Decision at p. 7.)

Grantland Johnson's intent is clear and should be effectuated. It would be patently unjust to reject his substantial efforts and unmistakable objective of designating Mrs. Johnson as his beneficiary for medical, dental and option 2 benefits.

B. The Board Has Authority To Correct The Omitted Election Form Under Government Code Section 20160

Under Government Code section 20160, subdivision (a),[5] the CalPERS board may, "in its discretion and upon any terms it deems to be just," correct the errors or omissions of retired members or their beneficiaries. (*Ibid.*) They can correct such errors or omissions if:

> (a)(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.
>
> (a)(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.
>
> (a)(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

(*Id.*, § 20160, subds. (a)(1)-(a)(3).) Furthermore, an "error or omission" is correctable where the member or beneficiary undertook an inquiry "that would be made by a reasonable person in like or similar circumstances . . . ." (*Id.*, § 20160, subd. (a).) Code of Civil Procedure section 473, subdivision (b) "is to be liberally construed." (*Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368 [118 Cal.Rptr.2d 71].)

[5] All statutory references herein relate to the California Government Code unless otherwise indicated.

Here, Grantland Johnson's death and substantial health problems that existed before and arose during his efforts to complete the process for designating Mrs. Johnson as beneficiary of his Benefits satisfy excusable neglect and inadvertence, among other section 20160(a)(2) provisions. "Excusable neglect" is determined by whether the party seeking correction has shown a reasonable excuse for the default. (*Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1141-42.) "'To warrant relief under section 473 a litigant's neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances. The inadvertence contemplated by the statute does not mean mere inadvertence in the abstract. If it is wholly inexcusable it does not justify relief.'" (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206.)

Grantland Johnson's Election Form was not submitted, or was "omitted," because of his untimely death; he could not submit the confirmatory form because he was not alive to do so. Furthermore, his serious health conditions often took priority and at times was understandably more important for Grantland Johnson and Mrs. Johnson to address than formulating wedding plans. They were engaged as of 2012, but their marriage plans "ended up getting extended" due to Grantland Johnson's health issues. (Tr. 21:18-22.) Furthermore, he was unable to acquire the entire interest of his CalPERS benefits any earlier for reasons beyond his control. For a substantial period of time, his former wife refused to sign the proposed marital property agreement. Although Grantland Johnson initiated divorce proceedings on *April 8, 2013*, his former spouse did not sign the settlement agreement until *September 4, 2014*, approximately two weeks after his death. (Resp't Ex. J.)

Furthermore, at the exact same time that he and Mrs. Johnson were attempting to understand and engage in the complicated process for adjusting his CalPERS Benefits, Grantland Johnson had to undergo a high-risk surgery related to diabetes to save one of his legs. He was bedridden for approximately two-months following the surgery. He was also forced to undergo a series of wound debridement procedures in the following several months, between March and May 2014. (Tr. 23:25-24:3; 70:1-3; 72:8-18.) He was "in and out of [the] hospital through June and July, on top of [undergoing] four dialysis a week and constant doctor appointments." (Tr. 58:9-12.) His poor health and ongoing treatment prevented him from being able to use a computer to access CalPERS forms and perform CalPERS-related research. (Tr. 72:4-18.) In addition, Grantland Johnson had congestive heart failure. (Tr. 22:21-22.)[6]

On June 23, 2014, Grantland Johnson expressly informed CalPERS in writing that he wanted Mrs. Johnson to be named as his beneficiary for all of his CalPERS benefits. However, by the time CalPERS responded to his letter, Grantland Johnson was in the ICU. (Resp't Exs. E and F; Tr. 31:5-6.) Mrs. Johnson testified that while it was "not yet clear that [Grantland Johnson] was dying," it was an "extremely intense time." (Tr. 28:20-21.)[7]

Grantland Johnson and Mrs. Johnson acted diligently and reasonably in navigating a complex process under extremely difficult circumstances. The omission of his Election Form[8] and any delays in the beneficiary designation process on his part are excusable, were inadvertent and should be corrected.

When Mrs. Johnson first learned that CalPERS would not process Grantland Johnson's

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[6] The evidence, severity and frequency of Grantland Johnson's health issues are far from "vague," as CalPERS argues, and readily distinguishes this case from those cited in CalPERS' Closing Brief. (CalPERS Closing Br. at pp. 15-17.)

[7] Respondent is prepared to submit additional medical information under seal or on an otherwise confidential basis if it would assist the Board in analyzing Grantland Johnson's health status and the extent to which it substantially hindered his efforts to modify his beneficiary for CalPERS Benefits.

[8] The Proposed Decision provides scant and confusing analysis of section 20160. It states that the Election Form could not have been "omitted" because the form was "never received." (Proposed Decision at p. 7.) However, the absence of that document, and Grantland Johnson's inability to submit it, is precisely what constitutes the omission.

request to designate her as beneficiary for his Benefits in mid-February 2015, she immediately sent a letter to CalPERS on February 14, 2015, requesting that CalPERS address the error. (Tr. 48:19-49:6; 74:2-7; Resp't Ex. L.) Mrs. Johnson's request was transmitted well within the six month statutory period under section 20160(a)(1). Furthermore, pursuant to section 20160(a)(3), the requested correction will not provide Mrs. Johnson with any more than she would otherwise have been afforded had Grantland Johnson survived to submit the final Election Form, consistent with what he manifestly intended, clearly expressed and set out to achieve.

Accordingly, the Board should exercise its discretion to correct the omitted Election Form.

C. Grantland Johnson Substantially Complied With Section 21462

California courts have long held that a governmental requirement may be satisfied if the party seeking relief has substantially complied with the purpose or objective of the requirement.

> "'Substantial compliance . . . means actual compliance in respect to the substance essential to every reasonable objective of the statute.' Where there is compliance as to all matters of substance *technical deviations are not to be given the stature of noncompliance. Substance prevails over form.* When the plaintiff embarks [on a course of substantial compliance], every reasonable objective of [the statute at issue] has been satisfied."

(*Cal-Air Conditioning, Inc. v. Auburn Union Sch. Dist.* (1993) 21 Cal.App.4th 655, 668 [26 Cal.Rptr.2d 703], citations omitted, first emphasis omitted and second emphasis added.); *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1017 n.24 ("each *objective or purpose* of a statute must be achieved in order to satisfy the substantial compliance standard," but not "'actual compliance' with every specific statutory requirement"), emphasis added.)

Under section 21462(a)(1), if a member who elected to receive an option 2 settlement receives a judgment awarding the total interest in the retirement system following dissolution of marriage, the member may

> 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.

(*Ibid.*) In addition, under section 21462(b), the election must be made "within 12 months of the date of entry of the judgment . . . or within 12 months following marriage if the spouse is named as beneficiary . . . ." (*Ibid.*) Section 21462(c) states in relevant part that an election that a member fails to make within 12 months of a qualifying event can "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." (*Ibid.*)

Grantland Johnson substantially complied with section 21462. Pursuant to section 21462(a), Grantland Johnson petitioned for divorce from his former spouse and was "award[ed] the total interest" in his CalPERS benefits. (*Ibid.*; *see also* Resp't Ex. J.) Here, because his former spouse signed the agreement, and the community property-related judgment was filed and endorsed, after Grantland Johnson's death, it fell to Mrs. Johnson to submit the judgment to CalPERS. She did so in January 2015 and again in February 2015. (Tr. 43:8-10; Resp't Exs. K and L.)

Furthermore, Grantland Johnson clearly "elected" to designate Mrs. Johnson as his new beneficiary for option 2 benefits in his June 23, 2014 letter to CalPERS, where he stated that he wanted Mrs. Johnson to be named as beneficiary for all of his CalPERS retirement and death benefits. (Resp't Ex. E.) Grantland Johnson also submitted a Modification Form consistent with selecting option 2 benefits, following a telephone call with CalPERS during which Grantland Johnson expressed his intent to select that benefit option. (Tr. 35:19-21; 37:9-12; 84:15-20.)[9]

While Grantland Johnson did not formally submit an Election Form with recalculated allowances under section 21462(c), and was not alive to do so, he satisfied the objective and purpose of that requirement. CalPERS does not and cannot argue that intent, affirmative acts in furtherance of that intent, and substantial compliance principles do not apply to section 21462.[10] According to CalPERS, the Election Form provides an estimate of the member's allowance and what the beneficiary would receive based on the selected option. (Tr. 119:1-7.) CalPERS states that the Election Form helps it determine "*what* the new option is and *who* the new beneficiary is . . . ." (Tr. 203:14-16, italics added.) Furthermore, CalPERS suggested that the Election Form is important because members could change their mind about modifying their benefits. (Tr. 150:4-8.)[11]

Here, Grantland Johnson affirmed and re-affirmed on several occasions "what" option he intended to select, option 2, and "who" he wanted to designate as his new beneficiary, Mrs. Johnson. There is no question based on his unequivocal written and oral statements to CalPERS what he intended to accomplish, and no indication that he ever sought to select a different option or designate anyone else as his new beneficiary. He had unequivocally expressed his election to change his beneficiary for option 2 benefits by the time he died. It is obvious that he would have turned in the final form had he survived longer. Moreover, there is nothing to suggest that he would have changed his mind based on potentially receiving any reduced monthly benefit.

Grantland Johnson substantially complied with the requirements and procedures for designating Mrs. Johnson as his beneficiary for medical, dental and option 2 benefits.

V. CONCLUSION

For the reasons described above, Respondent Lee Turner Johnson respectfully requests that the Board reject the Proposed Decision.

Respectfully submitted,

KERSHAW, COOK & TALLEY, PC

By:

Ian J. Barlow
Counsel for Respondent

[9] These elections also occurred within the 12-month statutory period described under section 21462 (b). The judgment awarding Grantland Johnson an entire interest in his CalPERS benefits was filed on December 31, 2014 (Resp't Ex. J), and all of Grantland Johnson's requests to designate Mrs. Johnson as his beneficiary for option 2 benefits occurred between June 2014 and August 2014.

[10] 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.)

[11] In addition, CalPERS for the first time in its Closing Brief raised the issue of "deathbed elections," suggesting that Grantland Johnson's marriage and efforts at issue in this matter were borne from a deathbed marriage and, if the election were accepted, would constitute a "deathbed election." As discussed above, in footnote 2, Mrs. Johnson submitted a Request for Introduction of Evidence Not Contained in the Administrative Record, attaching declarations that attest to the legitimacy of their marriage and his strenuous efforts to designate Mrs. Johnson as his beneficiary for medical, dental and option 2 benefits.