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Ref. No. 2015-0373

May 13, 2016

Cheree Swedensky, Board Secretary  
Board Services Unit, Executive Office  
California Public Employees' Retirement System  
Lincoln Plaza North, 400 Q Street, Rm 3340  
Sacramento, CA 95811

**Subject:** CalPERS Opposition to Respondent Johnson's Request for Introduction of Additional Testimony Not Contained in the Administrative Record - In the Matter of the Appeal Regarding Death Benefits Payable Upon the Death of GRANTLAND LEE JOHNSON by LEE TURNER JOHNSON, Respondent.

Dear Mr. President and Members of the Board:

On May 6, 2016, Respondent Johnson filed a request for the Board to consider four declarations that are not contained in the administrative record. CalPERS opposes Respondent Johnson's request for the following reasons.

The four declarations are testimonial, not documentary, evidence. Board Rules do not permit parties to supplement the administrative record with testimony. Board Rule III.E.1 is quite clear on this: "This policy [regarding requests to supplement the record] applies only to documentary evidence. Under no circumstances will the Board accept new witness testimony at a full hearing." Accordingly, these declarations should not be admitted or considered.

In addition, admission of the declarations would be prejudicial to CalPERS because CalPERS has had no opportunity to cross-examine the declarants or present counter testimony to rebut their assertions, which is the fundamental reason for trials and hearings in the first place.

Were that not enough to preclude the admission of the declarations, their substance is also inadmissible because it is irrelevant and speculative. The declarants merely state their impressions of what they thought Mr. Johnson may have intended or desired. For example, Mr. Camp's declaration expresses his *opinion* that Mr. Johnson "was determined to do whatever he could to make sure that Lee Turner Johnson was secure

and provided for, particularly through his pension benefits.” Camp Declaration ¶ 5. This broad impression is irrelevant to the very specific issue at hand. More importantly, such opinion testimony about what someone else was thinking is flatly inadmissible as just that – lay opinion. In fact, neither Mr. Camp’s nor any of the other declarations recount any actual statement made by Mr. Johnson about the specific issue in this case.

Respondent Johnson also fails to demonstrate “good cause why the evidence could not, with reasonable diligence, have been discovered and produced at the hearing.” (Board Rule III. E. 3.) In fact, Respondent Johnson provides **no reason** why this testimony could not have been presented at the hearing. Respondent Johnson had the opportunity to introduce the declarations or testimony of the declarants at the hearing, since all of these declarants represent that they have been long-term family friends of both Decedent Johnson and Respondent Johnson; however, she failed to do so.

Failing to establish good cause, Respondent Johnson simply claims the testimony was not presented at the hearing because CalPERS did not raise any issues relating to the legitimacy of the marriage or deathbed elections until CalPERS filed its closing brief. Respondent Johnson appears to be mainly concerned about the legislative history that was attached to CalPERS brief, which states the member and the beneficiary must be living on the effective date for the election to be valid.

As to the legitimacy of the marriage, CalPERS has never questioned the validity of the marriage between Respondent Johnson and Decedent Johnson. Therefore, any testimony attempting to establish the validity of the marriage is irrelevant.

As to the notion of deathbed elections and that the member must be living on the effective date of the hearing; this issue was presented at the hearing and testified to by CalPERS staff and Respondent Johnson. (See, Tr. pp. 151:18-25, 171:1-7; 180:7-20) In fact, Respondent Johnson’s attorney raised this very issue at the hearing, during direct examination of Respondent Johnson and cross-examination of CalPERS staff. (See Tr. p. 48:4-9, “. . . do you ever remember anybody at CalPERS ever informing you or him that both the member and the new beneficiary must be alive on the date when the new election was to become effective?”; Tr. p. 158.) Thus, Respondent Johnson was fully aware of this issue and had ample opportunity to present further testimony during the hearing.

Having failed to seize the opportunity to present rebuttal testimony at the hearing, Respondent Johnson could have filed an objection or a motion with the Office of Administrative Hearings after CalPERS brief was filed, requesting the ALJ disregard the legislative history or reopen the record to consider additional testimony. Respondent Johnson once again missed her opportunity and failed to take any action. Regardless, there is no need for Respondent Johnson to present testimonial evidence to rebut the legislative history, as it was never accepted into evidence. The ALJ, *sua sponte*, decided not to consider the legislative history. The ALJ, as noted in the Proposed Decision, solely looked at the statute to discern the intent of the legislature and find

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Respondent Johnson is not entitled to the benefits pursuant to the plain language of Government Code section 21462.

For all of the above reasons, CalPERS requests that the Declarations containing testimonial evidence presented by Respondent Johnson not be admitted or considered by the Board.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Preet Kaur', with a long horizontal flourish extending to the right.

PREET KAUR  
Senior Staff Attorney

cc: Ian Barlow