ATTACHMENT A

THE PROPOSED DECISION

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BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for Death Benefits Payable on the Death of Mark A. Soto, by ANNETTE SOTO Respondent, and MARINA SOTO HERNANDEZ, Respondent.	Case No. 2014-0370 OAH No. 2014060606

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on November 16 and 30, 2015, in Sacramento, California.

Elizabeth Yelland, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Matthew Ritchie,[1] Attorney at Law, represented Annette Soto (respondent Soto), who was present.

Jennifer Miller Moss,[2] Attorney at Law, represented Marina Soto Hernandez (respondent Hernandez), who was present.

Evidence was received, and the record remained open until February 5, 2016, for the parties to submit written closing arguments, which were timely received. The record was thereupon closed, and the matter submitted for decision.

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CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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ISSUE

Whether CalPERS correctly accepted as valid the beneficiary designation dated June 14, 2010, naming Marina Hernandez and Anthony Soto, the son of decendent Mark A. Soto (Mr. Soto), as beneficiaries?

FACTUAL FINDINGS

1. The Statement of Issues was made and filed on May 7, 2014, by Anthony Suine, Chief of the Benefit Services Division of CalPERS, in his official capacity.

Background and Preliminary Matters

2. Mr. Soto was employed by the Department of Water Resources from July 1, 1992 through October 12, 2007, and by virtue of his employment was a miscellaneous member of CalPERS, pursuant to Government Code section 21530. Mr. Soto died on May 22, 2013. At the time of his death, Mr. Soto did not have a beneficiary designation on file with CalPERS.

3. Respondent Soto was Mr. Soto's spouse at the time he died. Respondent Soto and Mr. Soto had one adult son, Anthony. Respondent Soto and Mr. Soto were legally separated on October 20, 2011. Pursuant to a marital separation agreement signed by Mr. Soto and respondent Soto, a Judgment of Legal Separation was filed with the Sacramento County Superior Court, on October 20, 2011, by which both were awarded full interest their own respective CalPERS benefits.

4. Respondent Hernandez is Mr. Soto's natural mother. At the time of Mr. Soto's death, he had been living with his mother in her home.

CalPERS's Initial and Revised Determination

5. By letter dated July 24, 2013, CalPERS notified respondent Soto that as Mr. Soto's surviving spouse she was the proper beneficiary and entitled to receive death benefits payable on his account. The benefits payable upon Mr. Soto's death consist of a lump sum Group Term Life Insurance payment of $5,000, plus a Basic Death Benefit of $86,006.02, which can be paid in a lump sum or in monthly payments. The letter explained to respondent Soto what documents CalPERS would need before payment could be made.

6. On July 30, 2013, respondent Soto submitted an application for pre-retirement death benefits payable upon the death of Mr. Soto. She included the required documents.

7. On August 14, 2013, CalPERS sent a letter to respondent Hernandez, acknowledging receipt of a letter from respondent Hernandez on July 25, 2013. Respondent Hernandez's letter had enclosed a Judgment of Legal Separation of Mr. Soto and Respondent

Soto, filed in the Sacramento County Superior Court on October 20, 2011. By its letter of August 14, 2013, CalPERS informed respondent Hernandez that the legal separation did not terminate the marital relationship between Mr. Soto and respondent Soto, and that in the absence of a writing showing Mr. Soto's intent to designate the CalPERS benefits to another person, respondent Soto would be the highest-ranking statutory beneficiary. The CalPERS letter lists the first three statutory beneficiaries in order, as follows:

(1) a member's spouse, or if none
(2) a member's natural or legally adopted child(ren), or if none
(3) a member's surviving parent(s)

The CalPERS letter to respondent Hernandez set a deadline of August 28, 2013, for her to find and submit any beneficiary designation Mr. Soto may have signed.

8. On August 23, 2013, attorney Jennifer Miller Moss, representing respondent Hernandez, sent a letter via facsimile and certified mail to CalPERS, enclosing a document purporting to show Mr. Soto's intent to designate respondent Hernandez and Mr. Soto's son, Anthony Soto, as beneficiaries of his CalPERS death benefits. The document reads as follows:

June 14, 2010

To Pers,
I request my Calif. State Retirement beneficiary be Marina
Hernandez and my son Anthony Soto only three thousand [sic].
I cannot pay any attorney cost [sic]. Please follow my wishes.

/s/Mark A Soto
[Address]

9. Respondent Hernandez testified she found the document in one of several boxes of papers her son Mr. Soto had kept at her home, and that she took the original to CalPERS and submitted it to a member of the CalPERS staff, who kept the original and gave a copy to her. The original has not been located.

10. On September 18, 2013, CalPERS sent a letter to respondent Soto advising her that CalPERS determined she is not the eligible beneficiary of the death benefits payable on Mr. Soto's account. The letter explained that death benefits are payable according to the ranking of statutory beneficiaries, unless the decedent has prepared a valid written beneficiary designation. The letter further explained that respondent Hernandez had searched Mr. Soto's boxes of personal records and found a letter dated June 14, 2010, designating two beneficiaries, other than respondent Soto. The CalPERS letter stated a comparison of the signatures on the June 14, 2010 beneficiary designation, and Mr. Soto's signature on the marital separation agreement appear to match, and therefore CalPERS intended to honor the letter as a valid beneficiary designation. CalPERS's letter advised

respondent Soto she had 30 days to send a written appeal to CalPERS. Respondent Soto timely appealed.

Expert Witnesses

11. The central factual issue in this matter is whether the June 10, 2014 beneficiary designation submitted by respondent Hernandez is authentic. CalPERS and respondent Soto both retained forensic document examiners to compare the June 10, 2014 beneficiary designation with known writings of Mr. Soto and respondent Hernandez. Both experts testified at hearing and prepared written reports admitted into evidence. Their respective opinions are discussed below.

12. Joseph G. Merydith: Mr. Merydith is a forensic document examiner, certified by the American Board of Forensic Document Examiners in 2002. He is employed full-time by the California Department of Justice, Bureau of Forensic Services. He also works part-time in his own consultancy practice, Merydith Forensic Consulting. He has testified as an expert in over 50 cases in state and federal courts in 24 California counties. He was retained in this matter by CalPERS.

13. Mr. Merydith designated the June 10, 2014 beneficiary designation as Q1. He compared Q1 with several known writings of Mr. Soto and respondent Hernandez. Mr. Merydith noted similarities and dissimilarities between the Q1 and other known writings of Mr. Soto. Some of the dissimilarities include the appearance and apparent formation of the letters "a," "e," "u," and "N." The signature on Q1 appears to be more labored than the samples of Mr. Soto's known signature. Some of the similarities include the style, height relationships, spacing, and some apparent letter formations of the Q1 signature and Mr. Soto's signature on his known writings.

14. Mr. Merydith received a few samples of respondent Hernandez's known writing for comparison to Q1. From the small sample of respondent Hernandez's writing, her hand printed "u" is similar to the "u" in Q1.

15. Mr. Merydith's examination and conclusions were limited by the fact he did not have an original of Q1, and because he received a relatively limited number of known writings of Mr. Soto and respondent Hernandez for comparison to Q1. Due to these limitations, Mr. Merydith could not definitively identify or exclude either Mr. Soto or respondent Hernandez as the author and signatory of Q1.

16. Notwithstanding these limitations, Mr. Merydith leans against the validity of Q1. He explained that a forensic document examiner's level of certainty is measured on a scale of one to nine, with nine indicating the highest level of certainty. On a scale of one to nine, Mr. Merydith's level of certainty is a six that Mr. Soto did not write the body of Q1, and a five that Mr. Soto did not sign it.

17. Nanette M. Barto: Ms. Barto is a forensic document examiner. She graduated from the International School of Forensic Document Examination in 2009. Her training included two years of on the job apprenticeship, from July 2007 to July 2009. She works independently in her own consultancy practice, Eye for the Obvious. She has testified as an expert in more than 20 cases in superior courts in more than ten California counties. She was retained in this matter on respondent Soto's behalf.

18. Ms. Barto compared Q1 with several known writings of Mr. Soto and respondent Hernandez. Ms. Barto noted dissimilarities between Q1 and Mr. Soto's known writings with respect to the signature, which appeared to be more labored on Q1 than Mr. Soto's known signatures. She also noticed dissimilarities between the body of Q1 and Mr. Soto's known writings with respect to the letters "a," "e," "u," and "N." Ms. Barto also noted many similarities between Q1 and Ms. Hernandez's known writings. Based on her comparison of hand writing samples, Ms. Barto concluded that Mr. Soto did not write or sign Q1, and that respondent Hernandez did write and sign the Q1 document.

Discussion

19. Taken together, the expert testimony of Mr. Merydith and Ms. Barto and their respective reports credibly demonstrate by at least a preponderance of evidence that Mr. Soto did not write or sign Q1. For this reason, it is established that CalPERS incorrectly accepted as valid the beneficiary designation dated June 14, 2010 (Q1), as valid.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198.) The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) "final compensation" (Gov. Code, §§ 20037, 21350, 21352 and 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.) Members are afforded an opportunity to elect retirement payment options and to make beneficiary designations. This includes designation of beneficiaries to receive lump sum Death Benefit.

2. Government Code section 21490, subdivision (a), provides:

> Except as provided in subdivision (b), a member may at any time, including but not limited to, at any time after reaching retirement age, designate a beneficiary to receive the benefits as may be payable to his or her beneficiary or estate under this part, by a writing filed with the board.

3. Government Code section 21493, subdivision (a), provides, in relevant part, that if a person had no beneficiary designation in effect on the date of death, any benefit payable shall be paid to the survivors of the person in the following order:

(1) The decedent's spouse.
(2) The decedent's natural or adopted children.
(3) The decedent's parents.
(4) The decedent's brothers and sisters.

4. The matters set forth in the Factual Findings and Legal Conclusions as a whole have been considered. CalPERS incorrectly accepted as valid the beneficiary designation dated June 14, 2010, (Q1). Respondent Soto met her burden of establishing that CalPERS incorrectly accepted as valid the beneficiary designation dated June 14, 2010. She is therefore the proper beneficiary entitled to receive death benefits payable on Mr. Soto's account.

ORDER

1 CalPERS' acceptance of the purported beneficiary designation dated June 14, 2010, designating Marina Soto Hernandez and Anthony Soto as the beneficiaries of Mark Soto's death benefits, is reversed.

2. The appeal of Annette Soto to be recognized as the beneficiary of the death benefits payable on Mark Soto's account, consisting of a $5,000 lump sum Group Term Life Insurance Benefit, and an $86,006.02 Basic Death Benefit is granted.

DATED: March 7, 2016

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TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings