

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Decedent Mark Soto (Decedent) was employed by the Department of Water Resources from July 1, 1992 through October 12, 2007. By virtue of his employment, he was a state miscellaneous member of CalPERS. Decedent died on May 22, 2013. At the time of his death, Decedent had not filed a beneficiary designation with CalPERS.

Respondent Annette Soto (Respondent Soto) was Decedent's spouse at the time of his death. Respondent Soto and Decedent were legally separated on October 20, 2011, and remained separated until his death. Pursuant to a Marital Separation Agreement signed by both parties, Decedent and Respondent Soto were awarded full interest in their own respective CalPERS benefits.

Respondent Marina Hernandez (Respondent Hernandez) is Decedent's mother. After Decedent and Respondent Soto legally separated, Decedent moved in with his mother and was living in her home at the time of his death.

On July 24, 2013, CalPERS notified Respondent Soto that as Decedent's surviving spouse, she was the proper beneficiary of death benefits payable on his account. The benefits payable consist of a lump sum Group Term Life Insurance payment of \$5,000, plus a Basic Death Benefit of \$86,006.02.

On July 30, 2013, Respondent Soto submitted an application for Pre-Retirement Death Benefits.

On August 14, 2013, CalPERS notified Respondent Hernandez that the legal separation did not terminate the marital relationship between Decedent and Respondent Soto, and in absence of a written designation to the contrary, all death benefits were payable to Respondent Soto. Respondent Hernandez was given two weeks to find any beneficiary designation Decedent may have signed.

On August 23, 2013, Respondent Hernandez sent a copy of a letter to CalPERS. The letter purports to show Decedent's intent to designate Respondent Hernandez and Decedent's son as beneficiaries. The letter reads in its entirety:

June 14, 2010

To Pers,

I request my Calif. State Retirement Beneficiary be Marina Hernandez and my son Anthony Soto only three thousand. I cannot pay any attorney cost. Please follow my wishes

/s/Mark A. Soto
[address]

Respondent Hernandez testified that she found the document in a box of papers her son kept at her home. The original letter was not produced to CalPERS or to the Office of Administrative Hearings.

On September 18, 2013, CalPERS sent a determination letter to Respondent Soto advising her that due to the June 14, 2010 beneficiary designation, she was not the eligible beneficiary of the death benefits payable on Decedent's account. Respondent Soto appealed.

Two days of hearing were completed on November 16 and 30, 2015. Both Respondents were represented by counsel at all phases of the hearing. At hearing, the central factual issue was whether the June 14, 2010 beneficiary designation was authentic. CalPERS and Respondent Soto both retained forensic document examiners to compare the June 14, 2010 beneficiary designation with known writings of Decedent and Respondent Hernandez. CalPERS' examiner opined against the validity of the document, but stated that his opinion was not conclusive due to the limited number of writings for comparison. Respondent Soto's examiner concluded that Decedent did not write or sign the June 14, 2010 letter, and that Respondent Hernandez did write and sign the letter.

The Administrative Law Judge (ALJ) found that the testimony and reports of both examiners credibly demonstrated by a preponderance of evidence that Decedent did not write or sign the letter. For this reason, the ALJ found that CalPERS incorrectly accepted as valid the June 14, 2010 beneficiary designation.

The ALJ concluded that Respondent Soto's appeal should be granted. The ALJ ruled that Respondent Soto should be recognized as the beneficiary of the death benefits payable on Decedent's account. The ALJ found that CalPERS' acceptance of the purported beneficiary designation dated June 14, 2010 was an error, and should be reversed.

CalPERS Board of Administration adopted the Proposed Decision on May 18, 2016. Respondent Hernandez filed her Petition for Reconsideration on May 27, 2016. Respondent Hernandez fails to provide a valid reason to grant her Petition for Reconsideration.

In Respondent Hernandez's Petition for Reconsideration, she states that "many of the facts were not considered in the Proposed Decision." Respondent Hernandez's argument lacks merit. The hearing on this matter took two days. During those two days, both Respondents were given every opportunity to present facts, witnesses, and evidence in support of their positions. This evidence was thoroughly considered and discussed in the Decision.

Respondent Hernandez states that the ALJ assigned to hear the case was "not familiar with the facts of the case and not sufficiently versed in the legal and factual issues he was to determine." Respondent Hernandez's argument is without merit. Even a cursory reading of the six page Decision reveals that the ALJ understood all the facts and legal issues.

Respondent Hernandez states that certain pieces of circumstantial evidence were not considered by the ALJ. Again, Respondent Hernandez is incorrect. The Decision shows that the ALJ considered all facts presented at the hearing, circumstantial or otherwise.

The bulk of Respondent Hernandez's Petition rests on the validity and weight to give to testimony from each of the forensic handwriting experts. The ALJ found that taken together, the expert testimony of both experts "credibly demonstrate by at least a preponderance of evidence that [Decedent] Mr. Soto did not write or sign Q1." Presumably, Respondent Hernandez did not like the result after hearing. Respondent Hernandez may disagree with the ALJ's findings of fact and legal analysis, but it is clear from the Decision that evidence was taken on the underlying facts, exhibits, expert reports, and various documents presented by all sides. The

ALJ simply found against Respondent Hernandez. Respondent Hernandez has not raised any new evidence or change in circumstances which would warrant reconsideration.

Finally, Respondent Hernandez argues that she has now located the original June 14, 2010 designation, which she wants submitted for further examination as newly discovered evidence. Respondent Hernandez 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.) This hearing was originally scheduled for March 18, 2015. CalPERS requested a continuance so CalPERS could retain services of a forensic handwriting expert to scrutinize all documents, especially the June 14, 2010 designation. CalPERS attempted to gather all relevant documents over the summer of 2015, *including the original of the June 14, 2010 letter*. Despite repeated requests by letter, emails and at meetings where documents were delivered by both Respondents, the original June 14, 2010 letter was never produced. Respondent Hernandez testified at hearing that she submitted the original to CalPERS, but CalPERS never found any proof that the letter had ever been submitted. Now, after the Decision is rendered adverse to her position, Respondent Hernandez has miraculously found the original letter. The fact that CalPERS never received the original letter as Respondent Hernandez testified at hearing also makes Respondent Hernandez's claim that Decedent wrote and signed the letter suspect. Failing to establish good cause, Respondent Hernandez's request that the original document be submitted for further examination as newly discovered evidence should be denied.

Staff argues the Board deny the Petition for Reconsideration and uphold its decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

June 15, 2016


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