

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Appeal of Death Benefits  
Payable Upon the Death of Mauricio E.  
Cardenas by:

Case No. 2015-0823

KIMBERLY M. CARDENAS,

OAH No. 2016030603

SAMUEL CARDENAS,

and

PAUL R. CARDENAS,

Respondents.

**PROPOSED DECISION**

This matter was heard by Ji-Lan Zang, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), on August 2, 2016, in Glendale, California.

James C. Paul, Attorney at Law, represented the California Public Employees' Retirement System (CalPERS). Darren J. Goodman, Attorney at Law, represented respondents Kimberly Cardenas (respondent Kimberly Cardenas), who appeared, and Samuel Cardenas (respondent Samuel Cardenas), who did not appear. Respondent Paul R. Cardenas (respondent Paul Cardenas) appeared and represented himself.

Oral and documentary evidence was received, and argument was heard. The record was left open until August 26, 2016, to allow all parties to file and serve closing briefs by August 19, 2016, to allow all parties to file and serve any responses by August 26, 2016.

Respondents Kimberly and Samuel Cardenas's closing brief, dated August 18, 2016, was received on August 19, 2016, marked as exhibit C, and lodged. Attached to respondents Kimberly and Samuel Cardenas's closing brief was a declaration, dated August 18, 2016, from respondent Kimberly Cardenas. The declaration was separately marked as exhibit D for identification only. Although CalPERS did not object to exhibit D, the ALJ did not admit it into evidence because it failed to comply with the requirements of Government Code section 11514 and because the ALJ had kept the record open for briefing, not additional evidence.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED 22 Sep 2016  
*Ally H. [Signature]*

CalPERS's closing brief, dated August 19, 2016, was received the same day, marked as exhibit 12, and lodged. CalPERS's reply brief, dated August 26, 2016, was received on August 26, 2016, marked as exhibit 13, and lodged.

No reply brief was submitted by respondents Kimberly and Samuel Cardenas. The record was closed, and the matter was submitted for decision on August 26, 2016.

## FACTUAL FINDINGS

1. Anthony Suine, Chief of the Benefits Services Division of CalPERS, filed the Statement of Issues while acting in his official capacity.

2. Mauricio E. Cardenas was a state miscellaneous member of CalPERS by virtue of his employment with the Department of Fish and Wildlife. Effective June 1, 2011, Mr. Cardenas (decedent) retired.

3. On May 12, 2011, decedent signed an application for service retirement electing Option 1 monthly allowance.<sup>1</sup>

a. In section 3d of the application, decedent designated his son, respondent Paul Cardenas, as his sole beneficiary for the Option 1 Balance. Section 3d contained a notice which stated, "You may change this beneficiary (ies) at any time. This designation automatically revokes when there is a change to your marital status, domestic partnership status, or when there is a birth or adoption of a child. . ." (Ex.10)

b. In section 4 of the application, decedent designated respondent Paul Cardenas as his sole beneficiary for the lump-sum Retired Death Benefit. Section 4 of the application contained the same notice as described above in Factual Finding 3a.

c. In section 5 of the application, decedent listed his other son, respondent Samuel Cardenas, as his natural or adopted unmarried child under the age of 18, who is eligible for survivor continuance benefit.

4. Decedent died on December 21, 2014. He was not married at the time of his death. Decedent was survived by his two sons, respondent Samuel Cardenas and respondent Paul Cardenas. Respondent Samuel Cardenas is decedent's child from decedent's marriage to his former wife, respondent Kimberly Cardenas. Respondent Paul Cardenas is decedent's child from another prior marriage. At the time of decedent's death, respondent Samuel Cardenas was a minor child under the age of 18, and respondent Paul Cardenas was an adult over the age of 18.

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<sup>1</sup> Under this retirement option, the member receives a monthly allowance during his or her lifetime. Upon the member's death, the remaining member contribution is payable as a lump sum to the designated beneficiary. (Gov. Code, § 21455.)

5. CalPERS did not receive any new beneficiary designation from decedent prior to his death.

6. Decedent's payable death benefits include the following: (1) Option 1 Balance of \$34,485.79<sup>2</sup>; (2) a pro-rata Option 1 Benefit of \$2,432<sup>3</sup>; and (3) the lump-sum Retired Death Benefit of \$2,000. These death benefits are payable according to decedent's beneficiary designation dated April 13, 2011. Additionally, a post-retirement survivor's allowance was payable to eligible survivors in accordance with Government Code section 21624.

7. Decedent's Option 1 monthly allowance ceased to be payable on the date of his death on December 21, 2014. Before being notified of decedent's death, however, CalPERS issued a retirement benefit payment to decedent in the amount of \$3,121.71 on January 1, 2015. CalPERS was able to recover a partial reimbursement from the bank, but a payment of \$3,048.90 was improperly deposited into a bank account under the joint control of respondent Paul Cardenas and respondent Kimberly Cardenas. The overpayment of \$3,048.90 was subsequently transferred by respondent Paul Cardenas to another account. Therefore, an overpayment in the sum of \$3,048.90 remains due and payable to CalPERS from respondent Paul Cardenas.

8. On January 17, 2015, respondent Kimberly Cardenas filed an application for retired member/payee survivor benefits, seeking benefits on behalf of her son, respondent Samuel Cardenas.

a. Decedent and respondent Kimberly Cardenas were divorced on February 14, 2002. (Superior Court of California, County of Santa Barbara, case number 01035382.) Pursuant to the Marital Settlement Agreement (MSA), dated February 7, 2002, which was incorporated into the judgement for dissolution of marriage, decedent and respondent Kimberly Cardenas waived their rights to each other's pension and retirement plans. Specifically, section IX of the MSA provided that "any separately held pension and/or retirement plans shall remain the sole and exclusive property of the individual in whose name said policies exist." (Ex. A.)

b. Moreover, section V of the MSA required decedent to pay respondent Kimberly Cardenas \$300 per month, beginning January 1, 2002, as child support for their minor child, respondent Samuel Cardenas. During his lifetime, decedent did not pay this

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<sup>2</sup> The Option 1 balance of decedent's member contributions and interest was \$43,023.41. However, decedent had elected to purchase service credit, the amount of which was deducted from his member contributions. The balance remaining in decedent's member contribution account after reductions for benefits paid during his lifetime and the cost of additional service credit purchase was \$34,485.79.

<sup>3</sup> The pro-rata benefit represents the retirement allowance that accrued during the 21 days in December 2014 prior to decedent's death.

child support obligation, and it fell into arrears. After his death, pursuant to a Findings and Order After Hearing (FOAH), dated August 7, 2015, the Superior Court in the family law case determined that decedent owed respondent Kimberly Cardenas a total of \$78,572 in child support arrears for the period of January 1, 2002 to April 1, 2015.

c. There was no evidence that any other court order relating to child support or to decedent's retirement plan has been entered.

9. After a review of respondent Kimberly Cardenas's application, CalPERS determined that the Option 1 Balance, the pro-rata Option 1 Benefit, and the lump-sum Retired Death Benefit, must be paid in accordance with decedent's written beneficiary designation. Thus, as decedent's designated beneficiary, respondent Paul Cardenas was entitled to these benefits. As decedent's surviving minor child, respondent Samuel Cardenas was eligible to receive a monthly post-retirement survivor's allowance of approximately \$917.07 per month. In a letter dated May 1, 2015, CalPERS notified respondent Kimberly Cardenas of this determination.

10. On May 26, 2015, respondent Paul Cardenas filed an application for retired member/payee survivor benefits.

11. In letters dated May 29, 2015 and June 24, 2015, respondent Kimberly Cardenas appealed CalPERS's determination and requested a hearing.

a. Respondent Kimberly Cardenas claimed that Government Code section 21490, subdivision (b)(2), nullified decedent's designation of respondent Paul Cardenas as his beneficiary. She maintained that the provisions of the statute entitle respondent Samuel Cardenas to all of decedent's Option 1 death benefits and the lump-sum Retired Death Benefit.

b. Government Code section 21490 provides in pertinent part:

(a) 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.

[¶] . . . [¶]

(b)(2) No designation may be made by an unmarried member who has attained the minimum age for voluntary service retirement applicable to the member in his or her last employment preceding death if that designation is in derogation of the rights of the member's unmarried, dependent children who are under the age of 18 years at the time of the member's death.

12. In a letter dated June 1, 2015, respondent Paul Cardenas was advised that because there was an appeal of CalPERS' determination, death benefits would not be paid until the appeal process was completed.

13. At the administrative hearing, the parties agreed that the facts of the case are undisputed. Although afforded with the opportunity, respondents Kimberly Cardenas and Paul Cardenas did not testify at the hearing.

14. Respondents Kimberly Cardenas and Samuel Cardenas contend that decedent's designations of respondent Paul Cardenas as his sole beneficiary of Option 1 death benefits and lump-sum Retired Death Benefit are void because Government Code section 21490, subdivision (b)(2), prohibits the designation of a beneficiary "in derogation of the rights" of the member's minor child. Respondent Samuel Cardenas, by virtue of his status as the decedent's minor child at the time of the beneficiary designation, has a "general right" to decedent's death benefits. Alternatively, by virtue of the Family Code, he has a right to court-ordered child support within the meaning of Government Code section 21490, subdivision (b)(2).

15. CalPERS contends that Government Code section 21490, subdivision (b)(2), does not apply in this case. CalPERS construes the provision as protecting minor children's rights to benefits, only to the extent that they are a statutory beneficiaries enumerated in other sections of the Public Employees Retirement Law (PERL), set forth at Government Code section 20000 et seq. The PERL does not provide for minor children to be statutory beneficiaries to the Option 1 Balance, the pro-rata Option 1 Benefit and the lump sum Retired Death Benefit, and thus respondent Samuel Cardenas is not entitled to these benefits.

16. The issue on appeal is whether CalPERS correctly determined that respondent Paul Cardenas is entitled to receive the Option 1 Balance, the pro-rata Option 1 Benefit, and the lump-sum Retired Death Benefit.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including the both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, note 5.) In challenging decedent's written beneficiary designation, respondents Kimberly Cardenas and Samuel Cardenas bear the burden of proof. As set forth in Factual Findings 1 through 16, and Legal Conclusions 1 through 18, that burden was not met.

2. The parties' contentions turn on the meaning of a minor children's "rights" to benefits under Government Code section 21490, subdivision (b)(2). Respondents Kimberly

and Samuel Cardenas's broad interpretations of the statute, as granting either a "general right" or right to enforce child support, were not persuasive. CalPERS's interpretation, that a minor child's rights to benefits supersede those of a designated beneficiary only when the child is a statutory beneficiary under the PERL, was a more logical reading of the statute.

### *The "General Rights" of the Child*

3. Respondents Kimberly Cardenas and Samuel Cardenas assert that Government Code section 21490, subdivision (b)(2), should be construed liberally to include the "general rights" of the child. Respondents Kimberly Cardenas and Samuel Cardenas claim that respondent Samuel Cardenas holds such rights, because he was decedent's minor child at the time of decedent's beneficiary designation.

4. However, this interpretation of Government Code section 21490, subdivision (b)(2), would deprive the member of the ability to designate anyone other than his or her minor child as the beneficiary. Any beneficiary designation that excludes the minor child would be void because it would be "in derogation" of the child's rights. Such a result would conflict with PERL statutes that direct CalPERS to pay the death benefits in question to a member's designated beneficiary as the first in order of priority, regardless of the existence of any minor children. Specifically, under Government Code sections 21455, 21506, and 21623, a member's Option 1 Balance, the pro-rata Option 1 Benefit, and the lump-sum Retired Death Benefit, respectively, are payable first to the member's designated beneficiary. Only in the absences of a beneficiary designation, would the children of a deceased member be entitled to any benefits, simply by virtue of their status as the decedent's natural or adopted children.<sup>4</sup> (Gov. Code, § 21493.) Consequently, Government Code sections 21455, 21506, and 21623, in conjunction with Government Code section 21493, must be read as conferring upon a member the ability to designate anyone he or she chooses as a beneficiary, even if the designation excludes the member's minor child.

5. The basic principles of statutory construction require that "[t]he words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) Therefore, Government Code section 21490, subdivision (b)(2), must be construed more narrowly in order to comport with PERL statutes allowing a member to make beneficiary designations to the exclusion of minor children.

### *The Right to Enforce Child Support*

6. Another interpretation of Government Code section 21490, subdivision (b)(2), offered by respondents Kimberly Cardenas and Samuel Cardenas is that the statute

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<sup>4</sup> Under Government Code section 21493, if there is no beneficiary designation, benefits are payable the natural or adopted child of a deceased member as second in order of priority to the surviving spouse.

recognizes rights which may exist by virtue of other court orders and statutes beyond the PERL. They claim that respondent Samuel Cardenas holds such rights based on Family Code section 3900, the child support order contained in the MSA, and the child support arrears order contained in the FOAH. This argument, however, was also unconvincing.

7. Family Code section 3900 provides that “the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances.” It is undisputed that there is a significant public policy interest in having child support obligations fulfilled. It is also undisputed that respondent Samuel Cardenas, as the minor child of the marriage between decedent and respondent Kimberly Cardenas, had a general right to child support under the Family Code and a right to a specific amount of child support and arrears pursuant to the MSA and the FOAH.

8. However, under the Family Code, a child support order or an arrears order does not establish a right to enforce child support in a retirement or pension plan. To render a child support order enforceable against a retirement or pension plan, there must be an additional order which mandates the plan to pay child support. Indeed, during decedent's lifetime, respondent Kimberly Cardenas could have enforced the child support order against decedent's CalPERS account by means of an earnings assignment order or a Domestic Relations Order (DRO)<sup>5</sup> that meets the terms of the PERL.<sup>6</sup> (Fam. Code, §§ 2060-2065, 5208; Gov. Code, § 21290.) Without having to join CalPERS to the divorce proceeding,<sup>7</sup> respondent Kimberly Cardenas could have enforced any child support arrears owed to respondent Samuel Cardenas through a writ of execution against decedent's CalPERS account. (Fam. Code, § 5103; *In re Marriage of Lamoure* (2011) 198 Cal.App.4th 807, 820.)

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<sup>5</sup> A DRO is a judicial order, entered as a part of a divorce or legal separation, which divides a retirement or pension plan between a plan participant and an alternate payee. The alternate payee must be a spouse, former spouse, child or other dependent of the plan participant.

<sup>6</sup> CalPERS is a governmental plan and is not subject to the Employee Retirement Income Security Act that governs Qualified Domestic Relations Orders (QDRO). The requirement for CalPERS to distribute payments pursuant to a DRO is governed by the PERL, set forth at Government Code sections 21290 et seq.

<sup>7</sup> In its reply brief, dated August 19, 2016, CalPERS contends that it is not bound by the child support order because CalPERS was not joined to the divorce proceeding under Family Code section 2060, subdivision (b). However, Family Code section 5103 allows levy on an employee benefit plan to collect child support arrears without a joinder. Subdivision (a) of the statute provides: “Notwithstanding Section 2060, an order for the payment of child, family, or spousal support may be enforced against an employee benefit plan regardless of whether the plan has been joined as a party to the proceeding in which the support order was obtained.”

9. Nevertheless, there was no evidence that respondent Kimberly Cardenas had obtained a writ of execution, an earnings assignment order, or a DRO that complies with the terms of the PERL during decedent's lifetime. Without such a pre-existing order, no statute under the Family Code provides for the issuance of an order postmortem.<sup>8</sup> Therefore, after decedent's death, neither the child support orders in the MSA and the FOAH, nor any statute under the Family Code, granted a right to enforce child support in decedent's CalPERS account.

10. In fact, to interpret Government Code section 21490, subdivision (b)(2), in a manner as to grant such a right would be contrary to case law. In *In re Marriage of Padgett* (2009) 172 Cal.App.4th 830, Robert and Beverly Padgett were divorced pursuant to a judgment of dissolution. The sole reference to the husband's pension plan in the judgment was an order reserving the family court's jurisdiction over the pension plan. After the divorce, Robert Padgett remarried. When he died in 2005, both Beverly Padgett and Robert Padgett's wife from the second marriage, Donna Padgett, made claims for surviving spouse benefits payable from Robert Padgett's pension plan. Beverly Padgett applied for the family court to enter a QDRO based on the original order contained in the judgment. The family court granted her application and entered a QDRO which allocated to her a portion of the surviving spouse benefits. On appeal, the Court of Appeal held that where the original order regarding the pension plan evinced no intent to award an interest in benefits to Beverly Padgett, the order cannot be modified to create such an interest after the occurrence of the benefit-triggering event (i.e. Robert Padgett's death). (*Id.* at p. 855.) Hence, the QDRO was improper, and Beverly Padgett was not entitled to surviving spouse benefits from the pension plan.

11. Here, as set forth in Factual Finding 8a, the sole reference to decedent's retirement plan is contained in section IX of the MSA. It provided for decedent and Kimberly Cardenas to maintain any separately held pension or retirement plan as his and her own exclusive property. There is no intent under the MSA to award respondent Samuel Cardenas any right to enforce child support in decedent's retirement plan. Thus, as in *Padgett*, the MSA relating to decedent's CalPERS account cannot be modified to create such an interest after the benefit-triggering event of decedent's death. Accordingly, if Government Code section 21490, subdivision (b)(2), was interpreted in a manner as to award an enforceable right to child support in the death benefits payable from decedent's CalPERS account, the result would violate the holding of *Padgett*.

#### *The Rights of the Child under the PERL*

12. CalPERS's position is that Government Code section 21490, subdivision (b)(2), protects the rights of the child only to the extent that they are provided under the

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<sup>8</sup> After decedent's death, the child support order did not automatically terminate, but it became a charge against decedent's estate. (*Taylor v. George* (1949) 34 Cal.2d 552, 556; *Stein v. Hubbard* (1972) 25 Cal.App.3d 603, 605.) In this case, however, decedent did not designate his estate as the beneficiary.

PERL. In support of this interpretation, CalPERS provided examples in the Government Code where rights of surviving children to benefits under certain circumstances supersedes those of designated beneficiary. Specifically, during the administrative hearing, CalPERS cited to the 1957 survivor allowance (under Government Code section 21546) and the post-retirement survivor allowance (under Government Code section 21624) as types of payment in which surviving children take precedence over a designated beneficiary. In its closing brief of August 19, 2016, CalPERS cited to two additional instances when Government Code section 21490, subdivision (b)(2) would apply: payment of special death benefits (under Government Code section 21541) and payment of alternate special death benefits (under Government Code section 21547).

13. Respondents Kimberly and Samuel Cardenas disputed this interpretation. In their closing brief of August 18, 2016, they assert that the 1957 survivor allowance and post-retirement survivor allowance are automatically payable and do not require beneficiary designation. Thus, neither benefit is of the type contemplated by Government Code section 21490, subdivision (b)(2), because the statute is intended to invalidate certain beneficiary designations. With respect to CalPERS's references to special death benefits and alternate special death benefits, respondents Kimberly and Samuel Cardenas did not file a reply brief and did not address this issue.

14. Respondents Kimberly and Samuel Cardenas are correct in so far as Government Code section 21490, subdivision (b)(2), should apply only in instances where beneficiary designation is possible. Government Code section 21490, subdivision (b)(2), states that “[n]o designation may be made by an unmarried member. . .” The condition precedent is that a beneficiary designation must be made in order for Government Code section 21490, subdivision (b)(2), to operate.

15. However, respondents Kimberly and Samuel Cardenas are inaccurate in their contention that the 1957 survivor allowance is an automatic payment that does not require a beneficiary designation.<sup>9</sup> In fact, the 1957 survivor allowance (under Government Code sections 21546, subdivision (e)(2)), the special death benefit (under Government Code section 21542), and the alternate special death benefit (under Government Code section 21547, subdivision (a)) are all payable in lieu of basic death benefit. The basic death benefit consists of, among other sources, the accumulated contributions of the member and is payable to the beneficiary designated by the member. (Gov. Code, §§ 21531, 21532.) Thus, the 1957 survivor allowance, the special death benefit, and the alternate special death benefit are provisions under the PERL in which the rights of surviving children, as statutory beneficiaries, would override the interest of any beneficiary designated by the member.

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<sup>9</sup> The post-retirement survivor allowance is derived from employer contributions and is not payable in lieu of basic death benefit. (Gov. Code, § 21624.) This allowance does not require a beneficiary designation, and Government Code section 21490, subdivision (b)(2), does not apply in this instance.

16. Specifically, with respect to the 1957 survivor's allowance, the Court of Appeal, through a series of decisions, analyzed a prior version of Government Code section 21490 (section 21204) in the context of the PERL statute setting forth statutory beneficiaries. (See *Lee v. Board of Administration* (1982) 130 Cal.App.3d 122; *Beck v. Board of Administration* (1982) 136 Cal.App.3d 1031; *Knight v. Board of Administration* (1983) 148 Cal.App.3d 973.) The Court found that this survivor's allowance is provided to statutory beneficiaries under the Government Code "in derogation of the designated beneficiary's expectancy of the basic death benefit." (*Lee v. Board of Administration, supra*, (1982) 130 Cal.App.3d at p. 129.)

17. Given the foregoing, the most reasonable construction of Government Code section 21490, subdivision (b)(2), is that it prevents a member from designating a beneficiary in derogation of the rights of a minor child, only to the extent that the child is a statutory beneficiary under the PERL. The benefits in question in this case are the Option 1 Balance, the pro-rata Option 1 Benefit, and the lump-sum Retired Death Benefit. As set forth in Legal Conclusion 4, each of these benefits are payable to the member's designated beneficiary by statute. Since minor children are not statutory beneficiaries to these benefits under the PERL, Government Code section 21490, subdivision (b)(2), does not apply. Therefore, respondents Kimberly Cardenas and Samuel Cardenas are not entitled to any of the death benefits payable from decedent's account. Respondent Paul Cardenas, as the designated beneficiary, is entitled to these benefits.

18. It is regrettable that this narrow construction of Government Code section 21490, subdivision (b)(2), results in child support obligations to respondent Samuel Cardenas remaining unpaid. Nevertheless, the PERL and existing case law preclude any other interpretation of Government Code section 21490, subdivision (b)(2). In sum, the determination of CalPERS that respondent Paul Cardenas is entitled to receive the Option 1 Balance, the pro-rata Option 1 Benefit, and the lump-sum Retired Death Benefit was correct and should be upheld. Additionally, based on Factual Finding 7, after decedent's death, CalPERS disbursed a payment in the amount of \$3,048.90 to respondent Paul Cardenas in error. This overpayment is reimbursable to CalPERS.

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ORDER

1. The appeal of respondents Kimberly and Samuel Cardenas is denied. CalPERS's determination that respondent Paul Cardenas is entitled to receive the Option 1 Balance, the pro-rata Option 1 Benefit, and the lump-sum Retired Death Benefit is upheld.

2. CalPERS shall offset the previous overpayment in the amount of \$3,048.90 against benefits payable to respondent Paul Cardenas.

DATED: September 21, 2016

DocuSigned by:  
  
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JI-LAN ZANG  
Administrative Law Judge  
Office of Administrative Hearings