

**ATTACHMENT C**

**RESPONDENT(S) ARGUMENT(S)**

## RESPONDENT'S ARGUMENT

In the Matter of the Appeal of Lifetime  
Monthly Benefit of Joseph R. Garcia,

OHA Case No.: 202000902  
Agency Case No.: 2020-0591

The assigned Administrative Law Judge failed to address all matters of law propounded by Respondent and which are crucial to a just decision in this matter. She also blatantly ignored direct evidence proffered through the testimony of key witnesses.

The CalPERS statement of issues filed with the administrative court conceded that the document titled Disability Retirement Election Application, (IDR Application) was not a valid beneficiary designation. The application form was not filled out correctly. It did not indicate a selected retirement payment option. There can be no valid beneficiary designation when the retirement payment option it is based on was not chosen.

As further detailed below, the IDR Application can properly be construed as a forgery, a product of perjury, fraudulent in fact, and signed under false pretense.

The IDR application form was determined to be incomplete and not a valid designation by CalPERS. It should not now be treated as a valid beneficiary designation by this Board.

The Supplemental Retirement Information (SRI) form suffers the same fate. It too must be construed as a forgery, a product of perjury, fraudulent and signed under false pretense. It too is invalid as a matter of law and cannot lawfully effectuate a beneficiary designation of a member's lifetime disability benefit.

**FORGERY**

The offense of forgery consists of creating or changing something with the intent of passing it off as genuine, usually for financial gain or to gain something else of value. Ms. Kubicek falsely signed both forms purporting to be Mr. Garcia's wife and did so because the forms would not have been accepted by CalPERS otherwise, as a spouse's signature was required by law. Forgery may, but does not always include the signing of another person's name to a document without his or her consent. Black's Law Dictionary defines the crime of forgery as the "act of . . . or expressing any untrue statement with prejudice of malice with the purpose or intent to defraud another person". Forgery is also commonly said to be the false making or material altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. According to the CalPERS representative who testified, there was in fact a few monthly payments made to Ms. Kubicek. Those payments constitute injury or detriment to CalPERS (as well

1 as to RESPONDENT, the true intended beneficiary), fulfilling the element of injury specified under the  
2 definition of forgery and perjury.

3 PERJURY

4 Perjury is the willful assertion as to a matter of fact, opinion, belief, or knowledge, made...either upon  
5 oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open  
6 court, or in an affidavit, or otherwise, such assertion being material and known to such witness to be false.  
7 Information is material if it is probable that the information would influence the outcome. (Black's Law  
8 Dictionary, 10<sup>th</sup> Edition.) In signing as Mr. Garcia's spouse, wherein a spouse's signature was statutorily  
9 required for the beneficiary designation to be valid, Ms. Kubicek committed perjury.

10 Both the IDR form and the SRI form were legally required under Government Code section 21261 to be  
11 signed by Mr. Garcia's wife (Diane Garcia, a.k.a. Diane Stewart). The language of that statute mandates the  
12 member's current spouse's signature. See Gov.Code Section 21261(a); ("...a designation of  
13 beneficiary...SHALL contain the signature of the current spouse of the member...[]."

14 Ms. Stewart testified that she was married to Mr. Garcia at the time both forms were signed and submitted  
15 to CalPERS. Ms. Stewart testified that she did not sign either of the forms. Furthermore, Ms. Stewart testified  
16 that the divorce papers were not filed until July or August 2011, which is after<sup>1</sup> the initial application for  
17 disability retirement was signed and submitted to the County. The fact that testimony from Mr. Garcia's  
18 [then] wife (Diane Stewart) stating she was married to Mr. Garcia at the time both the IDR form and SRI form  
19 were submitted to CalPERS and that the dissolution of marriage between her and Mr. Garcia was not initiated  
20 until July or August of 2011, is direct evidence. The Administrative Law Judge erroneously dismissed  
21 uncontroverted witness testimony proving Mr. Garcia's dissolution of marriage was initiated AFTER the  
22 beneficiary designation forms were submitted. Court divorce records were not necessary in light of Ms.  
23 Stewart's personal knowledge and competent testimony.

24 Ms. Kubicek testified that she herself signed both beneficiary designations under penalty of perjury  
25 [falsely] representing herself as Mr. Garcia's spouse. In doing so she falsely impersonated Mr. Garcia's wife,  
26 made a material false representation, committed perjury, committed forgery and committed fraud in general.  
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<sup>1</sup> The date of the initiation of the dissolution of marriage is significant. Ms. Stewart's testimony indicates the divorce was initiated by Ms. Kubicek via the power of attorney in July or August of 2011, which is AFTER the submission of the IDR application form which was dated April 27, 2011 (the date the form was signed by the Del Norte County Personnel Officer – Joey Young). As such, the subsequent judgment of dissolution issued by the Superior Court in October of 2011, would have been a "qualifying event", entitling Mr. Garcia to change the beneficiary. Which is what Mr. Garcia attempted to do at least twice (See CalPERS Exhibits 8 & 12). CalPERS inexplicably denied his request to add RESPONDENT as his lifetime beneficiary, ignoring the fact that a qualifying event did in fact occur.

1 California legislature has codified maxims of jurisprudence to be applied as general propositions not  
2 needing proof or argument. One of which applies to the facts and circumstances of this matter now before this  
3 Board. "No one can take advantage of his own wrong" (Civil Code section 3517). Meaning if a person  
4 commits fraud, perjury, forges a document or falsely impersonates someone else, they cannot benefit from  
5 their unlawful act or dishonesty. It is not allowed as a matter of law.

#### 6 FRAUD

7 Clearly, Ms. Kubicek engaged in more than just a simple mistake, instead she engaged in dishonesty,  
8 subterfuge, and she committed fraud. Fraud is a general term used to describe many different forms of  
9 deceitful and deceptive conduct. Black's Law Dictionary defines fraud as "an intentional perversion of truth  
10 for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to  
11 surrender a legal right; a false representation of a matter of fact, whether by words or by conduct, by false or  
12 misleading allegations, or by concealment of that which should have been disclosed, which deceives and is  
13 intended to deceive another so that he shall act upon it to his legal injury." False impersonation is recognized  
14 as a form of fraud. Ms. Kubicek signed both the IDR application and the SRI form falsely purporting to be  
15 Mr. Garcia's wife or registered domestic partner. Neither of which were true pursuant to her own testimony  
16 at the hearing. Ms. Kubicek testified she was never married to Mr. Garcia, nor were they ever registered  
17 domestic partners.

18 As a matter of law, under Civil Code section 3517, Ms. Kubicek cannot be allowed to benefit from the  
19 fraud (including perjury, false impersonation and forgery) she committed.

#### 20 PROBATE CODE SECTION 21380

21 Probate Code section 21380 creates a statutory presumption of fraud when a donative transfer is made by  
22 and through a power of attorney. Marian Kubicek testified during the hearing that she did not live with  
23 Joseph Garcia prior to his incarceration. She explained that she moved into Mr. Garcia's home so that she  
24 could take care of household tasks while he was serving time in jail. Ms. Kubicek also testified that she  
25 herself prepared and sent the SRI form to CalPERS, after signing it. It should be noted that not only did Ms.  
26 Kubicek sign as Mr. Garcia's spouse, she signed it as power of attorney for Mr. Garcia's spouse. Assertions  
27 that were clearly false and deceptive in light of witness testimony given at the hearing.

28 Probate Code 21380 therefore applies, and placed the burden of proof on Ms. Kubicek by "clear and  
convincing evidence" to show that naming herself as the lifetime beneficiary was not the product of fraud.  
Ms. Kubicek failed to meet her burden of proof. Her only explanation and offer of proof was her own  
testimony stating that Mr. Garcia wanted to provide for her and her son (*to the exclusion of his own biological  
child*) which is more than questionable in and of itself, but was in fact controverted by the testimony of  
Charlene VanAlstine (*indicating that Ms. Kubicek bragged to her about screwing Mr. Garcia over by naming*

1 herself as his beneficiary and that there wasn't a damn thing he could do about it; and that Mr. Garcia told  
2 Ms. VanAlstine on a number of occasions that RESPONDENT would be financially secure after his death as  
3 she would receive his lifetime disability benefits), testimony of Diane Stewart (indicating that Mr. Garcia had  
4 stated to her that RESPONDENT was his intended beneficiary both before and after the fraudulent  
5 beneficiary designation was submitted to CalPERS and that she was shown the original IDR paperwork by  
6 Mr. Garcia and Ms. Kubicek's name was nowhere included in it), testimony of Karen Olson (indicating that  
7 Mr. Garcia told her RESPONDENT would be and was named as his lifetime disability beneficiary, and  
8 showed her CalPERS forms with RESPONDENT'S name filled in as his beneficiary, not Ms. Kubicek's),  
9 testimony of Angela Berry (indicating that Mr. Garcia complained of fraud and/or forgery by Ms. Kubicek,  
10 retained legal representation to address the situation and also testified that Mr. Garcia stated that  
11 RESPONDENT was and had always been his intended beneficiary).

12 Additionally, Probate Code Section 45 offers further clarification by providing the definition of  
13 "instrument," which includes "**any other writing that designates a beneficiary** or makes a donative transfer  
14 of property." [emphasis added]. A donative transfer is a transfer of a right, property or benefit without  
15 adequate compensation and has been held to include beneficiary designations.

#### 16 APPLICABLE PROBATE CODE SECTIONS

17 Notwithstanding the issues of fraud (perjury, false impersonation, false pretense and forgery), Probate  
18 Code Sections, 4264, 4462, and 4465, govern powers and scope of authority for durable and statutory powers  
19 of attorney. Probate Code Section 4054, specifies the effective date of the applicable statute(s). The effective  
20 date of January 1, 1995, "applies to all powers of attorney regardless of whether they were executed before,  
21 on, or after January 1, 1995." (Probate Code section 4054(a).)

22 Using either power of attorney form to modify or designate a beneficiary of a disability retirement plan is  
23 precluded unless **express written authority** is granted within the power of attorney form. (Prob.Code section  
24 4264(e)&(f).)

25 Express written authority is held to mean, a written statement without ambiguity. Black's Law Dictionary  
26 defines the term "express" as "Clear; definite; explicit; unmistakable; not dubious or ambiguous." Express  
27 Authority is defined as, "authority delegated to agent by words which expressly authorize him to do a  
28 delegable act. That which confers power to do a particular identical thing set forth and declared exactly,  
plainly, and directly with well-defined limits; an authority given in direct terms, definitely and explicitly, and  
not left to inference or implication." *Black's Law Dictionary 10<sup>th</sup> Edition*. The written statement in each of  
the powers of attorney (CalPERS Hearing Exhibits 3 & 4) is not clear, definite, explicit, nor unmistakable.

1 The Administrative Law Judge inexplicably ignored the legal deficiency of the power of attorney forms  
2 which are missing the required “express” wording.

3 The written statement on the power of attorney forms, is as follows: “I, Joseph Garcia grant Marian Davis  
4 who is my power of attorney the extended powers to accept and/or receive any of my property, in trust or  
5 otherwise, as a gift” (CalPERS Exhibit 3) and secondly “I, Joseph Garcia grant Marian Davis who is my  
6 power of attorney the [extendeds] to accept and/or receive any of my property in trust or otherwise as a gift.”  
7 (CalPERS Exhibit 4). Neither of which constitute an express authority as a matter of law. Express language  
8 authorizing Ms. Kubicek to designate herself as a beneficiary of the disability retirement benefit is non-  
9 existent. Both statements are ambiguous in that neither specifically mentions the power to “create,”  
10 “change,” nor “designate a survivorship interest nor “designate” or “change” a beneficiary designation. The  
11 statements refer to property and not specifically to a beneficiary designation. The express language missing is  
12 wording to the effect that Mr. Garcia authorized Ms. Kubicek to “change a beneficiary” or “name herself as a  
beneficiary.” As such the SRI form’s beneficiary designation by way of a power of attorney form is null and  
void as it is not authorized by law.

13 Probate Code Section 4264, is dispositive of this fatal issue. It states, “An attorney-in-fact under a power  
14 of attorney may perform any of the following acts on behalf of the principal or with the property of the  
15 principal **only if** the power of attorney **expressly grants** that authority to the attorney-in-fact:...(e) Create or  
16 change survivorship interests in the principal’s property or in property in which the principal may have and  
17 interest; and (f) Designate or change the designation of beneficiaries to receive any property, benefit, or  
contract on the principal’s death.” [**emphasis added**].

18 HEARSAY

19 Hearsay is admissible in an administrative hearing. Even though administrative hearsay has been held to  
20 be “supplemental” in effect, without a timely hearsay objection having been made to proffered evidence, any  
21 hearsay evidence is deemed admissible for all purposes. There were no objections by CalPERS to any  
22 testimony elicited by Respondent or given by Respondent’s witnesses. Furthermore, there was no hearsay  
23 objections to key documentary evidence offered by Respondent. As such, most if not all documents (to wit:  
24 Respondent’s Exhibits) and all of Respondent’s witnesses’ statements can support an ultimate finding of fact.

25 CONCLUSION

26 There is only one valid beneficiary designation that should be recognized and upheld. The beneficiary  
27 designation signed by Mr. Garcia on February 24, 2015 (CalPERS Hearing Exhibit 8) naming Respondent as  
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1 his beneficiary. Respondent is and has always been Mr. Garcia's intended beneficiary and more importantly  
2 the rightful one to receive it.

3 She is Mr. Garcia's biological child. In 2011 when the fraud occurred, she was only 5 years old. On the  
4 other hand, Ms. Kubicek was a girlfriend who spent less than a year with Mr. Garcia (less time than that, if  
5 the time of his incarceration is not counted – which was May 10, 2011 through Ms Kubicek and Mr Garcia's  
6 breakup in September - October of 2011).

7 Both the May 2011 (IDR application) and June 2011 (SRI) beneficiary designation forms are not valid.  
8 Both were signed under false pretense and both are products of fraud and perjury. Ms. Kubicek was not Mr.  
9 Garcia's spouse nor registered domestic partner. Ms. Kubicek was not power of attorney for Mr. Garcia's  
10 wife, Ms. Stewart.

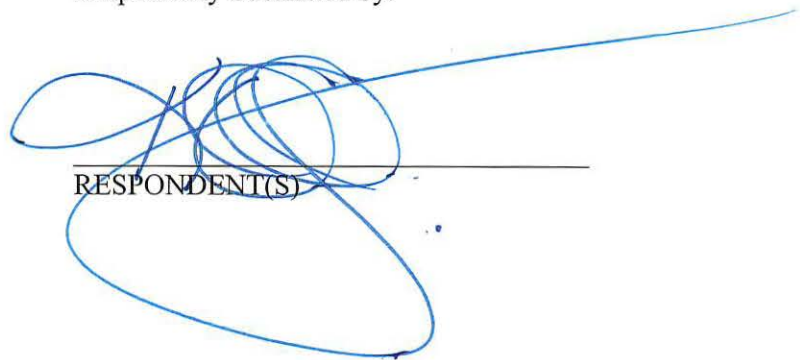
11 Ms. Stewart's notarized signature on the IDR and SRI forms was required under statutory law. Yet Ms.  
12 Kubicek signed both forms via a notary public declaring under penalty of perjury that she, herself, was Mr.  
13 Garcia's current spouse or registered domestic partner.

14 Neither of the power of attorney forms expressly conferred the power to self-designate. And Ms. Kubicek  
15 failed to rebut the presumption of fraud by clear and convincing evidence as is mandated under statutory law.

16 Respondent urges this Board to declare the beneficiary designation(s) naming Marian Kubicek, a.k.a.,  
17 Marian Davis, a.k.a., Marian Dadforth invalid and without effect. And further urges this court to uphold the  
18 beneficiary designation signed by Mr. Garcia in February 2015 as valid, naming Respondent as the rightful  
19 beneficiary of his lifetime monthly benefit.

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22 DATED: 1/23/23

Respectfully Submitted by:

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RESPONDENT(S)