ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Statement of Issues (Appeal Regarding Death Benefits Payable Upon the Death of THOMAS LECHUGA), by: BRANDY LECHUGA-FALK, Respondent, and TODD LECHUGA, Respondent, and PATRICIA (LECHUGA) O'HARA, Respondent.	Case No. 2013-0050 OAH No. 2015031130

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on November 18, 2015.

Elizabeth Yelland, Senior Staff Attorney, represented complainant Diane Alsup, Interim Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Respondents Brandy LeChuga-Falk and Todd LeChuga appeared and represented themselves.

Alfred A. Cabral, Attorney at Law, represented respondent Patricia (LeChuga) O'Hara.

Evidence was received and matter was submitted on November 18, 2015.

ISSUE PRESENTED

Whether CalPERS is correct in its determination that respondent Patricia (LeChuga) O'Hara (respondent O'Hara) is the eligible beneficiary to receive the monthly Option 4/2W benefit of $3,454.81 and the pro-rated allowance benefit of $1,266.77 on account of Thomas S. LeChuga.

FACTUAL FINDINGS

1. Complainant Diane Alsup filed the Statement of Issues solely in her official capacity as Interim Chief of the CalPERS Benefits Services Division.

2. Thomas S. LeChuga (decedent LeChuga) was employed by the San Francisco Bay Area Rapid Transit District (BART) beginning August 21, 1972. By virtue of his employment, decedent LeChuga was a local miscellaneous member of CalPERS. Decedent LeChuga retired for service from BART effective July 16, 2000.

3. Decedent LeChuga was married twice. Decedent LeChuga's first wife was Mary Beckstead. They were divorced and as part of the dissolution agreement, Mary Beckstead received the right to 11.99 percent of decedent LeChuga's retirement monthly allowance until his death and the same percentage of his Lump Sum Death Benefit. Respondents Brandy LeChuga-Falk and Todd Lechuga are decedent LeChuga's children.

4. Decedent LeChuga's second wife was respondent O'Hara. On or about October 18, 2000, decedent LeChuga elected retirement benefit Option 4/2W (Community Property Option) and designated his then-wife respondent O'Hara as his co-beneficiary of the monthly death benefit allowance along with his former wife Mary Beckstead. He designated respondent O'Hara as his sole beneficiary of his Lump Sum Retired Death Benefit.

5. Decedent LeChuga and respondent O'Hara were divorced on or about October 8, 2008. As part of the dissolution, decedent LeChuga was awarded his CalPERS retirement account free and clear.

6. By letter dated November 18, 2008, decedent LeChuga notified CalPERS that his divorce from respondent O'Hara was final and asked CalPERS to "remove my wife Patricia A. LeChuga from my enrollment." He provided her CalPERS identification and social security numbers. In the second paragraph of the two-paragraph letter, decedent LeChuga added:

> If any information is needed please contact me ASAP. I should have a single enrollment with PERS Care. Are there any additional forms that need to be changed? My contact number

is a Cellular telephone [number omitted], in Grants Pass, Oregon.

7. Decedent LeChuga died on November 11, 2011, in Grants Pass, Oregon. In a letter dated February 13, 2012, respondent LeChuga-Falk requested confirmation that the estate of decedent LeChuga is the beneficiary of all benefits payable on account of decedent LeChuga.

8. On March 12, 2012, CalPERS received an Application For Survivor Benefits from decedent LeChuga's first wife Mary Beckstead claiming her community property Option 4/2W survivor benefits. Mary Beckstead received her community property share of the Retired Lump Sum Death Benefit and is receiving her lifetime Option 4/2W death benefit. She is not a party to this matter and her share of decedent LeChuga's account is not in dispute.

9. On April 2, 2012, CalPERS received a completed Application for Survivor Benefits from respondent O'Hara claiming her Option 4/2W survivor benefits.

10. CalPERS notified respondent LeChuga-Falk by letter dated August 3, 2012, that respondent O'Hara would receive the lifetime monthly Option 4/2W benefit in the amount of $3,454.81 and $1,266.77 for the 11 days in November of 2011 that decedent LeChuga survived. LeChuga's one-time retired death benefit of $500 would be paid to respondent LeChuga-Falk and her brother respondent LeChuga, after deducting Mary Beckstead's community property share.

11. Respondent LeChuga –Falk asserted in a letter dated September 10, 2012, that all payments of decedent LeChuga should be made to his trust and/or his children, except for Mary Beckstead's community property interest. CalPERS reviewed her request and affirmed its earlier determination regarding the distribution of decedent LeChuga's account. Respondent LeChuga-Falk appealed.

12. The essence of respondent LeChuga-Falk's and respondent Todd LeChuga's challenge to the resolution by CalPERS rests on the interpretation of the November 15, 2008 letter to CalPERS authored by their father. The letter is date stamped received by CalPERS on December 31, 2015. They assert that the letter and attached final divorce decree manifested decedent LeChuga's intent to remove his former wife respondent O'Hara as a recipient of any benefits related to decedent LeChuga's CalPERS account. They point to the sentence asking if any additional forms needed to be changed. However, this focus on a single sentence ignores the context of the brief letter which dealt exclusively with enrollment in decedent LeChuga's health care benefits. This conclusion is buttressed by decedent LeChuga's telephone calls to CalPERS summarized in the telephone logs or "Customer Touch Point Report" entries. On October 8, 2008, decedent LeChuga called CalPERS asking about health care benefits and was told to send a copy of his divorce decree to delete his spouse. On January 2, 2009, decedent LeChuga called and told CalPERS that he had mailed a copy of his divorce decree and a letter stating his wish to cancel his former spouse from his

health plan. He was advised that the letter had not been received, and asked to re-mail it. In a later call on the same day, decedent LeChuga asked additional questions about removing his former spouse from his health care. The telephone log does not reference any conversations with decedent LeChuga about deleting respondent O'Hara as his beneficiary for other benefits. There was an earlier call to CalPERS on August 20, 2007, in which decedent LeChuga asked if Mary Beckstead could continue to receive a retirement allowance on decedent LeChuga's account even though she had moved out of the State of California and had remarried. He was told that these events did not alter Mary Beckstead's right to her share of the retirement allowance. In summary, even though decedent LeChuga had the right to delete and/or change his beneficiary after the divorce from respondent O'Hara awarded his complete control of his retirement benefits, there is no evidence that he exercised such right.

13. Respondents Todd LeChuga and Brandy LeChuga-Falk also asserted, as least by implication, that their father's failure to delete respondent O'Hara as a beneficiary must have been the result of result of mistake, inadvertence, surprise, or excusable neglect. Respondent Brandy LeChuga-Falk spoke with her father about his letter asking to remove respondent O'Hara from his "enrollment," and confirmed that he had sent a copy of the divorce decree. She expressed in her testimony at the administrative hearing that her father believed that the divorce decree removed respondent O'Hara from all benefits. He also told her that he resubmitted the November 15, 2008 letter because he suspected that respondent O'Hara was continuing to use his health care benefits. Respondent LeChuga-Falk described her father as an intelligent man, even though he was not college educated. She is the successor trustee of his revocable living trust established on or about September 20, 2011, his named health care representative in his Health Care Power of Attorney, and the Personal Representative in his Last Will and Testament. By the terms of these documents, the bulk of decedent LeChuga's property went to his two children, and there is no mention of respondent O'Hara in the documents. Respondent Todd LeChuga discussed his father's divorce from respondent O'Hara with him and decedent LeChuga told him that respondent O'Hara kept what was hers and decedent LeChuga kept what was his, including his retirement benefits. Considering the evidence as a whole, there is simply too little to support the assertion that decedent LeChuga intended to change beneficiaries after his divorce from respondent O'Hara and failed to do so because of mistake, inadvertence, surprise or excusable neglect.

LEGAL CONCLUSIONS

1. Generally, the designation of a beneficiary under options 2 and 4/2W are irrevocable pursuant to Government Code section 21492. However, Government Code section 21454 authorizes a change in a member's beneficiary in the event of dissolution of a marriage in which the division of community property awards the total interest in the retirement system to the retired member. Thus, when decedent LeChuga divorced respondent O'Hara and was awarded full control of his CalPERS retirement account, he could have deleted respondent O'Hara as his option 2/4W monthly death benefit beneficiary.

2. Decedent LeChuga, while suggesting to his children that he did not wish respondent O'Hara to receive any benefits attributable to his CalPERS account, did not communicate a specific request to CalPERS to effect his stated intentions. In contrast, he contacted CalPERS by telephone after his divorce and asked about deleting respondent O'Hara from his health benefits and acted to do so by sending a written request accompanied by his divorce decree. In a somewhat similar case, the First District Court of Appeals held that to effect a change in beneficiary of a retirement fund, there must be a clear manifestation in writing of intent by the member to make such a change. (*Hudson v. Posey* (1967) 255 Cal. App.2d 89, 93.) The court added that an oral statement that the member intended to change a beneficiary is not enough. (*Ibid.*)

3. Government Code section 20160 reads:

> (a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:
>
> (1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.
>
> (2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.
>
> (3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.
>
> Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.
>
> (b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.
>
> (c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of

obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

4. The terms "mistake, inadvertence, surprise, or excusable neglect" are found in Code of Civil Procedure section 473, subdivision (b), which reads:

(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. However, in the case of a judgment, dismissal, order, or

other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, dismissal, order, or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment, dismissal, or other proceeding was taken against him or her and that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

5. In the two most relevant decisions interpreting Government Code section 20160's language regarding the sort of errors or omissions that may be corrected, members were permitted to change the type of retirements they sought (service or disability) based on mistaken factual assumptions. In one case, the member did not appreciate that his chosen disability retirement would be reduced by his later receipt of federal Social Security benefits whereas a service retirement would not have been reduced. (*Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559.) In the other case, neither the member nor CalPERS realized that the member was in fact disabled when he elected to take a less financially advantageous service retirement. (*Button v. Board of Administration of Public Emp. Retirement System* (1981) 122 Cal.App.3d 730.) The common theme in these cases was the judicial approval of changes that provided the maximum benefits to which the members were entitled from the retirement system.

6. There are many cases interpreting the language of Code of Civil Procedure section 473 providing relief from adverse judgements that resulted from mistake, inadvertence, surprise or neglect. However, these holdings are also not particularly helpful in the resolution of this matter because the courts in such decisions emphasized the overriding goal of adjudicating controversies on their merits. (*Zamora v Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 254, citing *Benjamin v. Dalmo Mfg.* (1948) 31 Cal.2d 523, 525.) In discussing the mandatory relief provision relating to an attorney's error or omission, the California Supreme Court in the *Zamora* decision stated that the proper inquiry to determine if an attorney's mistake or inadvertence was excusable is whether a reasonably prudent person under the same or similar circumstances might have made the same error. (*Zamora supra*, at p. 258, citing *Bettincourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276.)

7. Here, as noted in the Factual Findings, respondents Brandy LeChuga-Falk and Todd LeChuga failed to establish by a preponderance of the evidence that decedent LeChuga's failure to delete designated beneficiary respondent O'Hara was an error or omission. Therefore, there is no reason to resolve whether his error or omission resulted from mistake, inadvertence, surprise or excusable neglect and no reason to apply the "reasonably prudent person" standard recited in the *Zamora* decision.

ORDER

Respondent Brandy LeChuga's and respondent Todd LeChuga's appeal from CalPERS' determination that respondent O'Hara is the eligible beneficiary to receive the monthly Option 4/2 benefit and the pro-rated allowance benefit on account of decedent Thomas S. LeChuga are DENIED.

Dated: December 10, 2015

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Karl Engeman
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KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings