

**ATTACHMENT C**

**RESPONDENT'S ARGUMENT REGARDING THE PETITION  
FOR RECONSIDERATION**

Attachment C

**FAX COVER SHEET**

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TO	Matthew Jacobs, Esq.
COMPANY	CalPERS Legal Office
FAX NUMBER	19167953659
FROM	408 College Ave Law Offices
DATE	2023-10-26 22:04:37 GMT
RE	Petition for Reconsideration / CalPERS Ref. No.: 2022-0990 / OAH Case No.: 2023030199

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**COVER MESSAGE**

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Dear Mr. Jacobs, Esq.,

Attached hereto please find, Respondent's, Esteban A. Ramirez's, Argument in Support of his Petition for Reconsideration. Should you have any questions or concerns, please call our office directly at (707) 545-0368. Thank you for your very kind courtesy and attention on this matter.

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October 26, 2023

**Sent via E-mail: Board@CalPERS.ca.gov and Fax: (916) 795-3972; (916) 795-3659**

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Matthew G. Jacobs, Esq.  
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RE: In the Matter of the Appeal of Lifetime Monthly Benefit Payable Upon the Death of  
 Michael A. Garcia by ESTEBAN A. RAMIREZ, Respondent.

CalPERS Ref. No.	:	2022-0990
OAH Case No.	:	2023030199

**Petition for Reconsideration**

**Respondent's Argument in Support of his Petition for Reconsideration**

This shall respectfully serve as Respondent's, Esteban E. Ramirez's, Argument in support for reconsideration of the CalPERS Board of Administration's adopted Decision made at its September 20, 2023, meeting. The primary issue in this matter is whether CalPERS correctly determined that Respondent, Esteban E. Ramirez, is not an Option 4 lifetime beneficiary for deceased CalPERS member Michael A. Garcia as a result of CalPERS member, Michael A. Garcia, excusably, inadvertently, and mistakenly not having his Modification of Original Election Retirement form prepared and submitted with either a notarized signature and/or a signature witnessed by a CalPERS representative at any CalPERS office prior to his tragic untimely death.

This letter is timely submitted on October 26, 2023, in response to correspondence received from CalPERS dated September 25, 2023, which provides that the CalPERS Board made a Decision to accept Sean Gavin's, Administrative Law Judge, Proposed Decision, which

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was rendered on July 17, 2023, and provided Respondent with this opportunity to submit a petition to the Board for reconsideration.

The adopted Decision rests upon an improper determination and improper application of statutory law relating to the authority of excluding certain evidence being presented during, and at the administrative hearing held on June 15, 2023. The ALJ's Proposed Decision was rendered without the benefit of all available, competent, and appropriate evidence being before the court.

The California Constitution imposes on CalPERS a duty to "ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland v. Public Employees' Retirement System* (2002), 95 Cal.App.4<sup>th</sup> 29, 46.). Here, the administrative law judge ("ALJ"), Sean Gavin, is in clear violation of due process rights to a fair hearing by excluding specific witness testimony from being presented citing to attorney-client privilege and, therefore, CalPERS' duty to its member, Michael A. Garcia, is unequivocally entirely disregarded. Moreover, "[CalPERS] has a duty to follow the law." (*City of Pleasanton v. Bd. Of Administration* (2012) 211 Cal.App.4<sup>th</sup> 522, 544.) ALJ, Sean Gavin, incorrectly cites attorney-client privilege barring Mr. Charles Prickett, Esq. from testifying as to the intent and affirmative steps of deceased CalPERS member, Michael A. Garcia. Michael A. Garcia submitted a change to his beneficiary without a notarized signature as a result of inadvertence, mistake, surprise or excusable neglect. Under well-settled and understood California law, there are several exceptions to the attorney-client privilege after the client's death. In particular, one exception provides that the privilege does not apply to a communication if it is relevant to an issue concerning the validity or intended meaning of a deceased client's writing purporting to affect a property interest. See *Cal. Evid. Code* §§ 960-61. This exception seeks to permit disclosures that a deceased client presumably would have wanted, to help ensure that the client's property is transferred as intended. Because a client presumably would want such disclosures, there is a diminished danger that this exception would interfere with the goal of encouraging candid attorney-client communication. Due to that diminished danger, disclosure of a communication pursuant to this exception would appropriately give expression to the public's interest in having the evidence before the factfinder.

As such, the ALJ, Sean Gavin, has zero authority to bar the witness testimony of Mr. Charles Prickett, Esq.. The aforementioned exception to attorney-client privilege set forth in *Cal. Evid. Code* §§ 957, 960-61 unequivocally applies in that, without this exception, it would be much harder for the factfinder, here, ALJ, Sean Gavin, to decide correctly an issue relating to the intent or validity of a client's writing transferring property. The evidence contained in the communications relevant to the deceased member's wishes may not be available from any other source. Accordingly, barring Charles Prickett, Esq.'s testimony where the testimony by his client, who is deceased, is otherwise not available is misplaced.

Since Respondent, Esteban Ramirez, bears the burden of proving that he is entitled to the agency action he is seeking (*Gov. Code*, § 11504.), and that the standard of proof is preponderance of the evidence (*Evid. Code*, §115.), it is essential in this present matter that the Board recognize and acknowledge the exception to the attorney-client privilege set forth in *Cal.*

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*Evid. Code* § 957. This exception is based on the theory that claimants in privity with the estate claim through the client, not adversely, and the deceased client presumable would want his communications disclosed in litigation between such claimants so that his desires in regard to any disposition of this estate might be correctly ascertained and carried out. The exception is based on the assumption that a decedent would have wanted the attorney-client communication disclosed in litigation between the decedent's beneficiaries.

Witness, attorney, Charles Prickett, Esq., in attendance at the administrative law hearing sought to present oral testimony as to his former client, deceased CalPERS member, Michael A. Garcia's and Mr. Garcia's specific intent to elect Respondent as his new lifetime beneficiary. He was present at the ALJ hearing to provide substantial evidence giving light to Mr. Garcia's submitted Modification of Original Election at Retirement form naming Respondent as a new beneficiary replacing his deceased sister inadvertently not having a notarized signature and/or was not signed in the presence of a witnessing CalPERS representative due to the ongoing unprecedented global COVID-19 pandemic, and Mr. Garcia's immunocompromised delicate state of health rapidly declining as he sought medical treatment for aggressive cancer. ALJ, Sean Gavin, as the factfinder, should have heard the testimony presented by Charles Prickett, Esq., which establishes beyond dispute that deceased CalPERS member, Michael A. Garcia, intended that his CalPERS pension be paid upon his death to Respondent, Esteban Ramirez. Furthermore, the record in this matter establishes that deceased CalPERS member, Michael A. Garcia, communicated his intention repeatedly to CalPERS staff, the CalPERS staff understood his request, and issued directions, and that inadvertently before he could correct the unnotarized signature, he died.

As such, pursuant to *Government Code* § 20160, subdivision (a), the board may correct the errors or omissions of a retired member provided that all 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 of these terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking the correction with a status, right or obligation not otherwise available under this part.

Respondent is entitled to relief pursuant to *Government Code* § 20160. The barred testimony of deceased member's attorney Charles Prickett, Esq. would, and could, illuminate the advancement of the deceased member's illness due to the worsening progression of cancer as well as his immunocompromised status forcing him to be ultra-wary of potential COVID-19 exposure. Due to Michael Garcia's illness, and his genuine concern about contracting COVID-19, he forbid any public outsider from entering into his home or making close personal contact

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with him because he was battling aggressive cancer. Contracting COVID-19 while he was undergoing medical treatment for cancer would have been instantaneously fatal to him. We need not further elaborate on how distressing it was being tragically ill during the recent pandemic and being in need of and dependent on reasonable and necessary medical care, let alone seeking severe aggressive cancer treatment. Seeking any appropriate medical care whatsoever under the strict precautions of preventing the spread of COVID-19 was an extraordinarily arduous, nearly impossible, task. Our Country's entire healthcare system was under duress. Michael Garcia's battle with cancer during the pandemic is an extraordinary exigent circumstance that caused a procedural oversight. The unprecedented global pandemic further retarded the deceased member's reasonable accessibility to execute a notarized signature. This failure is clearly the result of mistake, inadvertence, surprise or excusable neglect. The failure by decedent to either notarize his signature on his submitted MOLOB (Modification to Life Option Beneficiary) or sign it in the presence of a CalPERS staff member in-person at a CalPERS office location that may be made by a reasonable person in like or similar circumstances constitutes an "error or omission" correctable under this section. Moreover, if Mr. Charles Prickett, Esq.'s witness testimony had not been incorrectly barred from being presented as evidence to the ALJ, it would further substantiate the unique exigent circumstances of Mr. Garcia's final days in his life suffering from cancer during a global pandemic excusably preventing him from being able to visit a CalPERS office location or risk COVID-19 exposure from a non-family member of the public to have his signature notarized.

The applicable rules are clear, and the cases interpreting those rules are clear. CalPERS has a legal responsibility to administer its resources fairly and consistently to preserve the availability of funds. As such, the purpose of CalPERS plan provisions is to provide a method of ascertaining the desire and intent of the member with reference to the payment of death benefits. Here, where the intention of the Decedent is known, then to the extent possible, such intention must be given effect where doing so doesn't penalize the fund. "The statute should be construed to give effect to an executed designation when there is a clear manifestation of intent by the member to make the change and the designation is filed promptly after death so as to prevent any prejudice to the retirement system." *Watenpaugh v. State Teacher's Retirement System* (1959) 51 Cal.2d 675, 680; *Gallagher v. State Teacher's Retirement System* (1965) 237 Cal.App.2d 510.

Both Respondent and witness, Charles Prickett, Esq., establish, and no one seriously disputes whatsoever, that CalPERS member did not intend to designate Respondent as beneficiary. In both *Watenpaugh and Gallagher, Id.*, the courts considered evidence of ineffective attempts by the retiree to change beneficiaries. In each case, the intended beneficiary came to court after the pensioner's death seeking the court's power to direct the pension fund administration to give effect to the beneficiary change consistent with, and to give effect to, the manifested intention of the decedent. In each case, the courts looked for evidence of intent coupled with manifest action demonstrating such intent. The courts upheld the claim of beneficiaries where there was evidence that the deceased both intended to make the change and took some affirmative step to do so, even if the deceased's action did not satisfy the strict requirements of the fund administrator.

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Courts understand that people being people, some pensioner may trip over the rules, so they should be interpreted liberally to do justice with earned money. "It is more reasonable to assume that all the government intended to require was satisfactory evidence of the intent to change the beneficiary, together with satisfactory evidence showing positive action on the pensioner's part to effectuate such intent, and that when once this is shown, legal technicalities relating to ministerial acts or perfunctory acts will be brushed aside in order to carry out the expressed will and intent..."[of the deceased] *Wicktor v. Los Angeles County*, supra 177 Cal.App.2d 390, at 398.

Respondent has provided, and CalPERS admits, that deceased member 100% attempted and expressed his intention to change his beneficiary from his deceased sister to Respondent. The evidence supports a finding that the deceased member took affirmative steps to do so. Furthermore, the testimony of deceased member's counsel, Charles Prickett, Esq. who served as a close friend and confidant to the deceased member as such having personal knowledge of relevant facts could and would testify competently to the truth of the facts as stated therein, which was incorrectly barred from presenting testimony by ALJ, Sean Gavin.

Accordingly, the only alternative to doing justice is for the Board to accept that it is just "tough luck" for Respondent when CalPERS blindly enriches itself with money that does not belong to them. With all due respect, it is not reasonable for the Board to prematurely accept the Decision without all evidence having been presented. Respondent hereby respectfully requests that the Board reconsider the Decision in its entirety or in the alternative, there exist more than sufficient grounds to remand the case back to the Office of Administrative Hearings for the taking of further evidence to hear the witness testimony of Charles Prickett, Esq. to appropriately fashion a remedy that does not compel CalPERS to pay benefits without the opportunity of all possible evidence being presented as to the intent and affirmative actions of deceased member.

There is ample evidence of Michael A. Garcia's genuine intention to change his Lifetime Monthly Benefit from his deceased sister to his partner coupled with objectively discernable manifestations of this intent, his unfortunate tragic state of health, and the unprecedented global COVID-19 pandemic that unequivocally constitutes an "error or omission" correctable under *Government Code* § 20160.

For the reasons set forth above, Respondent, Esteban Ramirez, respectfully requests the Board to reconsider adopting the Decision proposed by ALJ, Sean Gavin, that it enter a different Decision pursuant to the principles of equity and good faith including disregarding the improper application of statutory law barring key witness testimony from being presented at the June 15, 2023, Office of Administrative Hearing, conducted by ALJ, Sean Gavin. The ALJ's Proposed Decision was rendered without the benefit of all available, competent, and appropriate evidence being before the court. Therefore, we request CalPERS Board of Administration's adoption of the Decision made at its September 20, 2023, meeting be reconsidered.

Very truly yours,

**Law Office of Steven H. Spiegelman**



Steven H. Spiegelman, Esq.

Attorney for Respondent, ESTEBAN A. RAMIREZ