

ATTACHMENT C

RESPONDENT'S ARGUMENT



Danniss Woliver Kelley
Fax: 855-933-2611
Email: Helpdesk@dwkesq.com

Fax

To: Cheree Swedensky Assistant to the Board
CalPE

From: William Tunick

Fax: 1-916-795-3972

Date: Jan 27, 2022 12:10 PM

Subject: Case No. 2021-0235; Respondent's Argument

Confidentiality Warning: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information which is privileged, confidential, proprietary or exempt from disclosure under applicable law. If you are not the intended recipient or the person responsible for delivering the message to the intended recipient, you are strictly prohibited from disclosing, distributing, copying or in any way using this message. If you have received this communication in error, please notify Helpdesk@dwkesq.com and destroy and delete any copies you may have received.



DANNIS WOLIVER KELLEY

Attorneys at Law

WILLIAM B. TUNICK

Attorney at Law

wtunick@DWKesq.com

San Francisco

SAN FRANCISCO
200 California Street
Suite 400
San Francisco, CA 94111
TEL 415.543.4111
FAX 415.543.4384

LONG BEACH
444 W. Ocean Blvd.
Suite 1070
Long Beach, CA 90802
TEL 562.366.8500
FAX 562.366.8505

SAN DIEGO
750 B Street
Suite 2600
San Diego, CA 92101
TEL 619.595.0202
FAX 619.702.6202

CHICO
2485 Notre Dame Blvd.
Suite 370-A
Chico, CA 95928
TEL 530.343.3334
FAX 530.924.4784

SACRAMENTO
555 Capitol Mall
Suite 645
Sacramento, CA 95814
TEL 916.978.4040
FAX 916.978.4039

BERKELEY
2087 Addison Street
2nd Floor
Berkeley, CA 94704
TFI 510.345.6000
FAX 510.345.6100

FRESNO
7170 N. Financial Drive
Suite 135
Fresno, CA 93720
TEL 559.388.5802
FAX 559.388.5803

January 27, 2022

FAX AND U.S. MAIL

Cheree Swendensky
Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701
Fax: (916) 795-3972

Re: Respondent's Argument
Case No. 2021-0235
OAH Case No. 2021060275
Our file 8495.22620

Dear Ms. Swendensky:

We write on behalf of the Twin Unified School District ("District") to respectfully request that the California Public Employees Retirement System Board of Administration ("Board") reject the Proposed Decision in the above-referenced case. The District's position throughout this appeal has been that Respondent Stacie Thompson ("Respondent") filed an untimely election under Government Code section 20309.7 ("Section 20309.7") to transfer from CalPERS to CalSTRS, that CalPERS may not ignore an explicit statutory deadline to grant an untimely election, and that even if Respondent was not notified of Section 20309.7, no error was committed for CalPERS to remedy under Government Code Section 20160 ("Section 20160") because the District was under no legal obligation to notify Respondent. For these reasons, and as explained in more detail below,¹ the District urges the Board to reject the Proposed Decision and grant the District's appeal in its favor.

CalPERS May Not Ignore An Explicit Statutory Deadline To Allow An Untimely Election

As a preliminary matter, it appears all parties agree that Section 20309.7 requires that in order to take advantage of the one-time transfer opportunity and option, an

¹ This letter is intended to supplement the District's prior briefing before the administrative law judge and to reaffirm those arguments in front of the Board. Additional detail on the District's arguments and authority can be found in the District's Closing Brief and the District's Reply Brief.

www.DWKesq.com

Cheree Swendensky
CalPERS Executive Office
January 27, 2022
Page 2

employee must make an election on or before June 30, 2018. (Reporter's Transcript ("RT") 33:14-18².) CalPERS' own Circular Letter #200-007-18 ("Circular Letter") and the very Election Form that Respondent completed specify this same explicit statutory deadline. (Ex. 7, p. A28; Ex. 9, p. A32.) It is also undisputed that Respondent did not complete and file the election form until September 23, 2019. (RT 33:19-21.) This did not meet the requirements of Section 20309.7 and CalPERS should have rejected the election request on this basis.

The Alleged Notification Requirement Does Not Alter Application Of The Statutory Deadline

The Proposed Decision seeks to sidestep the clear statutory language by concluding that Section 20309.7's statutory deadline only applied if the District notified Respondent of its existence. There is no support in the statutory language or the Circular Letter for this assertion. Yet, the Proposed Decision concludes the "District's contention that it had no obligation inform respondent of her rights is without merit." (Proposed Decision ("PD") 16:27.) The Proposed Decision attempts to support this conclusion without citing any mandatory notification obligation found in law, or otherwise. Instead, it simply states the District "was *instructed* to inform effected employees of their right to elect", "was put on notice by CalPERS regarding Government Code section 20309.7", and had an opportunity to identify such employees. (PD 16:26-17:27.)

The Proposed Decision appears to arrive at the above standard based on the Circular Letter, but omits any mention that informing employees was not a mandatory obligation. The Circular Letter stated that: "Employers who are aware of employees who have been misreported to CalPERS for their creditable service under CalSTRS *should* inform those employees of their right to elect to have that service covered in CalSTRS." (Ex. 7, p. A28, emphasis added.) While the Circular suggests employers should notify their employees, it does not require employers take any action. Thus, contrary to what the Proposed Decision suggests, the Circular Letter cannot be the basis for finding an error was committed if an employee was not notified.

Section 20309.7 Abrogated Any Discrepancy Made Prior To Its Enactment And Renders Section 20160(b) Inapplicable

The Proposed Decision does not consider the impact of the enactment of Section 20309.7 to find an error in Respondent's enrollment in CalPERS at the time of her employment. However, Section 20309.7 is a specifically tailored statute designed to remedy this precise occurrence, abrogating any such error in enrollment. To accept the Proposed Decision's argument would be to render a large portion of Section 20309.7 a nullity.

Section 20309.7 gave CalPERS members a one-time opportunity and option to transfer any misreported service from CalPERS to CalSTRS. However, this option was only available until June 30, 2018. (Gov. Code, § 20309.7, subd. (b)(2)(A).) At the same time, it required that for those who did not make the election, they "shall continue to retain membership in this system and have his or her past and future service in that position credited to this system...." (Gov. Code, § 20309.7, subd. (a).) In other words, Section 20309.7 was squarely targeted at this precise situation – CalPERS members whose service made them eligible for CalSTRS

² See attached excerpts for referenced sections of the Reporter's Transcript.

Cheree Swendensky
CalPERS Executive Office
January 27, 2022
Page 3

membership – and directed that they be allowed a one-time opportunity to elect CalSTRS or thereafter remain in CalPERS.

The Proposed Decision recognizes the Legislature's purpose for enacting Section 20309.7 was "to allow effected employees to choose whether to stay in CalPERS or transfer their service to CalSTRS." (PD 16:26.) However, because Respondent failed to make the election within the statutory window, the Proposed Decision again falls back to categorizing this as a remediable error under Section 20160(b). But such an application would render Section 20309.7 (b)(2)(A)'s deadline meaningless because it would allow Section 20160(b) to be used to correct *any* misreporting at *any* time, even long after June 30, 2018. It would also conflict with subdivision (a)'s explicit direction that such member "shall continue to retain membership in [CalPERS]." Again the Proposed Decision improperly applies the specifically tailored statute.

For these reasons, the District maintains its position that Section 20309.7 abrogated any discrepancy made prior to its enactment, such that relying on Section 20160(b) to remedy such discrepancy would be improper.

Section 20160(a) Is Similarly Inapplicable And Does Not Require CalPERS to Correct Respondent's Failure To Elect during The Statutory Deadline

The Proposed Decision misstates the law with respect to correcting a member error under Section 20160(a) and glosses over facts leading to conclusory findings. The Proposed Decision states that "section 20160 *requires* CalPERS to correct the errors and omissions made by *members*," which is incorrect. (PD 25:8, emphasis added.) While it is true that CalPERS is required to correct errors of employers, CalPERS is not required to correct errors of members, but it may do so if the member makes the request "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." (Gov. Code, § 20160, subd. (a)(1), emphasis added.)

The Proposed Decision concludes that Respondent sought to make the election within a reasonable time after discovery of her right, but omits that Respondent testified she was aware and knew that her service could be reported to CalSTRS for "several years." (RT 53:3-20.) Respondent's own testimony suggests that she exceeded the subdivision's six month window for remedying a known error, and does not meet the burden to invoke subdivision (a) of Section 20160. For this reason, Section 20160(a) should have been found to be inapplicable in this instance.

Finally, there is also some question as to the accuracy of several of the factual findings in the Proposed Decision. For example, the Proposed Decision states the District told Respondent that she would be required to pay the \$100,000 costs for making the election, suggesting the District attempted to coerce Respondent into not making the election. (PD 9:11) This is incorrect and Respondent's own testimony contradicts this statement. Respondent stated she was told it would cost *the District* over \$100,000, not that the District told her she would be responsible for paying. (RT 51:3-11.)

Cheree Swendensky
CalPERS Executive Office
January 27, 2022
Page 4

Conclusion

For the forgoing reasons, the District maintains its position articulated in both the District Closing Brief and the District's Reply Brief, and respectfully requests that the Board reject the Proposed Decision's conclusions and grant the District's appeal.

Very truly yours,

DANNIS WOLIVER KELLEY



William B. Tunick

WBT:ah

Transcript Excerpts

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT

SYSTEM

---oOo---

In the Matter of the Appeal of Agency Case No. 2021-0235
Retirement System Election for
Misreported Service of OAH No. 2021060275

STACIE THOMPSON,

Respondent,

and

TWIN RIVERS UNIFIED SCHOOL
DISTRICT,

Respondent.

_____ /

---oOo---

REPORTER'S TRANSCRIPT OF VIRTUAL PROCEEDINGS

Thursday, October 7, 2021

9:00 a.m.

Sacramento, California

BEFORE ADMINISTRATIVE LAW JUDGE MARCIE LARSON

---oOo---

Reported by: ANN R. LEITZ, CSR NO. 9149

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES

ADMINISTRATIVE LAW JUDGE MARCIE LARSON
OFFICE OF ADMINISTRATIVE HEARINGS
2349 Gateway Oaks Drive #200
Sacramento, California 95833

FOR CALPERS:
BY: JOHN SHIPLEY, Senior Staff Attorney
P.O. Box 942707
Sacramento, California 94229-2707

FOR THE RESPONDENT TWIN RIVERS UNIFIED SCHOOL DISTRICT:

DANNIS WOLIVER KELLEY
BY: WILLIAM B. TUNICK, Attorney at Law
200 California Street, Suite 400
San Francisco, California 94111

FOR THE RESPONDENT STACIE THOMPSON:
BY: STACIE THOMPSON, In Pro Per

---cOo---

1 request before allowing her to make the selection, did CalPERS
2 conduct a review to ensure she is eligible to transfer her
3 credits to CalSTRS?

4 A. Yes.

5 Q. What would CalPERS do to ensure that she's eligible to
6 make this transfer?

7 A. CalPERS would look at the circumstances and look at
8 the employment, if it was certificated, what type of position
9 it would be. We would also reach out to CalSTRS to see if
10 that position could be reported to CalSTRS.

11 Q. I believe you testified that this ability to make this
12 election is based on Government Code 20309.7; is that correct?

13 A. Correct.

14 Q. Is there a deadline by which someone must make the
15 election in that government code section?

16 A. Yes.

17 Q. And what's the deadline?

18 A. It is -- it was June 30th of 2018.

19 Q. And Ms. Thompson made the election after June 30th,
20 2018; is that correct?

21 A. Correct.

22 Q. So if her election was made after the deadline, why
23 was CalPERS of the opinion that it was going -- could be made
24 by her?

25 A. We looked at the circumstances. It appears to be that

1 that -- in the Statement of Issues that I'm looking at, it
2 says that any costs related to it should be between the
3 employee and employer. They never talked to me about any
4 cost. I don't know if that means that the cost should be
5 negotiated or sit down and talk about how much it's going to
6 cost. It's for the one on October 31st, 2019, where it said
7 it would cost them over \$100,000. And it says that any
8 reporting or cost related to it should be resolved between
9 employee, employer and CalSTRS. That conversation never took
10 place. They never asked me, Okay, this is how much it's going
11 to cost. What do you want to do? After that, they would not
12 talk to me. It was through their attorney. So I'm just
13 confused as to why they were okay to move forward before they
14 knew how much it cost and then all of the sudden they were not
15 at fault.

16 This has been going on for two years and I've had to
17 go to work and work for these people for two years after
18 considering how they have treated me, and it has affected me
19 in the way that I teach. I feel really sick, I'm tired, I
20 have headaches because of what they have put me through the
21 past two years. So I'm just tired of being tired. But I'm
22 not going to give up because they were in the wrong, and the
23 fact that they have tried to say that they're not sickens me
24 to my stomach, especially considering I'm still working for
25 them.

1 ---oOo---

2 EXAMINATION

3 MR. SHIPLEY: Q. So, Ms. Thompson -- and I know this
4 goes back a little ways, but to the best of your ability, do
5 you recall when you first became aware that you could have the
6 service that had been reported to CalPERS, that there was an
7 option to be able to transfer that service to CalSTRS? Do you
8 recall when you first became aware of that?

9 A. Like I said, it was several years ago, just through my
10 own research. I think the conversation kind of came up when
11 you get those things from social security every year around
12 your birthday, and I started thinking about, Well, I thought
13 teachers didn't pay into social security and I was looking at
14 my stubs and I'm thinking, well, I'm paying into it, why is
15 that? And that's when it all kind of started to click. And I
16 was telling them I'm paying into social security and I
17 shouldn't -- like almost \$400 a month is going towards social
18 security and I really shouldn't be paying it, AND that's when
19 I just started to research on my own and that's when I took it
20 to HR and started asking.

21 Q. But you don't have any type of specific date that you
22 remember when that happened?

23 A. I don't, I don't have any date. Like I said, it was
24 several years ago.

25 Q. You've seen there's the election form that you signed