

ATTACHMENT C

RESPONDENT'S ARGUMENT

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FROM	Constance Dewey
DATE	2022-08-26 10:18:24 GMT+14
RE	OAH Case No. 2020120099, County of Glenn Respondent's Argument

COVER MESSAGE

Ms. Swedensky,

Attached is Respondent County of Glenn's argument regarding the June 28, 2022 proposed decision in the referenced matter. A copy will follow via U.S. Mail.

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August 25, 2022

VIA FACSIMILE & U.S. MAIL

Fax No. 916.795.3972

Ms. Cheree Swedensky
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P.O. Box 942701
Sacramento, CA 94229-2701

Re: *OAH Case No. 2020120099*
Respondent's Argument
Client-Matter: GL060/009

The County of Glenn ("County") submits this argument requesting that the California Public Employees' Retirement System ("CalPERS") Board of Administration ("Board") adopt the Proposed Decision issued by the Administrative Law Judge's ("ALJ") as its own decision in this matter.

I. INTRODUCTION

This represents the second time this matter comes before the CalPERS Board with a proposed decision recommending that the CalPERS Board grant the County's appeal. This matter involves CalPERS' attempt to collect from the County overpayments made to members beyond the three-year statute of limitations. CalPERS' intended action clearly violates the statute of limitations in Government Code section 20164(b)(1) as a matter of law. The applicability of the three-year statute of limitations is clear and unambiguous and CalPERS lacks legal authority to ignore the statute of limitations provided by the Legislature under CalPERS' enabling legislation, the Public Employees' Retirement Law ("PERL"). CalPERS also has no express or implied authority to bill a third party for the overpayments, as it seeks to do in this matter.

The members argued that the exclusion of the additional compensation at issue triggers the penalty provisions for retired members under Government Code section 20164.5, which was enacted by Senate Bill ("SB") 278. However, as it is undisputed that the overpayments were the result of a payroll error, the members cannot demonstrate that the compensation was agreed to in an MOU for pension purposes. CalPERS staff was correct to argue, and the Proposed Decision correctly holds, that the member appeals should be denied.

The Proposed Decision, which followed two separate rounds of extensive briefing on the legal arguments, an administrative hearing, and oral argument, carefully weighs, considers, and rejects each argument raised by CalPERS and the members. Thus, the County requests that the CalPERS Board adopt the Proposed Decision as its own.

II. PROCEDURAL BACKGROUND

On November 20, 2020, CalPERS issued the Statement of Issues. On February 4, 2020, the County filed a motion to dismiss arguing CalPERS lacked legal authority to proceed against the County as a matter of law. On May 14, 2021, the ALJ issued a proposed decision granting the County's motion. At its July 14, 2021 meeting, the CalPERS Board rejected the proposed decision and ordered that an administrative hearing take place. (Proposed Decision [PD], p. 6, fn. 4.) On January 6, 2022, CalPERS issued an amended Statement of Issues to add the issue of overpayment and penalty obligations under Government Code section 20164.5. The hearing took place on February 17, 2022. On June 28, 2022, the ALJ issued the Proposed Decision, again siding with the County.

III. FACTUAL BACKGROUND

CalPERS conducted an audit of the County's payroll reporting for the period covering July 1, 2012 through June 30, 2017. (PD, p. 4, ¶ 4.) On December 6, 2018, CalPERS issued the final public agency review audit report. (*Id.*) The report determined that certain compensation should not have been reported for inclusion in pension benefits. (*Id.*) Specifically, the County inadvertently included items of special compensation in the base payrates and included them again as special compensation, resulting in double reporting of the items and inflated payrates. (*Id.*) However, the County correctly reported earnings to CalPERS. (*Id.*)

In early 2019, the County corrected the reporting error and provided CalPERS with a list of all impacted employees. (*Id.*, p. 5, ¶ 6.) In late 2019, CalPERS sought collection of the most recent three years of overpayments directly from the members. (*Id.*, ¶ 7.) In early 2020, CalPERS invoiced the County for certain overpayments related to the members who had corrections made to their accounts. (PD, pp. 4-5, ¶ 8.) The invoice provides in relevant part, "[b]ased on a retroactive payroll correction, we are limited from collecting the overpayment from the member based on Government Code section 20164(b)(1). In order to recover the entire overpayment to the system, we are invoicing you for the balance of the overpayment (Internal Revenue Procedure 2015-27, Section 3.02(3))." (*Id.*) The invoice sought to collect overpayments beyond the three-year statute of limitations directly from the County on a dollar-for-dollar basis.

Prior to mid-2016 to early 2017, CalPERS discharged overpayments beyond the three-year statute of limitations under Government Code section 20164(b), regardless of who caused the overpayment. (*Id.*, p. 7, ¶ 11-12.)¹ The discharge was consistent with CalPERS' Discharge from Accountability Policy, which provides, "debts owed that are beyond the relevant statute of limitation are not legally recoverable and no discretion for collection exists." (*Id.*, p. 7, ¶ 11.) When the debt was discharged under the policy, the debt is discharged to the entire CalPERS employer population through the annual valuation process. (*Id.*)

Sometime in mid-2016 to early 2017, CalPERS changed its discharge practice. Following the change, CalPERS began discharging overpayments based on member or CalPERS staff errors for debts beyond the three-year statute of limitations, but began invoicing employers for overpayments beyond three years where CalPERS determined the errors were caused by an employer error. (*Id.*, p. 7, ¶ 12.) The changes were the result of internal staff discussions regarding shifting the liability to employers. (*Id.*, p. 7, ¶ 13.) Deputy Executive Director, Anthony Suine directed staff to begin invoicing employers for the overpayments that were caused by the employer. (*Id.*) Although the invoices cited a Revenue Procedure, Mr. Suine acknowledged – as he must based on CalPERS' continued practice of discharging debts in various overpayment situations – that discharging the debt to the larger CalPERS employer population is and remains a permissible correction method under IRS guidelines. (*Id.*, pp. 7-8, ¶ 14.)

¹ As discussed extensively in the County's briefing, the date of the change is uncertain due to the shocking lack of formality and transparency involved in the change.

The change in practice was not memorialized in any written policy, it was never presented to the CalPERS Board for review or approval, and control agencies were not notified in accordance with CalPERS' 1994 delegation resolution. (*Id.*, p. 8, ¶ 15.) CalPERS also did not promulgate any regulations or issue a circular letter or notify employers other than by invoicing them. (*Id.*)

IV. DISCUSSION

A. **GOVERNMENT CODE SECTION 20164(B)(1) BARS COLLECTION OF OVERPAYMENTS BEYOND THREE YEARS**

The legal issue in this appeal is simple and the plain language of the PERL dispenses with this matter. Under Government Code section 20164(b)(1), a three-year statute of limitations applies and CalPERS cannot collect overpayments beyond three years. Government Code section 20164(b)(1) provides:

(b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:

(1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.²

The statute plainly, unmistakably, and unequivocally provides a three-year statute of limitations. Government Code section 20164(b)(1) is made applicable to "adjustment of errors or omissions." The Proposed Decision correctly concludes that, "[i]n sum, the plain language of Government Code section 20164, subdivision (b), precludes CalPERS' collection claim against the County." (*Id.*, p. 12, ¶ 26.)

The statute of limitations is also codified in policies adopted by the Finance and Administration Committee. CalPERS' Discharge from Accountability Policy provides that requests to discharge debts that involve the statute of limitations do not require approval. The Discharge from Accountability Policy recognizes that "discharges from accountability that involve member debts related to the administration of pension benefits are codified in Government Code section 20164(b)(1). The rationale for the statute of limitation delegation is that debts owed that are beyond the relevant statute of limitation *are not legally recoverable and no discretion for collection exists.*" (See: <https://www.calpers.ca.gov/docs/policy-discharge-from-accountability.pdf>, emphasis added.)

B. **NEITHER CALPERS' FIDUCIARY DUTIES NOR ITS DISCRETION ALLOW IT TO COLLECT FROM THE COUNTY**

The most basic and fundamental principle of administrative law – that administrative agencies cannot act in conflict with or exceed their statutory authority – ends CalPERS' attempts to collect the overpayments from the County. CalPERS cannot argue that its discretion or fiduciary duties allow it to act in contravention of a statute enacted by the Legislature. (PD, pp. 13-14, ¶¶ 27-28.)

In *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* [Alameda] (2020) 9 Cal.5th 1032, the California Supreme Court explained, "[i]t is well established that the rulemaking power of an administrative agency does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature. 'A ministerial officer may not ... under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without

² There are other instances where the statute of limitations is longer, but the parties agree that the mistake provision is the only applicable provision.

the scope of the statute' And, a regulation which impairs the scope of a statute must be declared void." (*Alameda, supra*, Cal.5th at 1067, citations omitted.)

CalPERS' proposed action to bill the County for payments made to members beyond the three-year statute of limitations fails on two separate grounds. First, CalPERS attempts to proceed in violation of the statute of limitations in Government Code section 20164(b)(1), which CalPERS has no authority or discretion to do. Second, CalPERS creates, without statutory authorization, third-party liability by attempting to collect *from the County* money that was paid *to the members*. CalPERS lacks authority to undertake both actions. Because CalPERS is bound to follow the statute, CalPERS cannot rely on its discretion, fiduciary obligations, or arbitrary desire to collect the overpayments from the County. (*Westly v. California Public Employees' Retirement System Board of Administration* (2003) 105 Cal.App.4th 1095, 1100.) The Proposed Decision did not reach the second issue because it determined the first was dispositive.

Indeed, the Board should be intimately familiar with the argument that its powers are limited by the PERL. CalPERS' staff argues in support of, and the Board routinely adopts, decisions finding that members must pay back money or have their retirement benefits reduced because CalPERS is bound to follow the PERL, regardless of the hardship or equitable considerations of a particular case.

C. CALPERS' ARGUMENTS IN FAVOR OF COLLECTION ARE WITHOUT MERIT

CalPERS staff introduced several arguments to evade the application of the plain meaning of Government Code section 20164(b)(1). CalPERS' arguments lacked internal consistency, coherence, and were each thoroughly considered and rejected in the Proposed Decision. Moreover, most of the arguments, if successful, would make overpayments collectable from the members, not the County.

1. Government Code section 20164 does not only apply to members

CalPERS argued in favor of rejecting the previous proposed decision contending that Government Code section 20164(b) only applies to members. The plain language of the statute does not limit the statute of limitations to collection from the members. Applying the recovery limit to members, but not employers who did not even receive the payments, is irreconcilable with the statute, which makes no such distinction and uses broad language identifying several mistake statutes and a catch-all provision that are all subject to the three-year limitation period. (PD, p. 12, ¶ 24.)

The interpretation is also at odds with the statute. The Legislature provided that the "payments" were not recoverable beyond three years under Government Code sections 20160, 20163, 20532, or otherwise. Government Code section 20532 is only applicable to employers. If Government Code section 20164(b) only applies to members, then there would be no reason to have included Government Code section 20532, which only applies to contributions from *employers*. (PD, p. 12, ¶ 25.) Therefore, the proffered interpretation is at odds with the plain language of the statute.

2. CalPERS lacks a statutory basis to collect from the County

The collection bar under Government Code section 20614(b) extends to "adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, *or otherwise...*" (Emphasis added.) Accordingly, CalPERS' attempts to collect under Government Code sections 20532 and 20536 are expressly prohibited by the PERL. (PD, p. 16, ¶ 32.) Even assuming they were not barred, neither provision provides authority for collection on a dollar-for-dollar basis from the County based on overpayments made to members. (PD, pp. 14-16, ¶¶ 29-32.)

3. The County's contract with CalPERS does not provide for collection of overpayments made to members

CalPERS' attempts to collect from the County based on the County's CalPERS contract fail. CalPERS cannot make a unilateral policy change and retroactively reinterpret a mutual agreement to fit its newly created action. Moreover, CalPERS is not conducting a valuation in accordance with law and the overpayments CalPERS seeks cannot be characterized as administrative, investigative, or valuation costs. (PD, p. 16, ¶ 33.)

4. CalPERS lacks authority to arbitrarily extend the statute of limitations

CalPERS' contention that it can apply any limitations period it desires is also without merit. Government Code section 20164(e) provides that CalPERS shall determine the applicability of the statute of limitations. However, CalPERS' decision is subject to judicial review and cannot be arbitrary and capricious. (See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 43; PD, pp. 17-18, ¶ 34-35.) There is no reasonable argument that a provision other than Government Code section 20164(b) applies.

CalPERS' argument that a discovery rule applies also fails. CalPERS' attempts to import a discovery rule into a portion of the statute where no discovery rule exists, even where the Legislature has expressly included a discovery rule elsewhere in the statute. The fact that the Legislature included a discovery rule in some provisions of Government Code section 20164, but not Government Code section 20164(b), completely undermines CalPERS' argument. (PD, pp. 20-21, ¶ 41-42.)

Even if either argument had support, collection would be from the members. (*Id.*, p. 21, ¶ 43.)

5. The three-year statute of limitations applies to administrative proceedings

CalPERS' contention that the statute of limitations does not apply to administrative proceedings, which the Proposed Decision notes borders on frivolous, fails for several reasons. First, CalPERS applied the statute of limitations under Government Code section 20164(b) to collection from the members. (PD, p. 19, ¶ 37.) Second, the statute of limitations is not a general statute of limitations, but is contained in CalPERS' enabling legislation, the PERL. (*Id.*, pp. 18-19, ¶ 38.) Third, even if CalPERS was correct, collection would be from the members who received the payment, not the County. (*Id.*, p. 20, ¶ 40.)

6. The IRS Revenue Procedure cited by CalPERS does not support CalPERS' position

The letters that CalPERS sent the County demanding payment for the legally uncollectable overpayments cite to Revenue Procedure 2015-27. The guidance has been updated, but is relatively similar. (PD, p. 21 fn. 6.) The Revenue Procedure does not stand for the position for which CalPERS cited it and there is nothing in the Revenue Procedure that would supersede or preempt Government Code section 20164(b)(1). The Revenue Procedure is neither a statute nor a regulation, is not in direct conflict with Government Code section 20164(b)(1), and CalPERS acknowledges that it relied on Government Code section 20164(b)(1) in limiting collections against the individual members.

CalPERS concedes that the Revenue Procedure does not preempt Government Code section 20164. (*Id.*, p. 22, ¶ 45.) The Proposed Decision identifies three additional reasons CalPERS' argument fails. First, the guidance does mandate collection from the County, but merely provides multiple correction methods. (*Id.*, pp. 22-23, ¶ 46.) CalPERS may not select a correction method that violates the PERL. (*Id.*) Second, CalPERS' argument is inconsistent with its past and current practice of discharging uncollectable debts to the wider CalPERS employer pool, which CalPERS acknowledged remains a permissible correction method. (*Id.*) Third, CalPERS has not sought a legislative change or judicial determination that Government Code section 20164(b)

is preempted. (*Id.*) In the absence of federal preemption, CalPERS cannot select a permissive correction method that would violate the PERL. (*Alameda, supra*, 9 Cal.5th 1032.)

Accordingly, neither Revenue Procedure 2021-30 nor its predecessors permit CalPERS to ignore the plain language of Government Code section 20164(b)(1) and the Proposed Decision should be adopted.

D. GOVERNMENT CODE SECTION 20164.5 IS INAPPLICABLE TO THIS MATTER

Government Code section 20164.5, which went into effect on January 1, 2022, has no applicability to these proceedings. Government Code section 20164.5 requires local agencies to pay CalPERS the full cost of any overpayments made to a retiree based on disallowed compensation and pay a 20-percent penalty of the amount calculated as a lump sum of the actuarial equivalent value of the difference between the retiree's pension calculated with the disallowed compensation and the pension calculated without the disallowed compensation for the projected duration of the benefit.

In order to trigger the above repayment and penalty obligations, specified elements must be met.³ The Parties did not dispute that the County inadvertently overreported payrates to CalPERS. (PD, p. 9, ¶ 19.) In order for the penalties to operate, one of the elements requires that the compensation be agreed to in an MOU as compensation for pension purposes. (Gov. Code, § 20164.5(b)(3)(A)(ii).) It cannot reasonably be disputed that the overpayments resulted from an overreporting error where the County inadvertently included an item of special compensation in payrate and reported it separately as special compensation. (*Id.*, pp. 9-10, ¶ 19.) Of course, this dual reporting was not agreed to in an MOU between the County and the association representing the members. (*Id.*) In addition, CalPERS' witness testified that due to the nature of the reporting error, no member contributions were paid on the overreported amount that caused the inflated payrates. (*Id.*) The fact that no member contributions were made prevents the employees from satisfying another element for establishing liability under Government Code section 20164.5(b)(3)(A). (*Id.*)

CalPERS also issued Circular Letter No. 200-076-21, which takes the position that payroll errors that exceed what is provided under a labor agreement are not within the ambit of Government Code section 20164.5. (PD, p. 10, ¶ 20.) The exclusion of payroll errors is a reasonable restatement of Government Code section 20164.5(b)(3)(A)(ii) because errors are not provided for under a labor agreement. Therefore, Government Code section 20164.5 has no applicability to this matter.

V. CONCLUSION

Government Code section 20164(b)(1) prohibits CalPERS from collecting from the County overpayments made to members that exceed the three-year statute of limitations. The County requests that the CalPERS Board adopt the Proposed Decision as its decision in this matter, as the Proposed Decision correctly applies a clear and unambiguous statute that requires granting the County's appeal. Requiring the County to continue to defend against an unsupported administrative action is a waste of public resources and inconsistent with CalPERS' duties as a fiduciary. The law compels the result in the Proposed Decision and CalPERS should adopt and follow it without further waste and delay.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Michael D. Youril

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³ The following elements must be established: "(i) The compensation was reported to the system and contributions were made on that compensation while the member was actively employed. (ii) The compensation was agreed to in a memorandum of understanding or collective bargaining agreement between the employer and the recognized employee organization as compensation for pension purposes and the employer and the recognized employee organization did not knowingly agree to compensation that was disallowed. (iii) The determination by the system that compensation was disallowed was made after the date of retirement. (iv) The member was not aware that the compensation was disallowed at the time it was reported" (Gov. Code, § 20164.5(b)(3)(A).)