

ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)

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FAX COVER SHEET

DATE: June 24, 2021

CLIENT-MATTER NUMBER: GL060/009

To:

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FROM	Michael D. Youril	PHONE	559.256.7813
RE:	OAH Case No. 2020120099 CalPERS/County of Glenn		

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June 24, 2021

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

Dear Ms. Swedensky:

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 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) and is improper as a matter of law. The ALJ correctly determined that the three-year statute of limitations under Government Code section 20164(b)(1) bars CalPERS from billing the County for overpayments made to members beyond the three-year statute of limitations. 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"). The Proposed Decision, which followed extensive briefing and more than an hour of oral argument, carefully weighs, considers, and rejects each argument raised by CalPERS in defense of its legally non-viable action. Thus, the County requests that the Board adopt the Proposed Decision as its own.

II. FACTUAL BACKGROUND

CalPERS conducted an audit of the County's payroll reporting for the period covering July 1, 2012 through June 30, 2017. (Proposed Decision [PD], p. 4, ¶ 6.) 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.*) CalPERS issued determination letters to the members excluding the compensation.¹

In January 2020, CalPERS invoiced the County for certain overpayments related to the members who had corrections made to their accounts. (PD, pp.4-5, ¶ 7.) 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 letter includes a line for the “employer portion” of the overpayment. The letter sought to collect overpayments beyond the three-year statute of limitations directly from the County on a dollar-for-dollar basis.

On November 20, 2020, CalPERS issued the Statement of Issues in this matter. (PD, p. 5, ¶ 8.) On February 4, 2020, the County filed a motion to dismiss, requesting that the ALJ issue a proposed decision to the Board because CalPERS’ action to bill the County for the overpayments violates the plain language of Government Code section 20164(b)(1). (PD, p. 5, ¶ 9.) On March 15, 2021, CalPERS filed its opposition. (*Id.*) On March 24, 2021, the County filed its reply. (*Id.*) On April 23, 2021, the ALJ heard oral argument.

On May 14, 2021, the ALJ issued the Proposed Decision granting the County’s motion and ordering that, “CalPERS’ claim to collect from the County of Glenn the balance of any overpayments to members beyond the three-year statute of limitations in Government Code section 20164, subdivision (b)(1) is DISMISSED.” (PD, p. 17, ¶¶ 1-2.)

III. DISCUSSION

A. THE MATTER INVOLVES A PURE QUESTION OF LAW AND A MOTION TO DISMISS IS PROCEDURALLY PROPER

The County acknowledges that a motion to dismiss is a unique vehicle in administrative proceedings under the Administrative Procedure Act. However, as discussed below and in the Proposed Decision, this matter involves a pure question of law, and CalPERS was utterly without authority to undertake its desired action. Under such circumstances, the citizens of the County of Glenn and the State of California should not have to waste resources pursuing a meaningless administrative hearing, as the result is legally compelled by the plain language of the statute.

CalPERS raised several procedural objections to the County’s motion to dismiss. The Proposed Decision carefully considers and rejects each of these contentions. (PD, pp. 5-8, ¶¶ 10-17.) Courts have recognized that a motion to dismiss is proper in administrative proceedings and that they promote administrative efficiency where the administrative agency has no legal basis to proceed or is without authority to provide the requested relief. (*Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626, 637-68; PD, pp. 5-6, ¶ 11.)

The ALJ was careful to limit the decision to the undisputed legal issues before the parties and explicitly determined that no witness testimony or evidence is required to construe the plain meaning

¹ Some of the members separately appealed and the appeals have been bifurcated.

of a statute. (PD, p. 7, ¶¶ 15-16.) Accordingly, it was appropriate for the ALJ to issue a Proposed Decision to the CalPERS Board based on the County's motion to dismiss.

B. 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 holds:

The three-year statute of limitations outlined in section 20164, subdivision (b)(1), expressly applies to 'payments into or out of the retirement fund, *whether pursuant to Section 20160, 20163, or 20532, or otherwise...*' Thus, CalPERS' fiduciary duties, as well as sections 20160, 20163, and 20532 cannot salvage CalPERS' claim against the County." (PD, pp. 10-11, ¶¶ 22-23, emphasis in decision.)

The Proposed Decision correctly determined, as the Board must, that the plain language of Government Code section 20164(b)(1) creates a three year statute of limitation for collection of erroneous overpayments. (PD, p. 9, ¶ 19.) Accordingly, the ALJ correctly determined that CalPERS cannot legally proceed against the County to collect overpayments beyond three years. (PD, p. 17, ¶¶ 1-2.) Therefore, the Board should adopt the Proposed Decision, as it is the only legally viable option available to CalPERS and the Board with respect to the overpayment.

C. THE THREE-YEAR STATUTE OF LIMITATIONS IS CLEAR AND THERE IS NO AUTHORITY OR PERSUASIVE ARGUMENT THAT ALLOWS CALPERS TO IGNORE THE STATUTE

1. **Principles of administrative law remove CalPERS' discretion and dictate that CalPERS follow the PERL**

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

² There are other instances where the statute of limitations is longer that are inapplicable to this matter.

overpayments from the County. The Proposed Decision correctly notes that CalPERS cannot argue that its discretion or fiduciary duties allow it to act in contravention of a statute enacted by the Legislature. (PD, pp. 10-11, ¶¶ 22-23.)

In *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association [Alameda]* (2020) 9 Cal.5th 1032, a highly anticipated case involving the "California Rule," 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 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. (PD, pp. 10-11, ¶¶ 22-23; *Westly v. California Public Employees' Retirement System Board of Administration* (2003) 105 Cal.App.4th 1095, 1100 ["We conclude the Board does not have plenary authority to evade the law..."]; *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870.)

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. CalPERS is without authority to ignore the PERL based on administrative fiat. If CalPERS wants to dispense with the three-year statute of limitations, it must seek a legislative change, as it is the only avenue available to CalPERS.

Accordingly, CalPERS has no discretion to proceed against the County for the overpayments and the Board should adopt the Proposed Decision.

2. **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. However, 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 updated version is Revenue Procedure 2019-19, which is substantially similar. (PI), p. 13, fn. 3.)

CalPERS concedes that the Revenue Procedure does not preempt Government Code section 20164. (PD, p. 14, ¶ 29.) 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. (*Id.*)³ The Revenue Procedure merely provides possible avenues for collection of overpayments.⁴

CalPERS argued that it must follow the Revenue Procedure to mitigate any possible loss of its tax exempt status. As the Proposed Decision correctly notes, the Revenue Procedure does not *require* CalPERS to do anything and reliance on the Revenue Procedure fails for three separate reasons. (PD, p. 14-15, ¶ 30.) First, the Revenue Procedure does not mandate collections from an employer. Instead, collection from an employer is one of *several* different permissive options for correction. (*Id.*) Second, the Revenue Procedure allows the plan sponsor to make up the difference for any overpayment. (*Id.*) Third, and most importantly, CalPERS cannot in the absence of federal preemption select a permissive correction method that would violate the PERL. (*Id.*; *Alameda, supra*, 9 Cal.5th 1032.)

CalPERS' position that it is required to collect from the County to maintain its tax exempt status is unpersuasive and specious. On the other hand, CalPERS' attempts to violate its own plan provisions (i.e., the PERL) by ignoring the statute of limitations under its own plan provisions to bill the County could be considered an operational failure that arises from a failure to follow plan provisions. (See 26 C.F.R. § 1.401-1(a)(2), (3); Revenue Procedure 2013-12, Section 5.01(2)(b).) CalPERS' violation of its own plan provisions could jeopardize its tax exempt status.

Accordingly, neither Revenue Procedure 2019-19 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. ADDITIONAL EXTRINSIC EVIDENCE BEYOND THE PLAIN LANGUAGE OF THE STATUTE ALSO SUPPORTS THE COUNTY'S POSITION AND THE PROPOSED DECISION

As discussed above and in the Proposed Decision, the plain and unambiguous text of Government Code section 20164(b)(1) ends this matter and the Proposed Decision should be adopted. However, evidence extrinsic to the Proposed Decision bolsters the County's position and the Proposed Decision. The issues are unnecessary to a resolution of the matter, but tend to support the County's position that CalPERS' action, in addition to being legally foreclosed, was arbitrary and capricious.

The statute of limitations is codified in policies adopted by the Finance and Administration Committee. CalPERS' Discharge from Accountability Policy addresses the discharge of uncollectable debts. Generally, debts in excess of \$20,000 are referred to the Finance Administrative Committee for review and final recommendation to the CalPERS Board for final action. However, 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

³ Even if the Revenue Procedure did preempt Government Code section 20164(b)(1), which it does not, it would make the entire amount collectable from the *members* who actually received the overpayments, not the *County*.

⁴ The County also contends that the three-year statute of limitations in Government Code section 20164(b)(1) constitutes an automatic correction method in the actual provisions of the plan (i.e., the PERL).

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statute of limitation *are not legally recoverable and no discretion for collection exists.*" (Emphasis added.)

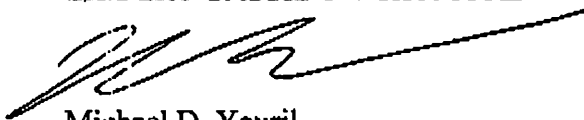
In other words, the CalPERS' Finance and Administration Committee and the CalPERS' Board recognize that no oversight is necessary for these debts because they are uncollectable as a matter of law. The Board is absolutely correct that the debts are uncollectable as a matter of law, and this is how CalPERS has proceeded for many years until what appears to be a recent and unarticulated change. If the overpayments were legally collectable, the delegation rationale would be incongruous with the policy. CalPERS also routinely discharges debts that are uncollectable under Government Code section 20164, and discharge of debts barred by Government Code section 20164(b)(1) make up the lion's share of uncollectable debts. Not surprisingly, CalPERS' staff was unable to point to any statute, regulation, Board policy, or even informal administrative guidance that supports its intended action. Instead, all extrinsic evidence supports the County's position, which is to be expected considering the statute commands that the debts are uncollectable after three years.

IV. 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 Board adopt the Proposed Decision as its decision in this matter, as the Proposed Decision correctly applies a clear and unambiguous statute that requires the dismissal of this action. 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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