

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

The issues in this case concern correction of an erroneous retirement benefit formula and collection of the overpayment amount of \$33,052.76 that resulted from applying the erroneous formula.

Josephina Limos (Respondent) became a member of CalPERS in 1974, when she was employed by the City of Oakland. She separated from Oakland in 1999, but Oakland never reported Respondent's separation to CalPERS. After leaving Oakland, Respondent was employed for about six years with the City of Richmond. She retired with approximately 31 years of service credit.

During the entire period of time Respondent was employed by Oakland, it had contracted for the 2% at 55 benefit formula for local miscellaneous members such as Respondent.

On June 19, 2004, Oakland amended its contract to provide a 2.7% at 55 benefit formula for local miscellaneous members. Respondent did not work at Oakland at any time after it amended its contract, so she is not eligible for the enhanced formula.

On March 18, 2004, Respondent emailed CalPERS, asking whether she would be entitled to the 2.7% at 55 benefit formula for her prior service at Oakland, if she returned to work there after the amendment was final. On March 22, 2004, CalPERS emailed Respondent, telling her that she would have to return to work for Oakland in order to convert her prior service to the enhanced 2.7% at 55 formula.

By virtue of the emails above, the Administrative Law Judge (ALJ) found that CalPERS had notice that Respondent had left employment at Oakland as of 2004, and that she was under the 2% at 55 formula when she left.

On various dates in 2005, CalPERS erroneously gave Respondent retirement estimates which all used the incorrect 2.7% at 55 formula to calculate Respondent's service with Oakland. Respondent retired for service on July 2, 2005.

On April 7, 2011, CalPERS informed Respondent that she was not entitled to the 2.7% at 55 formula for her work at Oakland, her retirement benefit had been erroneously calculated, and Oakland had not provided CalPERS with correct separation information.

On June 16, 2011, CalPERS informed Respondent that her retirement benefit had been corrected using the 2% at 55 formula. CalPERS informed her that her retirement warrant would be reduced by \$948.80/month. CalPERS also informed Respondent that the overpayment of \$33,052.76 was required to be repaid, and gave her several options for repaying the overpayment.

On June 29, 2011, Respondent appealed. Despite the financial hardship caused by the \$948.80 reduction in her monthly benefit, Respondent did not seek its reversal at hearing. She requested the \$33,052.76 be waived and she be released from liability.

The ALJ found that CalPERS' miscalculation and subsequent reduction of Respondent's retirement benefit by \$948.80 caused Respondent financial distress. Had she known CalPERS' retirement estimates were incorrect, she testified that she would have worked an additional four years.

The ALJ took Official Notice of the Precedential Decision *In the Matter of the Appeal of Decreased Level of Retirement Allowance of Harvey H. Henderson* (1998). The facts are similar in both cases. Both cases involve a dispute over who should pay for a mistake CalPERS made. Additionally in *Limos*, both CalPERS and Respondent knew (as evidenced by the 2004 emails) that Respondent left Oakland and her retirement benefit should have properly been calculated using the 2% at 55 formula. Nevertheless, CalPERS provided Respondent with incorrect retirement estimates using the 2.7% at 55 formula. Respondent relied on these erroneous estimates when she filed for service retirement on June 30, 2005.

As in *Henderson*, the \$948.80 monthly reduction to correct the benefit formula puts Respondent in a difficult financial situation. However, the ALJ upheld CalPERS' determination that it must correct the benefit formula going forward. However, the ALJ found that waiver of the overpayment was the appropriate resolution, because the Board previously waived the overpayment in *Henderson*. The ALJ reasoned that Respondent should not be given different or disparate treatment than Mr. Henderson.

The ALJ concluded that Respondent's appeal should be granted in part. He upheld CalPERS' decision to calculate Respondent's retirement pension using the 2.0% at 55 retirement formula prospectively. He granted Respondent's appeal and denied recovery of the overpayment. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

September 18, 2013

  
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