

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Joseph P. Furman (Respondent Furman) was employed by the Department of Justice as a Deputy Attorney General until his separation on January 30, 2004. During his employment, he accumulated a total of 16.7 years of service as a member of CalPERS. On January 29, 2004, Respondent Furman submitted a Request for Service Credit Cost Information – Additional Retirement Service Credit (ARSC). On August 19, 2004, CalPERS staff completed and mailed to Respondent Furman cost information and an election document to purchase five (5) years of service credit. No response was ever returned by Respondent Furman.

On March 9, 2011, Respondent Furman contacted CalPERS and requested information regarding eligibility to purchase ARSC. CalPERS advised Respondent Furman that he was not eligible to purchase ARSC since he was no longer in active CalPERS-covered employment, and he was advised of his appeal rights. Respondent Furman filed a timely appeal. This appeal was limited to the issue of whether Respondent Furman, an inactive member of CalPERS, should be allowed to purchase ARSC.

One of the key statutes governing the issues in the case is Government Code section 20909, which sets forth the criteria for purchasing ARSC. Section 20909 provides in pertinent part that:

(b) A member may elect to receive this additional retirement service credit at any time prior to retirement by making contributions as specified in Sections 21050 and 21052. A member may not elect additional retirement service credit under this section more than once.

...

(e)...This section only applies to the following members:

(1) A member while he or she is employed in state service at the time of the additional retirement service credit election.

A hearing was held before an Administrative Law Judge (ALJ) on September 9, 2014. Prior to the hearing, CalPERS explained the hearing process to Respondent Furman and the need to support his case with witnesses and documents. CalPERS provided Respondent Furman with a copy of the administrative hearing process handbook. CalPERS answered Respondent Furman's questions and clarified how to obtain further information on the process.

CalPERS presented evidence at the hearing through the testimony of one witness, cross-examination of Respondent Furman, and related documentary evidence. The evidence at the hearing established that Respondent Furman was informed that a cost and election packet would be issued within a period of time (4-6 months) which required his timely follow-up in order to be valid and to consummate the purchase of ARSC. Because he separated from covered service almost immediately after asking for the cost packet, in February 2004, this was Respondent Furman's only opportunity to

purchase ARSC. The evidence further established that pursuant to CalPERS practice, a subsequent notice was automatically mailed to Respondent through a mail merge system. A cost information and election package was prepared and was mailed by CalPERS to Respondent Furman on August 19, 2004. The election package specified that it was void if not returned within 30 days of its issuance.

Respondent Furman, a licensed attorney, represented himself at the hearing. He introduced evidence through his own testimony, cross-examination of CalPERS' only witness, and submission of related documentary evidence. At the hearing, Respondent Furman testified that he had not submitted an election to purchase ARSC because he had never received the costing packet and had not noticed that the packet had not been sent due to the press of his law practice and personal obligations until he was preparing to submit a service retirement application in 2011. He argued that he should be allowed to purchase the ARSC under the "mistake statute," Government Code section 20160. He also argued that he was entitled to invoke the doctrine of equitable estoppel against CalPERS in order to effect his purchase.

Government Code Section 20160 provides, in pertinent part:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of 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.

(3) ...Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

After considering the testimony and documentary evidence from both Respondent Furman and the CalPERS witness, the ALJ held that Respondent Furman was clearly prohibited from currently purchasing ARSC by the terms of section 20909. Further, Respondent Furman was not entitled to invoke section 20160 to complete the transaction, as the seven year delay in following-up on his initial request for ARSC costing disqualified him from eligibility under the "mistake" statute. The lack of follow-up could not qualify as a "correctable mistake" because he had failed "to make the inquiry that would be made by a reasonable person in like circumstances" per section 20160 (a)(3).

The ALJ further found that Respondent Furman was not entitled to equitable relief under the doctrine of estoppel. The doctrine of equitable estoppel is available in certain circumstances to those who detrimentally rely on representations made by another.

Under the doctrine of equitable estoppel a party may be estopped from denying an obligation if each of the following elements is established:

- (1) The party to be estopped must be apprised of the facts;
- (2) The party must intend or reasonably believe that his or her conduct will be acted upon;
- (3) The party asserting the estoppel must be ignorant of the true state of facts; and
- (4) The party asserting the estoppel must actually rely upon the other party's conduct to his or her detriment.

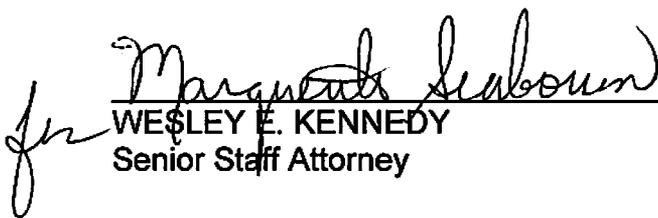
Further, equitable estoppel may only be applied against a governmental agency "where justice and right require it," and it will not be applied against the government where it would effectively nullify a rule of public policy.

The ALJ found that Respondent Furman had not met the third criteria for applying equitable estoppel. Because CalPERS had consistently represented to Respondent Furman the need to follow-up if he did not receive his costing packet within the specified period of time or risk losing his ability to make the purchase, Respondent Furman was not ignorant of the true facts. The ALJ also found that Respondent Furman had not met the fourth criteria for applying equitable estoppel, since he did not establish that he had relied on erroneous staff advice to his injury. Finally, the ALJ held that to permit estoppel where a statute expressly prohibits the purchase of ARSC by those no longer employed by the state would nullify the strong rule of public policy embodied in the statute, and impermissibly enlarge CalPERS' power.

The ALJ concluded that Respondent Furman's appeal should be denied. 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.

December 17, 2014



WESLEY E. KENNEDY
Senior Staff Attorney