

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Tahoe City Public Utilities District employed Barbara Ness (Respondent Ness) for approximately nine years. Based on this employment, Respondent Ness became a CalPERS member. She retired on February 8, 2004.

Respondent Ness lived in California and her mailing address was in Nevada. On November 8, 2010, during a phone call on an unrelated matter, Respondent Ness was told by CalPERS she was in an out-of-state healthcare plan rather than an in-state plan, and that the out-of-state plan had higher premiums. Respondent Ness asked that her healthcare be changed to an in-state policy and it was. CalPERS granted her retroactive reimbursement for six months' of premium overpayments effective to July 1, 2010, which was the start of the in-state plan.

Respondent Ness then asked CalPERS to reimburse her for \$8,800¹ in premium overpayments based on her calculation of the difference between the in-state and out-of-state premiums over the years. CalPERS wrote and explained that regulations promulgated under the Public Employees' Medical and Hospital Care Act (PEMHCA), specifically sections 559.502(f)(2)(C)(3) and 559.506(c)(1), only provided for six months of retroactive reimbursements under these circumstances. Furthermore, Respondent Ness had received yearly plan statements explaining that she was enrolled in an out-of-state health care plan, yet she never contacted CalPERS to make a change after receiving these notices. CalPERS provided Respondent Ness with appeal rights and she timely appealed.

Prior to the hearing, CalPERS explained the hearing process to Respondent Ness and the need to support her case with witnesses and documents. CalPERS provided Respondent Ness information on procedures and, after counsel was retained, explained the process to him as well. Respondent Ness's claim in the appeal is that CalPERS made an error or omission as defined by Government Code section 20160 that ought to be remedied by the reimbursement of \$8,800.

At hearing, CalPERS staff testified that until 2004 there was no difference in the premiums for out-of-state and in-state health plans. The increase in premiums began in 2005 and was based on zip code and mailing address. Respondent Ness was sent a 2005 health plan personal information statement which indicated she was "enrolled in **PERS CHOICE OUT OF STATE**". Yearly after 2005, she received similar statements which contained highlighted and bold notations that she was enrolled in an out-of-state plan. CalPERS staff testified about the difference between out-of-state versus in-state premiums. CalPERS staff presented their calculations of overpayments, which came to a total amount of only \$2,987.82 for the time period from 2005 to 2010, not the \$8,800 as claimed by Respondent Ness.

¹ At hearing it was determined that this figure was not correct. The amount of overpayment was \$2,987.00.

Respondent Ness testified and confirmed that CalPERS staff brought to her attention the fact she was in an out-of-state health plan. She had never moved and while she resided in California, her mailing address was in Nevada.

Pursuant to subdivision (a) of Government Code section 20160, the Board has the discretion to correct "errors or omissions" of any member "upon any terms it deems just," provided that: (1) the request to correct the error or omission is made "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;" (2) the error or omission was the result of mistake, inadvertence, surprise or excusable neglect as used in Section 473 of the Code of Civil Procedure; and (3) the correction will not provide the party seeking correction with a status, right or obligation not otherwise available. The failure by a member "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 the section.

The Administrative Law Judge (ALJ) determined that Respondent Ness did not establish that she was entitled to relief based on error or omission because an error or omission is not correctable if the member does not make the inquiry that would be made by a reasonable person in like or similar circumstances. The ALJ explained that Respondent Ness received yearly statements that she was enrolled in an out-of-state PERS Choice Plan and she had an obligation to read and notify CalPERS of any error in information. She did not do that for the period of 2005 to 2010 even though she received yearly statements. The ALJ found that Respondent Ness failed to make the reasonable inquiry necessary to establish her entitlement to relief.

The ALJ concluded that Respondent Ness'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


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