

ATTACHMENT C
RESPONDENT'S ARGUMENT

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10 **BEFORE THE BOARD OF ADMINISTRATION**
11 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
12 **STATE OF CALIFORNIA**

13 In the Matter of the Statement of
14 Issues Against:

Case No. CalPers/JRS 2013-0683

OAH No. 2014-100797

15 Julie Stothers Horner, trustee of the
16 Gloria J. Stothers 1993 Revocable
17 Trust,

**RESPONDENT'S ARGUMENT
AGAINST ADOPTION OF
PROPOSED OAH DECISION OF
APRIL 21, 2015**

18 Respondent

**FOR THE PERS BOARD MEETING
ON JUNE 17, 2015**

19 **INTRODUCTION**

20 Except for the legal conclusion that there is no statute of limitations
21 applicable to the respondent's claim, which should be adopted as precedent, the
22 proposed decision is based on an erroneous view of the applicable law and
23 misconstrues undisputed facts in the record. For the reasons shown, it should not
24 be adopted nor considered precedent for any purpose.

25 The underpayment of retirement benefits in question arose from the judicial
26 service of the late Stephen R. Stothers, a judge of the Los Angeles Municipal and
27 Superior courts, payable to his widow as he died after approximately 17 years'
28 active service while he was in active service.

This case contains two contested Issues, both pertaining to underpayment of

1 the survivor's benefits:

2 a. Failure to allow the purchase of credits for additional "on the job time"
3 due to the judge's pre-judicial military service credit of a maximum of four
4 years due to concealment from Judge Stothers and his widow of their ability
5 to purchase such credits, a matter JRS had a fiduciary duty to disclose to
6 them both, but which it did not; and

7 b. Underpayment of that proportion of "protected period"¹ retirement
8 benefits, calculated based on unlimited cost of living increases ["colas"]
9 accrued and vested during this protected and payable upon retirement
10 together with non-protected service benefits calculated without cola
11 application.

12 **THE STATUTORY RIGHT TO PURCHASE OF ON-THE-JOB TIME CREDITS FOR**
13 **PRE-JUDICIAL MILITARY SERVICE**

14 Since July 1, 1979, all general provisions of the PERS laws, such as the right
15 to purchase on-the-job time credit for prior military service, apply to JRS
16 pensioners. ***Government Code § 75005.***

17 Judge Stothers served in World War II on active and reserve duty for more
18 than four years prior to being appointed to the Los Angeles County municipal bench
19 in December, 1967. The county paid 100% of his salary during this service until
20 his elevation to the superior court December, 1969, and both he and the county
21 contributed to the JRS retirement plan.

22 Because at the time, counties were responsible for 100% of municipal court
23 judges' salaries, Judge Stothers was a "local" member of PERS. ***Villanazul v. City***
24 ***of Los Angeles, (Supreme Court en banc, 1951) 37 Cal.2d 718, 724.***

25 Two years after he became a judge, ***Government Code § 20932*** was

26 _____
27 ¹ The protected period service was rendered between Jan 1, 1970 and Jan 1, 1977.

1 chaptered into law, effective December 1, 1969, which provided that a member of
2 PERS (which manages the JRS program) could elect to receive state service credit
3 for pre-judicial-appointment military service, provided they paid for it.²

4 No time limit for such payment exists, thus this credit can be purchased by a
5 survivor or the survivor's successor in interest as here, and there is no prohibition
6 from deducting this expense from the underpaid benefits before payment.

7 JRS concealed the statutory right to purchase this credit both from Judge
8 Stothers and his widow. The extent of his military service should have been but
9 never was never inquired about.

10 Just like any other type of insurance, the purchase by the Judge of four
11 years' worth of judicial service credit based on his prior military service would have
12 allowed him to either retire with full benefits after 16 years' active judicial service,
13 or if he died while in office with less than 20 years' service, which is what
14 happened, his clock-time judicial service would be increased by a maximum of four
15 years, such that his widow would be paid as if he had 20 years' judicial service,
16 which would provide the maximum benefit available.

17 It is without dispute that no opportunity was afforded the judge nor Mrs.
18 Stothers to purchase this additional job time based on prior military service.

19 The OAH judge declined to allow the respondent to purchase this credit. It is
20 proposed that this case be remanded to the OAH for a determination as to the
21 precise amount of the underpayment of benefits (which should have been based on
22 the maximum 20 years' service if this service credit is purchased), allow the
23 respondent to purchase the necessary military credits (as a deduction from the
24 benefits to be paid) with a return to the board for adoption in a published decision.

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28 ² This benefit is commonly mis-construed as a state employee's right to purchase state
employment credits after taking a military leave of absence from active state service. The benefit in
question is the right to purchase state service credits based on "pre state service" military service.

1 **UNDERPAYMENT DUE TO NON-APPLICATION OF COLAS TO THAT**
2 **PROPORTION OF THE BENEFITS ATTRIBUTED TO PROTECTED SERVICE**

3 It is without dispute that vested retirement benefits cannot be divested
4 constitutionally, yet that is what JRS has done with respect to Judge Stothers'
5 seven years' service during the protected period when unlimited COLA's were
6 applicable to retirement benefits; JRS has unconstitutionally calculated protected
7 period benefits the same as the unprotected period benefits.

8 The OAH judge did not properly construe the respondent's prayer for relief.
9 She does **not** seek application of the unlimited COLAS to all of Judge Stothers'
10 judicial service, before and after the protected period nor did she ever refer to
11 protected period cola adjustments as being based on a "hypothetical judge" salary,
12 although JRS has consistently argued to the contrary and the OAH agreed.

13 The proper calculation of the protected period retirement benefits, to which
14 COLAS should have been applied, was presented and disregarded.

15 Retirement benefits are vested each day active employment occurs.

16 ***Olson v. Cory*, (1982) 134 Cal. App 3d 85, 90-91 ["Olson II"]**.

17 Judicial retirement benefits are tied to a sitting judge's salary. Protected
18 period service retirement benefits are **not** subject to a sitting judge's salary **after**
19 **the protected period ended.**

20 Thus, since the active judge's salary on the last day of the protected period
21 was \$49,166 per annum, **this non-hypothetical salary is "frozen" for**
22 **protected period retirement benefit calculations, because the actual**
23 **retirement benefits are based on that salary initially, but thereafter**
24 **subject to unlimited cola increases, annually, if and only if there is a**
25 **positive change in the cost of living index.** These protected-period COLA
26 adjustments are made ***without regard to the salary of a currently serving***
27 ***judge.***

28 Notwithstanding the fact that protected benefits are vested with a right to

1 COLA adjustments, the OAH decision unconstitutionally supported treating them
2 identically with non-vested, non-protected service benefits.

3 Respondent has never contended that the protected period benefits were
4 subject to the "double dip" of both unlimited colas and a percentage of the current
5 judicial salaries that increase occasionally, although the OAH misconstrued
6 respondent's position as requesting just that.

7 Further, the JRS erroneous argument to the OAH that the protected
8 period/cola adjusted benefits sought were tied to some "hypothetical judge" salary
9 was adopted by the OAH. This has never been the case. ***There is nothing***
10 ***hypothetical about the sitting judges' salary on the first day after the***
11 ***protected period ended, January 1, 1977; it is a matter of record.***

12 The board is invited to consider respondent's brief to the OAH and supporting
13 evidence, which explains in greater detail how the calculations should have been
14 made but were not, and the supporting authorities.

15 **CONCLUSION**

16 A substantial amount of attorneys fees have been paid to outside counsel by
17 PERS thus far with the result being an OAH decision that should neither be adopted
18 nor used as precedent except for the issue of no statute of limitations being
19 applicable, which is the correct reading of an unambiguous statute and which should
20 be made binding precedent for all purposes. It might make economic sense to
21 resolve this case by board action today and grant the respondent the relief she
22 seeks. The total under-payment, including pre-judgment interest is approximately
23 \$3,181,002.00. Updated spread sheet calculations can be supplied and a remand
24 for this purpose to the OAH is appropriate.

25 Respectfully submitted June 5, 2015,

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