ATTACHMENT C

RESPONDENT'S ARGUMENT

ATTACHMENT C

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FROM: Adam L. Marangell

Re: In Re the Matter of Steve Rubalcava
Case No. 2012-0570
OAH No. 2014080677

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BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (CALPERS)

In the Matter of the Cancellation of Military Leave of Absence Service Credit of: STEVE RUBALCAVA, Respondent	Case No.: 2012-0570 OAH NO.: 2014080677 **RESPONDENT'S WRITTEN ARGUMENT AGAINST PROPOSED DECISION** ALJ: Hon. David B. Rosenman Hearing Date: 2/26/15 Hearing Time: 9:30 a.m. Hearing Location: Los Angeles, CA

INTRODUCTION

Respondent objects to the proposed decision submitted to the Board in this matter and hereby submits this brief in support thereof. Namely, Respondent argues that he is entitled to military service credit or, alternatively, he should not have to repay CalPERS monies paid to him generated solely by the negligence of CalPERS and consisting of monies Respondent never requested.

The military credit issue was addressed by the Administrative Law Judge ("ALJ") first,

consisting of the first two issues. Whether PERS may seek repayment of benefits already paid to respondent was the third and last issue.

I. RESPONDENT IS ENTITLED TO MILITARY SERVICE CREDIT

CalPERS relies upon *Government Code* § 20997 in denying Respondent the right to "free" military leave credit. This statute reads:

> (a) Notwithstanding any other provision of this part, for each member other than a National Guard member absent without compensation due to military service pursuant to Section 20990, the employer shall contribute an amount equal to the contributions that would have been made by the employer and the employee during the absence. The employer's contribution pursuant to this section shall be based upon the member's compensation earnable and the contribution rates in effect at the commencement of the absence, if any of the following apply:
>
> (1) The member returns to state service within six months after receiving a discharge from military service other than dishonorable.
>
> (2) The member returns to state service within six months after completion of any period of rehabilitation offered by the United States government, except that for purposes of this section, rehabilitation solely for education purposes shall not be considered.
>
> (3) The member is granted a leave of absence from the state employer as of the same date the member was reinstated to that employment from military service, provided that the member returns to state service at the conclusion of the leave.
>
> (4) The member is placed on a state civil service reemployment list within six months after receiving a discharge from military service other than dishonorable and returns to state service upon receipt of an offer of reemployment.
>
> (5) The member retires from this system for service or disability during the course of an absence from state service for military service.
>
> (6) The member dies during the course of an absence from state service for military service.

The issue at hand centers around section (a)(5) as Respondent admittedly does not fall under any other section. Namely, CalPERS alleges that Respondent did not "retire" and therefore is not

eligible under this statute.

Respondent disagrees with this assessment and argues that he "retired" at the time he notified his employer that he was separating from his employment, on March 28, 2005, which was during the course of his absence for military service.

It is well settled that "any ambiguity or uncertainty in the meaning of the Public Employees' Retirement System legislation is to be liberally construed in favor of the public employee, as long as such construction is consistent with the clear language and purpose of the statute." *City of Martinez v. Workers' Comp. Appeals Bd. (2000) 85Cal.App.4th 601, 617.*

This liberal construction is also echoed in Federal law. In 1994 Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), a complete rewrite of the much-amended 1940 reemployment statute, codified at *38 U.S.C. 4301, et seq.* In its first case addressing USERRA, the Supreme Court held that USERRA should be "liberally construed for the benefit of he who has laid aside his civilian pursuits to serve his country in its hour of need." *Fishgold v. Sullivan Drydock & Repair Corp. (1946) 328 U.S. 275, 285.*

Furthermore, *Zuniga v. Los Angeles County Civil Service Commission (2006) 137 Cal.App.4th 1255*, is illuminating regarding the semantics of resignation versus retirement. While the facts and holding of *Zuniga* are dissimilar, the central issue is comparable:

> "In a petition for rehearing, Zuniga argues that he did not "resign," but instead "retired," and that the distinction is significant because the Commission retains jurisdiction in the cases of retirement. We disagree. As we understand the county's system and others like it (e.g., State Personnel Board and the **Public Employees' Retirement System**), the activating event is separation from service, whether by retirement, resignation, death, or discharge." *Id. at 1260, emphasis added.*

Here, Respondent clearly separated his service during his military absence and, as stated by the *Zuniga* court, "retired" from service as defined within *Government Code* § 20997(a)(5). He is thereby eligible for "free" military service credit.

In the alternative, Respondent should be able to purchase his military service credit, as he had been doing for years now and at the express invitation from CalPERS. In this regard, CalPERS should be estopped from cutting off Respondent's right to purchase military service credit. Respondent initially requested "free" military service credit and took the paid option only *after* CalPERS unilaterally invited him to do so. Respondent has thus detrimentally relied on this invitation since January, 2012, a lengthy time span entirely of CalPERS making.

II. PRINCIPLES OF EQUITY PREVENTS CALPERS FROM REOUPING ITS PAYMENTS TO RESPONDENT

In January of 2005, Respondent was honorably discharged from military service and was required to report to his employer (Riverside Sheriff's Department) in March. In March, however, Respondent separated from his employment with the intention to receive his retirement upon turning 50, which would be in approximately three years. Respondent considered himself "retired" at that time due to separating his employment with the intent to draw retirement benefits, which he is now doing through CalPERS.

Respondent wrote CalPERS in an attempt to receive military service credit time for the three years and two months he was assigned to active duty. Subsequently, CalPERS notified Respondent that he was not eligible to "free" military service credit. Importantly, Respondent ***never requested*** to purchase military service credit. **Nonetheless, CalPERS notified Respondent that while he was not eligible to "free" military service credit he could, in fact, purchase such credit, which he began doing on or about June 27, 2011.**

The first notice Respondent received that CalPERS was taking a contrary position with respect to his right to purchase military service credit was on January 15, 2015; nearly four years later. This was also the **first notice** to Respondent that CalPERS was seeking repayment of retirement benefits.

The foregoing facts are undisputed and were introduced at the hearing and referenced by the ALJ. If the Board upholds the ALJ's decision to deny Respondent military credit, it should reject the ALJ's recommendation that Respondent pay back CalPERS the monies already paid. The ALJ stated that Respondent should not "reap a windfall" due to these errors. This begs the question, however, of whether Respondent should be financially punished due to errors not of his making—of monies he never asked for in the first place. He simply asked CalPERS if he could receive free military credit, obviously never intending to pay for the credit. Again, he only elected the paid credit as the express invitation of CalPERS. There was no warning that at some point, perhaps four years later, he would have to repay all the money paid. Indeed, the only reason the amount is so large is due to CalPERS waiting nearly four years to claim its error and seek repayment.

Respondent contends this is inherently unfair and places an extreme financial burden on him. Respondent has been retired for years now and relies heavily on his retirement income. Indeed, *Government Code § 20160(a)* places a "reasonable time" not to exceed six month for CalPERS members to seek relief from mistakes. This statute also places a "reasonable person" standard upon the member. By extension, CalPERS should be held, in this case, to a similar standard—if not statutorily than in equity.

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CONCLUSION

Based upon the evidence submitted and the arguments contained herein, Respondent requests that the Board REJECT the ALJ's Proposed Decision and order that:

1. Respondent is entitled to receive military service credit at no cost; and/or
2. Respondent is entitled to purchase military service credit; and/or;
3. CalPERS is not entitled to recoup any erroneously monies paid to Respondent.

Respectfully Submitted,

LAW OFFICE OF ADAM L. MARANGELL

DATED: June 4, 2015

BY :
ADAM L. MARANGELL
Attorneys for Appellant

PROOF OF SERVICE
STATE OF CALIFORNIA

I am a citizen of the United States and a resident of the county aforesaid. I am over the age of 18 years and not a party to the within entitled action. My business address is: 155 N. Riverview Dr., Ste. 201, Anaheim Hills, CA 92808.

I am employed in the county of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 155 N. Riverview Dr., Ste. 201, Anaheim, CA 92808.

On June 4, 2015, I served the foregoing document described as:

RESPONDENT'S WRITTEN ARGUMENT AGAINST PROPOSED DECISION

on interested parties in this action by placing the true copies thereof enclosed in (a) sealed envelope(s) addressed as follows:

Cynthia A. Rodriguez
California Public Employees' Retirement System
P.O. Box 942707
Sacramento, CA 94229-2707

BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Anaheim, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on June 4, 2015, at Anaheim Hills, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Adam L. Marangell