ATTACHMENT C

RESPONDENT'S ARGUMENT

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CalPERS Board Unit

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application to Purchase Service Credit Prior to Membership of:	)	CASE NO. 2014-0459 OAH NO. 2014060618
REZA G. ZAMANIAN	)	RESPONDENT'S ARGUMENT
Respondent,	)	Date: June 17, 2015 Location: Sacramento ALJ: Timothy J. Aspinwall

CalPERS did not present evidence sufficient to meet its burden of proving that the SPM Cost Package had in fact been mailed to Respondent's home address as alleged. In order for the burden of proof to shift from Cal PERS having the burden of proving mailing to Respondent having the burden of proving non-receipt of the mailing it is necessary for CalPERS to first present admissible evidence the proves that the mailing occurred. In this case, at hearing CalPERS presented no such evidence. Not only did the CalPERS witness have nothing to do with the mailing at issue, but moreover she did not even work in the department that does do the mailing. Even more importantly to CalPERS complete failure of proof on this point is the fact that their Exhibit 7 – Participant Notes demonstrate that when documents are mailed the Notes should contain and entry to that effect. For example, when the Participant Notes document the mailing of an ARSC election packet on July 18, 2005 the note specifically states that such an

item was "Mailed". Whereas when the subject matter SPM Cost Package is mentioned in the Notes on April 8, 2013 it only states "QC complete – SPM cost packet". Nothing is stated within the Notes to indicate that the SPM cost packet was ever mailed out. Only the speculation of CalPERS witness Christina Estrada was introduced as "evidence" of the actual mailing and she had to admit she had no such independent knowledge but that she assumed that "QC complete – SPM cost packet" meant that it had been mailed. CalPERS witness Lindsey Bailey even admitted that the Participant Notes should reflect mailing.

Additionally, the mailing could have been done by certified mail but was not; it could have been done with a Declaration of Mailing attached but was not; it could have been done with a Return Receipt Requested but was not; a witness familiar with the mailing procedures within the Quality Control department could have been presented but was not. Therefore no documentary or testimonial evidence exists on this record that would allow the ALJ to have found that CalPERS met its initial burden of proving the mailing. Without this initial burden being met it was unnecessary for Respondent to overcome the presumption of receipt that comes along with proof of mailing. Nonetheless he put on a strong case of not only his household's non-receipt of the SPM Cost Package but also of the possibility of misdelivery as a result of the nearly identical nearby address.

Moreover, the SPM Cost Package letter does not tell the participant how to calculate the date within which to return the forms. It merely says within sixty days and does not say sixty days of what. Even had Respondent actually received the SPM Cost Package he would not have been unreasonable for him to add the five days for mailing that is customary under California civil law, (see CCP 1013 which may not apply by its terms but does highlight the uncertainty of the expressed 60 day deadline), to the sixty days. Had he been allowed to do so he would have

timely discovered his non-return of the SPM Cost Package in time to have submitted it when he came to the service center on June 11, 2013 and learned of the alleged April 8, 2013 mailing. Thus he should have been afforded the relief available under GC Section 20160. The ALJ's finding that a reasonable person would postpone his retirement or check with CalPERS in sufficient intervals to make sure the 60 day limit was not reached is unreasonable when the factual findings acknowledge that Respondent had been told it would take 30 days to six months for him to receive the SPM Cost Package.

The ALJ finding that the returned SPM Cost Package is the "election" expressly mentioned and required in GC Section 21032 cannot be correct. By its very terms this statute states that a Member "may elect at any time prior to retirement, in accordance with the regulations of the board, to receive credit for public service . . .". Neither of the CalPERS witness nor CalPERS counsel was able to recite or produce any "regulations of the board" that applied to this statute. Apparently there are none. One thing is certain even without regulations to flush out further meaning and that is the fact that the word "elect" cannot refer to the signing and returning to CalPERS of the SPM – Cost Package because it was not due to be returned until sixty days after April 8, 2013 and therefore was not due until long after Respondents April 13, 2013 retirement date. The word "elect" therefore must have a different meaning and Respondent submits that the more reasonable and different meaning must be that the Member submit a Request for Service Credit Cost Information prior to retirement. This is exactly what Respondent did submit on March 5, 2013. The document that the ALJ determined is the necessary election, (i.e. the SPM Cost Package) was not even allegedly mailed to Respondent until five days before his selected retirement date of April 13, 2013 and was not due for sixty days thereafter.

Given the confusion surrounding the meaning of the statute, the mailing of the SPM Cost Package, the deadline for returning the SPM Cost Package and Respondent's actual receipt of the SPM Cost Package it is respectfully suggested that the provisions of GC Section 20160 should be applied in this factual setting and the error allowed to be corrected.

DATED this 4th day of June, 2015

ENSMINGER LAW OFFICES, P.C.
Attorney for Respondent

By: _____
D. Randall Ensminger

Certificate of Service

The undersigned hereby certifies that the original of the foregoing was mailed and faxed this 4th day of June, 2015 to Cheree Swedensky, Assistant to the Board, CalPERS Executive Office, P.O. Box 942701, Sacramento, CA 94229-2701; Facsimile (916) 795-0725 and a copy mailed to Wesley E. Kennedy, attorney for CalPERS.

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Janel Rose