

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Lisa Hilder (Respondent) was employed as a social worker with the Department of State Hospitals – Patton. By virtue of her employment, Respondent was a state safety member of CalPERS. Respondent had approximately 10-years of state safety service, which was regarded as first tier service. Respondent also had 3.797 years of second tier service. Respondent elected to convert her second tier service to first tier service, which required a purchase of approximately \$15,575.00. After Respondent paid for the conversion of second tier to first tier service, she applied for disability retirement. Respondent was approved for disability retirement. After she was approved for disability retirement, Respondent became aware that the conversion of her second tier service to first tier did not result in an increase in the amount of the benefit she received. Respondent requested that her election to convert her second tier service to first tier service be cancelled or rescinded and that CalPERS refund to her the \$15,575.00 paid for the conversion. CalPERS Staff (Staff) reviewed Respondent's file and controlling statutes and determined that there had been no mistake, inadvertence, surprise or excusable neglect, as those terms are used in Government Code section 20160, sufficient to justify granting Respondent's request. Staff informed Respondent of their determination and Respondent appealed. A hearing on Respondent's appeal of Staff's determination was held on October 26, 2016. The parties filed post-hearing Briefs with the Administrative Law Judge (ALJ). The matter was submitted to the ALJ on November 23, 2016.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

The ALJ received into evidence and considered documentary evidence and the testimony of Respondent and a CalPERS witness.

The evidence showed that Respondent began calling CalPERS in August 2013, with questions regarding disability retirement. Staff responded to Respondent's questions and provided information regarding disability retirement, vesting for health benefits and the availability of Respondent to convert second tier service to first tier service. On September 10, 2013, Staff sent Respondent a tier conversion packet, which explained the tier conversion process. On the first page of the document, in bold font, was the statement that any tier conversion election, once made, would be irrevocable. More significantly, Respondent was informed, on page nine of the document, that a CalPERS member, filing for disability retirement, was subject to a cap (maximum benefit amount) of 33.33 percent of their final compensation, regardless of whether they were under a second tier or first tier formula and that, because of the cap, a tier conversion might not result in an ultimate increase in the total retirement benefit.

On September 20, 2013, Staff sent Respondent an estimate regarding disability retirement. Respondent had requested such an estimate. The estimate identified the three state employers Respondent had worked for, listed the amount of service credit attributed to each employer, and stated whether the service was regarded as being second tier or first tier. The estimate also informed Respondent that "a limit has been applied to your percent of final compensation." The percentage attributable to each employer equaled 33.33 percent, consistent with the information set forth in the tier conversion election packet sent to Respondent 10 days earlier.

On November 1, 2013, Respondent submitted a tier conversion application, seeking to convert her 3.797 years of second tier service to first tier. The cost of the conversion was \$15,574.73. Respondent paid that amount and the tier conversion was completed on November 21, 2013. Again, in the document confirming completion of the tier conversion, Respondent was advised (bold font and capital letters) that the election was irrevocable.

On January 2, 2014, Respondent filed an application for disability retirement, which was approved in February, 2014.

On February 20, 2014, Staff sent Respondent a disability retirement estimate, similar to the estimate previously sent to Respondent on September 20, 2013. The February 20, 2014 estimate reflected updated information. However, despite the fact that the completed tier conversion resulted in a change of the retirement formula for Respondent's second tier employer, from 1.25 percent at age 65 to 2 percent at age 55, the enhanced retirement formula (applied to the 3.797 years of service) did not increase Respondent's overall benefit payment because, as previously stated, Respondent's retirement benefit, if provided to her as a disability retirement rather than as a service retirement, was capped at 33.33 percent of her final compensation.

Respondent claimed that, in conversations with Staff, she was encouraged to convert her second tier service to first tier. The CalPERS witness, testifying on the basis of communications between Staff and Respondent documented in the Participant Notes system, stated that Staff "provided advice about the process to pursue a tier conversion," but that there was no "evidence that any CalPERS employees advocated a tier election conversion to [Respondent]." It was "explained that CalPERS employees may provide *guidance* about the retirement process, but cannot make *recommendations* regarding what a member should or should not do." (See Factual Finding No. 20; Italics in the original.)

After considering all of the evidence and testimony, the ALJ found, in relevant part, as follows:

"[Respondent's] election to pursue a tier conversion was not a mistake within the meaning of Section 473. [Govt. Code sec. 20160] She began exploring a tier conversion in September 2013, paid for it two months later, and filed her disability retirement application in January 2014. The documents were clear and specifically advised that 1) the election might

not change retirement benefits, 2) any election made would be irrevocable, and 3) disability retirement benefits are capped at 33 percent regardless of whether the service years are under the first or second tier. ...

There was no evidence that [Respondent] inquired as to the effect of the cap on her decision to convert second tier service to first tier service. There was also no evidence that CalPERS incorrectly advised [Respondent] regarding the propriety of a tier conversion. CalPERS is responsive; it provides documents and service to help a member accomplish their purpose. CalPERS is not an independent legal advisor and does not provide advice as to what a member should or should not do. ..."
(See Legal Conclusion No. 4.)

The ALJ concluded:

"As CalPERS correctly pointed out in its closing brief, CalPERS exists within the statutory and constitutional scheme under which it was created. CalPERS is without jurisdiction to provide a 'refund' of [Respondent's] money unless there is some statutory basis to do so. The only statutory basis that would allow CalPERS to return the money would be if she proved mistake under Government Code section 20160. [Respondent] did not prove that she made a mistake, on her own or as a result of any wrongful advice from CalPERS employees, when she elected a tier conversion that later proved not beneficial. Accordingly, CalPERS is not authorized by law to cancel the tier conversion and refund the \$15,574.73 it properly accepted in order to effectuate the tier conversion."

(See Legal Conclusion No. 4; Final Paragraph.)

The ALJ concluded that Respondent'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.

February 15, 2017



RORY J. COFFEY
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