ATTACHMENT C

RESPONDENT'S ARGUMENT
September 8, 2017

Via U.S. Mail and Facsimile to 916-795-3972

Cheree Swedensky
Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

Re:  In the Matter of the Appeal of the Effective Retirement Date of
Carol Morrison, Respondent
Agency Case No. 2016-0495, OAH NO. 2016090797

Dear Ms. Swedensky,

Enclosed please find Respondent's Argument in the above matter, which is being heard by the Board of CalPERS on September 20, 2017. The facsimile is being provided on September 8, 2017, per instructions provided by CalPERS, with the hard copy following by mail.

Please feel free to contact my office with any questions. Thank you.

Sincerely,

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BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal of the Effective Retirement Date of
CAROL R. MORRISON,
Respondent.

AGENCY CASE NO. 2016-0945
OAH NO. 2016090797

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Board Meeting Date: Sept. 20, 2017
Hearing Location: Sacramento
Respondent Carol R. Morrison files this Argument urging the CalPERS Board to decline to adopt the Proposed Decision of the Administrative Law Judge in this matter. The Proposed Decision rejected Respondent’s request for a correction of mistake under Government Code Section 20160. It concluded that it was Respondent’s responsibility to contact CalPERS earlier to correct her misunderstanding and obtain the information that CalPERS had omitted from all its correspondence, not CalPERS’ responsibility to provide clear information to its members to whom it owes fiduciary duties. It further concluded that no forfeiture occurred despite Respondent’s loss of over $30,000 of earned pension benefits. Respondent urges the Board to reject the decision and direct CalPERS to revise her retirement date to January 3, 2008.

I. ISSUES PRESENTED.

At issue in this matter is (1) whether Respondent “made a mistake which was the result of inadvertence, mistake, surprise or excusable neglect correctable by Government Code 20160,” and (2) whether CalPERS’ refusal to grant Ms. Morrison an effective retirement date of her 63rd birthday on January 3, 2008, results in an unlawful forfeiture of a vested pension right.¹

II. FACTS.

The facts are set forth in the Proposed Decision. Respondent takes no issue with the facts as set forth through Factual Finding No. 21 and therefore does not repeat them here.

However, following Finding No. 21, the Proposed Decision begins a section called “Discussion,” which states legal conclusions despite its placement under “Factual Findings.” For the reasons discussed below, Respondent urges the CalPERS Board to reject those conclusions in the Proposed Decision (regardless of their location in that decision) that are not supported by the evidence or reflect an error of law.

III. ARGUMENT.

The following elements of Government Code Section 20160 are uncontested by

¹ The Proposed Decision adopted CalPERS’ characterization of the forfeiture issue as “raised at the hearing.” However, Respondent raised it in her appeal correspondence with CalPERS and CalPERS responded to it at that time. Proposed Decision at 5, 7. It was also discussed extensively in Respondent’s Hearing Brief submitted before the hearing.
CalPERS: (1) Respondent's mistake of fact, is of a type encompassed by Government Code 20160; (2) Revising her retirement date to January 2008 would not provide Respondent with a benefit to which she is not otherwise entitled under the PERL; and (3) Respondent sought correction within a reasonable time after discovering her error.

Thus, the refusal to allow a correction under Gov. Code 20160 is based solely on the conclusion that Respondent did not make "the inquiry a reasonable person would make." This conclusion is wrong, because it disregards evidence favorable to Respondent as well as CalPERS's fiduciary duty to provide complete and unambiguous information to its members.

A. The Proposed Decision Disregards Evidence That Respondent Was Misled by CalPERS Materials.

First, the ALJ asserts that "it was respondent's responsibility to review the available information in a timely and thorough manner to plan for her retirement." Proposed Decision at 10. This statement implies a factual finding that Respondent did not review materials provided to her, and it also implies a finding that those materials adequately explained the situation and alerted her to the incorrectness of her understanding.

But the evidence did not reflect that Respondent did not read her annual statements. (The evidence did reflect that she did not even receive any CalPERS newsletters until after she commenced her pension in August of 2014.) The Proposed Decision's assertion that Respondent did not review materials sent to her unfairly paints her as far less reasonable than she was.

Second, the ALJ asserted that Respondent did not "establish that there was anything in CalPERS's Annual Member Statements or other materials she received about her pension benefits that was misleading." Proposed Decision at 10. This is simply a misstatement of the evidence. As set forth in the Proposed Decision, the member statements refer to the availability of a pension and the existence of a formula, but do not explain it. The closest the statements come to explaining the problem is a fine-print notation in the 2010 statement (and no others) that lists the same figure for monthly benefits connected to two different commencement dates. It appears in no other statements and is buried in boilerplate that otherwise looks the same in each statement, hardly the kind of type designed to be noticed by the reader. The other annual

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statements do not even mention the formula or list the benefit factor table.

The evidence established exactly how Respondent found the information misleading: the information above was incomplete and ambiguous, because it was provided right next to other information that showed an account that was ever-increasing due to the accumulation of interest, and she had been informed in 1996 that there were "definite advantages to leaving her funds in the system." She also was familiar with other retirement systems in which a delay continues to result in an increased monthly amount. Thus, the hints and cross-references in the CalPERS information were not sufficiently clear to demonstrate that her understanding was wrong. Only through triangulating multiple sources of information — the statements and the membership booklet she had received in 1992, well over a decade before the problem arose — could Respondent have recognized that her understanding was wrong. Thus, Respondent clearly explained how the statements were misleading for her. The Proposed Decision glosses over that evidence, providing unearned support to the conclusion that Respondent did not make a reasonable inquiry.

B. The Proposed Decision Transfers CalPERS' Fiduciary Duties to Respondent.

CalPERS has a fiduciary duty to deal in good faith with its members and to fully inform them of their options. Hittle v. Santa Barbara County Employees Retirement System (1995) 39 Cal.3d 374, 393-94 and n. 12. Communications must be complete and unambiguous. In re Application for Retroactive Reclassification to State Industrial Membership from State Safety Member of William R. Smith, CalPERS Precedential Decision No. 99-01 ("In re Smith") (citing Hittle). By finding that Respondent did not make the inquiry a reasonable person would make under the circumstances, the Proposed Decision relieves CalPERS of its duties and impossibly charges Respondent with the duty to correct the incomplete and ambiguous information provided by CalPERS.

2 Indeed, she did this in 2014, and still was unsure enough that she had to contact CalPERS for confirmation, asking in August 2014 "is all that retirement money lost to me?" However, the fact that she eventually figured it out does not mean that she was unreasonable in not figuring it out earlier.
The Proposed Decision states it is unreasonable to expect CalPERS to “anticipate her incorrect assumptions about her retirement benefits without having brought them to CalPERS's attention.” But this conclusion disregards CalPERS’s fiduciary duties and also exaggerates what Respondent says CalPERS should have done. There must be thousands of members in the situation that Respondent was in – approaching the age at which their benefit factor caps, but not in active CalPERS-covered employment. Although people commonly may decide to delay commencement of a benefit in order to obtain a higher monthly amount when they do receive it, there is simply no basis to believe that a member would choose to delay their pension in a way that results in a permanent loss. Thus, it is unfair to suggest that CalPERS needed to have Respondent’s specific situation brought to its attention in order to anticipate this problem.

CalPERS is aware of members who have separated from service for more than nine months and not returned to covered employment. It is not unreasonable to expect the fiduciary of the retirement system to include in member statements a note to the effect that “The benefit factor under your retirement formula stops increasing at age X. Unless you return to CalPERS-covered employment, delaying retirement past that age will result in the permanent loss of monthly benefits for each month of delay.” CalPERS’s claim that it need not convey the severity of the consequence of delaying past age 63 is not consistent with its fiduciary duties.

Similarly, the Proposed Decision relies heavily on the fact that there was a phone number Respondent could have called and seminars she could have attended. But those facts are only relevant if CalPERS would have corrected Respondent’s misunderstanding if she had called or attended a seminar. Thus, CalPERS’ argument is only that Ms. Morrison’s inquiry was inadequate because the information she needed would only be revealed if she asked precisely the right question at precisely the right time. This approach is not consistent with CalPERS’ fiduciary duties.

In Hittle, supra, the California Supreme Court found that SBCERA had violated its fiduciary duties to an employee by making only ambiguous reference to his right to apply for disability retirement rather than withdraw his contributions. Hittle, (1995) 39 Cal.3d 374, 393-94. The member had become disabled, and at termination was given a form to request refund of

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his contributions, and a form letter on which staff had also hand written “[i]f you have filed or intend to file for disability retirement you should not withdraw the above contribution.” Id. at 382. The Court found this disclosure ambiguous and insufficient. Id. at 393-94. It noted the fiduciary duty to “deal in good faith” with the member and found that the ambiguous disclosure amounted to concealment prohibited by fiduciary duties. Id. Addressing the concern that CalPERS raises here, the Court stated:

SBCERA must meet its fiduciary obligation to fully inform its members of their options in obtaining retirement benefits notwithstanding the extent of the Association’s knowledge of each member’s particular situation or entitlement. Nonetheless, the failure to satisfy this obligation is particularly egregious where the Association is on notice that a member may meet the qualifications to apply for a specific type of benefit.

39 Cal.3d at 393 n. 12. CalPERS’ disclosure here – a booklet provided in 1992, ambiguous annual statements, and a general invitation to call for more information – is no better.

Compare CalPERS’ protests here with its actions described in In re Application for Retroactive Reclassification to State Industrial Membership from State Safety Member of William R. Smith, CalPERS Precedential Decision No. 99-01 (“In re Smith”) (citing Hittle). In In re Smith, CalPERS was found to have fulfilled its fiduciary duty to members affected by a classification change by providing individualized packets labeled with affected employees’ names and sending them to the relevant employers, along with computerized lists of affected employees and hypothetical benefit comparisons and explanations of employees’ options. In re Smith at page 6, available at https://www.calpers.ca.gov/docs/99-01-smith-youth-authority.pdf.

Here, CalPERS need not have gone so far. It could have simply told inactive members that they would begin losing money upon reaching the age of maximum benefit factor if they did not return to covered employment. It failed to disclose that information, even when the member called about other issues. When a fiduciary has information that a beneficiary needs to know, it owes that beneficiary a duty to disclose. CalPERS is the fiduciary here. It may not hide behind the beneficiary’s ignorance of the need to ask the question.

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C. Ms. Morrison Has Lost Money.

The Proposed Decision says that no forfeiture has occurred because the PERL does not entitle Respondent to receive a specific amount of money. Proposed Decision at 11. Respondent agrees she has a right to the formula contracted for. That formula accounts for final compensation, years of service, and age (benefit factor). Thus, it allows for multiple options, including earlier commencement at a lower amount, or later commencement at a higher amount (the role of the benefit factor). Up until the point that the benefit factor reaches its maximum, a member might rationally choose to trade delayed commencement in return for a higher benefit when benefits begin. Once the benefit stops going up, no such rational tradeoff exists.

CalPERS will pay no amounts inconsistent with its formula if it grants Respondent's request under Gov. Code 20160. CalPERS had to actuarially account for Ms. Morrison's right to receive a pension based on the benefit factors applicable to her. CalPERS has never been free to deny Ms. Morrison's application for the benefits dictated by the formula. It is her money, earned through her work for the County of Santa Clara. To be sure, the formula governs. Had she died prior to commencing her pension, for example, she would have been entitled only to the pre-retirement death benefit. But she did not die, so she has a lifetime right to a pension. Had Ms. Morrison begun her pension at age 63, she would have begun receiving $403.94 per month as of January 2008. Just because the loss does not represent her entire lifetime pension (since she is still alive) does not mean CalPERS may keep it at Respondent's expense. She had a vested right to it, and CalPERS will not pay it. That is a forfeiture of vested benefits, which the law forbids.3

IV. CONCLUSION.

For the foregoing reasons, CalPERS should reject the Proposed Decision and hold that CalPERS should revise Ms. Morrison’s retirement record to reflect that she retired on January 3, 2008, and pay her pension retroactively to that date.

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3 Please refer to Respondent’s Hearing Brief for discussion of the law of vesting and forfeiture.
Dated: September 8, 2017

Respectfully submitted,

RENAKER HASSELMAN SCOTT LLP

By: Margo Hasselman Greenough

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Please see attached.

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