

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISIONS

Michael G. Cottle and Michele Y. Williams (referred to individually as Respondent Cottle and Respondent Williams; referred to collectively as Respondents) were hired by Respondent California Department of Corrections and Rehabilitation (Respondent CDCR) in 2009 and 2007, respectively. When hired, Respondent CDCR incorrectly placed both Respondent Cottle and Respondent Williams in the Second Tier retirement formula. At the times of the respective errors, Second Tier members did not make retirement contributions. So, neither Respondent Cottle nor Respondent Williams paid contributions towards their retirements while enrolled in Second Tier. Because both Second Tier enrollments were mistakes, CalPERS corrected both enrollments. CalPERS' corrections included the determinations that both Respondent Cottle and Respondent Williams were required to pay their retroactive contributions for the time that they were mistakenly classified as Second Tier. Both Respondent Cottle and Respondent Williams appealed.

Respondent Cottle's Misclassification and CalPERS' Correction

Respondent Cottle first became a CalPERS member through employment with the Housing Finance Agency (HFA) on December 16, 1998. While employed at HFA, Respondent Cottle was correctly enrolled at the State Miscellaneous Second Tier of 1.25% at 65 (Second Tier). As a Second Tier member, Respondent Cottle did not pay any retirement contributions. Respondent Cottle stopped working for HFA on March 4, 2000.

Respondent Cottle returned to state service on April 7, 2009 and began working at Ironwood State Prison (Ironwood), Respondent CDCR. Respondent Cottle was misclassified and erroneously placed in Second Tier when hired by Ironwood and paid no retirement contributions as a Second Tier¹ member. Respondent Cottle transferred positions within Respondent CDCR on March 21, 2011, and Respondent Cottle remained in Second Tier, where he continued to pay no retirement contributions.

In 2013, CalPERS learned that Respondent Cottle never elected the Second Tier classification. Because there was no election, Respondent Cottle's Second Tier classification was erroneous. He should have been enrolled in the First Tier when hired by Ironwood in 2009. As a result, CalPERS sent Respondent Cottle a letter advising him of the error on November 25, 2013. CalPERS also sent a package to Respondent Cottle describing his tier conversion choices.

On November 12, 2014, CalPERS advised Respondent Cottle that it was making a mandatory adjustment to his account due to the Second Tier misclassification and resulting contribution underpayment. The letter advised Respondent Cottle that his contribution rate should have been 5% for the First Tier classification instead of 0% for Second Tier classification. CalPERS gave Respondent Cottle the option to pay for his

¹ When hired by Respondent CDCR in 2009, Respondent Cottle became a state industrial member of CalPERS. Respondent's state industrial classification, as opposed to state miscellaneous, does not affect the outcome or analysis of this matter.

contributions in either a lump sum of \$22,148.83, or through 180 monthly paycheck deductions of \$184.97. The lump sum option included interest that accrued to the date of the letter. The installment option included 6% interest throughout the term of the payment plan.

Respondent Cottle did not agree to either option, and instead disputed that he was responsible for funding his own retirement. In January 2015, CalPERS notified Respondent Cottle that it was initiating 180 monthly deductions of \$184.97 from his paycheck. The automatic deduction included interest at 6% through the term of the plan. CalPERS initiated the monthly deductions effective February 1, 2015. Respondent Cottle's tier classification was corrected by Respondent CDCR and CalPERS, and Respondent Cottle was placed in First Tier classification for all of the state service at issue.

Respondent Williams' Misclassification and CalPERS' Correction

Respondent Williams began her employment with the State in 2000 when she was hired by the State Compensation Insurance Fund (SCIF). When hired, Respondent Williams was correctly enrolled in the First Tier Classification of 2% at age 55 (First Tier). On October 15, 2007, Respondent Williams transferred to a position with Respondent CDCR. Following her transfer, Respondent Williams was enrolled into membership but was erroneously classified as State Second Tier retirement formula of 1.25% at age 65 (Second Tier).

During her entire time with SCIF, Respondent Williams contributed 5% of her monthly compensation to retirement. After being erroneously classified as Second Tier following her 2007 transfer to Respondent CDCR, Respondent Williams ceased making retirement contributions.

Respondent Williams never elected the Second Tier classification, making that classification erroneous. Instead, Respondent Williams should have remained in First Tier following her transfer to Respondent CDCR, and she should have continued making monthly contributions to her retirement.

Respondent Williams contacted CalPERS on August 19, 2011, because contributions were not being taken from her monthly paycheck. Following the contact, CalPERS began an inquiry into Respondent Williams' account. However, because of CalPERS implementation of the myCalPERS system, there was a delay in researching Respondent Williams' issue.

Respondent Williams also communicated with her employer, Respondent CDCR, about her incorrect Second Tier classification. Effective January 1, 2012, Respondent CDCR corrected Respondent Williams' classification from Second Tier to First Tier, and she began paying First Tier contributions on a prospective basis.

On August 23, 2014, CalPERS notified Respondent Williams that she was incorrectly classified as Second Tier from 2007 through 2011. CalPERS thus determined that Respondent Williams underpaid her contributions from 2007 through 2011, in the amount of \$8,922.19 including interest. The August 23, 2014 letter gave Respondent

Williams the option to either pay for her underpaid contributions in a \$8,922.19 lump sum payment, or through 180 monthly paycheck deductions of \$74.90. The lump sum option included 6% interest that accrued to the date of the letter. The installment option included 6% interest throughout the term of the payment plan.

Thereafter, Respondent Williams requested a breakdown of the First Tier contributions she owed, which CalPERS provided. Respondent Williams then disputed that she was responsible for funding her own retirement because she did not make or cause the tier classification error.

Following an updated calculation of the underpaid contributions, CalPERS again advised Respondent Williams of her options to pay for her First Tier contributions. CalPERS offered Respondent Williams the option of funding her retirement by either a \$9,094.64 lump sum payment, or 180 monthly deductions in the amount of \$76.36 from her paycheck which included 6% interest. Respondent Williams signed and returned an election form choosing to repay her contributions through 180 monthly deductions with interest.

CalPERS initiated the deductions effective March 1, 2015. CalPERS corrected Respondent Williams' classification, and all of her erroneously reported service was converted to First Tier.

Petition for Writ of Mandate and Appeal

Together, Respondents filed a Petition for Writ of Mandate in 2016 to dispute CalPERS' determinations that they were individually responsible for their underpaid contributions. In 2018, the matter was dismissed without prejudice so that Respondents could pursue the matter through an administrative appeal. A hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH) was held on October 23, 2019. Respondent Cottle and Respondent Williams were separately represented by their individual attorneys at the hearing. Respondent CDCR did not appear.

Case Law and Government Code Sections Applicable to Underpaid Contributions

Both employee and employer contributions fund the CalPERS system, and such contributions are required. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198; see also *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2019) 6 Cal.5th 965, 972.) Under Government Code section 20771,² state member contributions must be deducted from a member's compensation. Contributions are required of all state members and set by statute. (Sections 20677.4 through 20683.91.) Those member contributions into the system are annually credited with 6% interest. (Section 20178(a).) Members electing to receive service credit in CalPERS must deposit interest that would have accrued. (Section 21051.)

Under section 21070.5, when a state industrial member returns to state service after a break of at least 90 days, that member must be enrolled into First Tier.³ Under that

² All future statutory references are to the Government Code unless otherwise noted.

³ Respondents' First Tier benefit formula is 2% at 55. (§ 21354.1.)

section, such a state industrial member may only be enrolled into Second Tier⁴ if he files an election with the Board within 180 days of hire. Since Respondent Cottle never elected Second Tier nor filed an election, his Second Tier placement was an error. Similarly, since Respondent Williams never elected Second Tier placement nor filed an election, her placement in the Second Tier was also an error.

Section 20160(b) requires CalPERS to “correct all actions taken as a result of errors or omissions of . . . any state agency or department.” Pursuant to section 20163, CalPERS’ duty to fix mistakes extends to errors resulting in an underpayment of a member’s or employer’s retirement contributions. Section 20163(b) allows for CalPERS to forgive contribution errors, but that exception only applies to minor calculation errors, and not errors in classification like what happened to Respondents. (See *Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565.) The error here was not a minor calculation error but was instead a misclassification resulting in Respondents’ incorrect placement into Second Tier.

Requiring Respondents to pay for their respective underpaid contributions is consistent with existing case law. (See *Campbell, supra*.) A First Tier retirement requires First Tier member contributions, so Respondents cannot receive retirements that they do not fund. (*Barrett v. Stanislaus County Retirement System* (1987) 189 Cal.App.3d 1593.) Requiring Respondents to fund their own retirements puts them in the exact place “they would have been had they been properly classified from the date of their employment.” (*Barrett v. Stanislaus County Retirement System, supra*, at 1609.)

The October 23, 2019 Hearing

Respondent Cottle testified on his own behalf at the hearing. Respondent Cottle first learned of his incorrect Second Tier placement from the letter from CalPERS dated November 25, 2013. Respondent Cottle never elected Second Tier and did not cause the enrollment error. Therefore, Respondent Cottle asserted he was not responsible for his underpaid contributions.

Respondent Cottle then argued that section 20283 required Respondent CDCR to pay for his underpaid contributions. Under section 20283, if an employer fails to enroll an employee into membership, the employer may be held liable for the employee’s unpaid contributions.⁵

Respondent Williams testified on her own behalf at the hearing. Respondent Williams never elected Second Tier. Respondent Williams claimed that she first learned of her incorrect Second Tier classification in 2011. However, Respondent Williams acknowledged that she knew that she made retirement contributions prior to her job with Respondent CDCR. Respondent Williams then confirmed that neither her pay stubs nor her annual member statements showed retirement deductions after she began working for Respondent CDCR in 2007.

⁴ Respondents were incorrectly enrolled into the Second Tier benefit formula, which is 1.25% at 65. (§ 21076.)

⁵ Section 20283 only applies when the employer fails to enroll an employee into membership, and does not apply if the employee is enrolled into membership at the incorrect classification.

Respondents both contended that section 20164's three-year statute of limitations relieved them from having to fund their own retirement.

CalPERS Staff testified at hearing. Staff explained that Respondents' misclassifications in Second Tier instead of First Tier were errors that CalPERS was required to correct under sections 20160 and 20163. Staff also testified that Respondents were both promptly enrolled into membership upon hire, which made any remedy under section 20283 inapplicable. Hence, Staff's testimony concluded that Respondents were both responsible for their underpaid contributions.

The Proposed Decision

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied the appeals. The ALJ found that Respondents were placed in Second Tier by mistake. Because of the mistake, section 20160 required CalPERS to fix the error, and place Respondents in First Tier. The correction also required CalPERS to collect Respondents' underpaid contributions during the time of their erroneous Second Tier classification.

The ALJ rejected Respondents' arguments that the exception articulated in section 20163(b) required CalPERS to forgive the underpayments. The ALJ determined that, "[w]hile there is a limited exception that allows CalPERS to forgive the normal contributions of a member, this exception only applies to minor calculation errors, and does not apply to errors of law in classification."⁶ (See Proposed Decision, p. 20 ¶10.) Accordingly, the ALJ held that Respondents are responsible for their contribution underpayments.

The ALJ also rejected Respondents' argument that CalPERS is barred from collecting the underpaid contributions because of the three-year limitation period included in section 20164. The ALJ reasoned that "[t]he three-year statute of limitations does not apply to administrative proceedings, such as CalPERS' action to collect from respondent the mandatory adjustment of underpaid retirement contributions." (See Cottle Proposed Decision, p. 22.) In reaching this determination, the ALJ relied on case law establishing that the three-year limitation period does not apply to administrative proceedings, but only to actions in superior court. (See *City of Oakland v. Public Employees' Retirement System, et. al*, (2002) 95 Cal.App.4th 29, at 50-51; see also *Krolkowski v. San Diego Public Employees' Retirement System* (2018) 24 Cal.App.5th 537, 556-557.)

Regardless of whether the statute of limitations applies, the ALJ determined that CalPERS corrected the errors within three years of learning of the mistakes, making the proceedings timely under section 20164.

The ALJ disagreed with Respondents' contention that Respondent CDCR failed to enroll them into membership. Under section 20283, the employer can be responsible for a member's underpaid contributions if the employer failed to enroll the employee into

membership. Since Respondent CDCR timely enrolled Respondents into CalPERS membership, the ALJ held section 20283 was inapplicable.⁷

Hence, the ALJ found that CalPERS may make mandatory adjustments to Respondents retirement accounts. Respondents must pay their underpaid retirement contributions.

The Proposed Decision Should Be Adopted

All CalPERS members must fund their own retirements through contributions. The error in Respondents' tier classification does not change that requirement. Finding otherwise would place Respondents in better positions than every other CalPERS member. To receive First Tier benefits, Respondents must pay First Tier contributions. The Proposed Decision properly determined each legal issue.

For all the above reasons, staff argues that the Proposed Decisions be adopted by the Board.

April 22, 2020

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Senior Attorney

⁷ Prior to the dismissal of Respondents' Petition for Writ of Mandate against CalPERS, the Superior Court ruled that section 20283 does not apply because Respondents were timely enrolled into membership.