

**ATTACHMENT C**

**RESPONDENT(S) ARGUMENT(S)**

**LOCAL 1000**



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CalPERS Legal Office

ATTACHMENT C

APR 1 2020

DATE: March 30, 2020

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**RE:** In the Matter of Appeal Regarding Mandatory Contribution  
Adjustment of MICHAEL COTTLE - Agency Case No. 2018-0721 /  
OAH Case No. 2018-120134

In the Matter of the Appeal Regarding Mandatory Contribution  
Adjustment of MICHELE Y. WILLIAMS - Agency Case No. 2018-0725  
/ OAH Case No. 2018120183

**RESPONDENTS' ARGUMENT**

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**RESPONDENT M.C. AND M.Y.M.'S ARGUMENT AGAINST  
PROPOSED DECISION**

RE: OAH Consolidated Case No. 2018-120134/ OAH Case No. 2018120183

Marcie Larson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this consolidated matter on October 23, 2019 in Sacramento, California. The issue presented is what is CalPERS' authority and mandates to make adjustments to members' retirement accounts where underlying errors made by the employer cause the underfunding of individual plans.

Notably, Ironwood State Prison or California Department of Corrections and Rehabilitation (CDCR) were served notice, failed to appear in any capacity and received a default judgement. Charles Glauberman represented CalPERS, Nicholas J. Gleichman represented M.C. and Carolyn Park represented M.Y.W. This argument against the proposed decisions is submitted on behalf of both employees.

In both cases, the employees' pension plans were underfunded because their employer CDCR failed to properly enroll the employees in the appropriate benefit plan. As a result, both employees' plans were underfunded. In both cases, CalPERS attempts to collect the arrears stemming from the employer's mistake.

**I. Argument**

The proposed decisions must be wholly rejected by the Board because it is contrary to the mandates of California statutes and case law. The decision contradicts the underlying facts, relevant doctrine, and even itself at times, all in pursuit of supporting an unnecessarily draconian conclusion.

The proposed decisions punish the aggrieved employees for their employer's incompetent negligent conduct.

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The legislature contemplated the possibility of these types of errors. California Government Code sections 20163(b)<sup>1</sup> and 20283 reasonably require CalPERS to collect the arrears from CDCR. Here, CDCR admits the mistake repeatedly, and it is the type of mistake that is forgivable under California law. The decisions represent an abuse of discretion and are plainly erroneous and must be rejected for adoption as well as precedent.

**A. CDCR Must Fund Respondent Employees' Pensions**

Under California law, CalPERS must correct the employees' retirement accounts by collecting the funds' arrears from the employer CDCR. The facts clearly establish that CDCR erred, which directly underfunded the employees' retirement account. California Government Code sections 20160-20164 acknowledge that errors occur, clerical or otherwise, which lead to an employee's pension fund being underfunded. The same codes also provide a straightforward roadmap to correct such mistakes.

California Government Code, § 20164(a) requires CalPERS uphold its obligation to its members throughout their membership. In turn, § 20160(b) provides CalPERS the relevant and applicable authority to correct errors or omission of state. It provides, in pertinent part, that CalPERS:

“shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.” In the immediate subsection, subsection (c), this authority is described as the “duty and power of the board to correct mistakes.” (Cal. Gov. Code section 20160(c).)

This duty and power is subject to several conditions and burdens of proof. The aggrieved party must show that the error was the result of a mistake, and that they made timely efforts and demands to correct the mistakes. (California Government Code section 20160(a)2 and (a)1.)

The underlying facts in the consolidated cases trigger CalPERS' duty and power to correct CDCR's mistakes. CDCR irrefutably made the mistakes by entering the employees into the wrong tier. Both employees made expedient attempts to demand a resolution. The stipulated facts show that, contrary to CalPERS' duty and power to correct mistakes, CalPERS made no such corrections, beyond asking the employees to correct their employer's incompetence by footing the bill.

Under section 20283, CDCR must fund the employees' pensions because their employer failed to enroll them into the proper pension plan. Despite the multiple stages of litigation in the instant matter, one fact has remained unassailable throughout- CDCR failed to enroll the employees in the proper pension plan, causing all the legal and financial turmoil that ensued.

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<sup>1</sup> Prior to 1970, section 20163 did not provide for forgiveness of underpayment of member contributions. In 1970, section 20163 was amended to provide under the circumstances specified in the second paragraph of the section. When Senate Bill No. 344 was sent to the Governor for signature, it was accompanied by an enrolled bill report submitted by PERS analyzing the bill and recommending that the Governor sign it.

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CDCR has at no point responded to the allegations, neglecting to even appear at the hearing to explain its actions.

Despite this fact, the proposed decisions ignore CalPERS' statutory mandate to bill the employer for the arrears. "As set forth in Factual Findings 1 through 19, Ironwood and the Department timely enrolled respondent[s] into membership. As a result, Government Code section 20283, subdivision (a), does not prohibit CalPERS from collecting the arrears from respondent." (M.C. Proposed Decision at Conclusion 11).

The underlying facts undermine, not support this conclusion. For example, in MC Factual Finding 4, the proposed decision correctly notes that CDCR transferred one employee "to a position with the Department. Upon his transfer, the Department erroneously enrolled respondent in Second Tier. No retirement contributions were taken out of respondent's pay," (*Id.*, emphasis added.)

Again, all parties agree that CDCR failed in their duty to properly enroll their employees. Despite this shared, unanimous understanding that CDCR failed in its duty to enroll, the proposed decisions hold 20283 does not apply because CDCR "timely enrolled" the employees. In doing so, the proposed decisions claim that the employer timely enrolled the employees, but failed to enroll them as shown by the mistake. This contradiction was underscored by CalPERS' own testimony that CDCR failed to properly enroll the employees (Hearing Transcript at pp.77, hereinafter "HT"). These two holdings stand in direct contradiction to one another and reveal the lack of reasoning in support of the decision.

Without explanation, both proposed decisions fail to acknowledge the glaring self-admitted errors that led to the failure in enrollment, propelling the instant litigation. The decisions implicitly hold that enrollment was "timely", but also find that CDCR did not fix the mistakes for years. The decision runs contrary to its own factual findings as well as plain logic and must be rejected.

**B. CDCR's error was clerical not classification**

Under settled case law, relief is available to Respondents such as the employees here where the employer's underlying mistake is a clerical error as opposed to an error in classification. The proposed decisions in the instant case unilaterally ignore and invalidate this distinction.

In *Campbell*, a group of employees was reclassified pursuant to an out of class claim. As a result of being reclassified, they were retroactively entered into a new tier of the system in correlation with their new class. (*Campbell v. Board of Administration* (1980) 103 Cal. App.3d 565.)

The court upheld the arrears for two main reasons. First, the *Campbell* court reasoned that the underlying statute seeks to protect members from clerical and scribner errors, like entering a "1" where an "I" should go. (*Id.* at 570.) Here, a one went where a two should have gone. This is exactly the type of clerical error that section 20163 was meant to address. The reclassification 'error' at the heart of *Campbell's* claim however is not the type of 'error' that the statute was meant to shield members from. (*Id.*)

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Second, Campbell underscores an important caveat: to enjoy the protection of the statute, the member must not know of the error at bar. In *Campbell*, the employees at bar stipulated to the knowledge element. (*Id.* at 571 fn 4.) Indeed, the employees in *Campbell* were pursuing reclassification, and could therefore not claim to be unaware of the mistake underlying the underfunding. Here, the undisputed facts establish neither employee had knowledge of the error.<sup>2</sup>

Upon being made aware, the employees in the instant case engaged in a thorough campaign to have the error corrected expeditiously. Unlike the underlying classification error in *Campbell*, here, the error was a scribner's error. The undisputed facts establish the employees were entered into the wrong level tiered retirement fund. *The state literally entered a "2" where a "1" should have been.* This is indisputably a clerical error, exactly as described in *Campbell*.

Despite the glaring distinctions between the cases, the proposed decisions somehow reach the conclusion that the Campbell plaintiffs, whose case was the result of their demand to be reclassified, were identical to the employees in the instant case, who did not even have knowledge that the error had occurred. Under the analysis of the proposed decision, 20283 would never apply to anyone. Through this decision, CalPERS has invalidated the entirety of a statutory scheme by relying exclusively on an AGPA's interpretation of the raw legal text. The result is untenable and the decision must be rejected.

**C. The proposed decision violates principles of administrative law**

The proposed decisions in the consolidated cases contravene the plain language of California Government Code sections 20283 and 20163(b). CalPERS' sole witness was unable to articulate what authority she relied on to interpret allows CalPERS to make an adjustment and collect from the CalPERS member the underpaid amount in spite of the plain language of California Government Code section 20163(b). Chan initially testified that said interpretation was gleaned from "Deerings" and then testified that the interpretation came from a CalPERS internal document which was neither included in CalPERS' evidence in this matter nor provided to employees at any time (HT, pp.91:11-96:19.).

California Government Code section 11340.5(a) provides that:

"[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State. . ."

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<sup>2</sup> The *Campbell* court makes a crucial observation regarding members' inability to discover mistakes made by the employer. It points out that "detail as to member rates is not readily accessible to a member, particularly at the time of employment, and he frequently will be unaware of an error in his rate of contribution." (*Id.* at 570.) This observation helps explain why, despite thoroughness and record keeping, the employees here did not notice the error immediately.

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CalPERS failed to show that the CalPERS internal document, which CalPERS purports to have relied on to make adjustments to the accounts of the employees, was adopted as a regulation and filed with the Secretary of State.

Courts look to the plain language of the PERL for interpretation. (See, e.g. *Metro. Water Dist. v. Superior Court* (2004) 32 Cal. 4th 491, 502; *Welch v. State Teachers' Ret. Sys.* (2012) 203 Cal. App. 4th 1, 18.) Where the Legislature makes express statutory distinctions, the courts "must presume it did so deliberately, giving effect to the distinctions, unless the whole scheme reveals the distinction is unintended." (*Metro. Water Dist. v. Superior Court* (2004) 32 Cal. 4th 491, 502.) Here, the plain language of California Government Code section 20163(b) prohibits CalPERS from making adjustments by collecting from the members when less the error was not known to the member and was not the result. The proposed decisions in the instant matter ignore this plain language in pursuit of an absurd conclusion.

## II. Conclusion

The proposed decisions in the instant matter are devoid of legal reasoning and are otherwise wholly deficient in meeting the requirements of California State Law. As such, they must both be rejected for adoption and for precedent.

Respectfully submitted,



NICHOLAS J. GLEICHMAN

Senior Union Representative

NJG/mw