

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Rita K. Palo (Respondent) became a member of CalPERS on June 10, 1998, through her employment with Salinas Valley State Prison, California Department of Corrections and Rehabilitation (CDCR.)

Respondent applied for industrial disability retirement on May 3, 2004. In the application, Respondent elected an Option 1 allowance naming her daughter as her beneficiary.

Respondent's true date of birth is March 1, 1932; however, in her application, she misrepresented her date of birth as March 1, 1942.

CalPERS approved Respondent's application and placed respondent on disability retirement effective May 16, 2004.

In 2017, CalPERS learned that Respondent was born on March 1, 1932, ten years earlier than she had claimed in her application for retirement.

CalPERS sent Respondent letters dated June 9, 2017, August 17, 2017 and September 28, 2017, informing her that the date of birth she specified on her application for disability retirement did not match the date of birth on file with the Social Security Administration. CalPERS requested a copy of Respondent's birth certificate, passport or driver's license.

CalPERS sent Respondent's counsel a letter dated October 26, 2017, informing Respondent that:

Ms. Palo's unmodified allowance was not based off her age or years of service credit at the time of retirement. However, Ms. Palo did not elect the unmodified allowance at retirement, she elected option 1. Option 1 reduces a member's unmodified allowance and is based off the member's age at retirement and the amount of contributions in the member's account.

Respondent's counsel sent CalPERS a copy of Respondent's driver's license showing her correct birthdate, March 1, 1932, on February 14, 2018.

CalPERS sent Respondent a letter dated February 27, 2018, informing her that CalPERS had corrected her birthdate. CalPERS informed Respondent that the

correction resulted in a decrease of \$19.18 per month in her retirement allowance and that from May 16, 2004, through February 28, 2018, CalPERS had overpaid her \$2,803.58.

CalPERS reduced Respondent's monthly retirement allowance by \$19.18 per month and also deducted \$327.78 per month until it recovered the \$2,803.58 overpayment.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH.) A hearing was held on February 11, 2020. Respondent was represented by counsel, Hugo Gerstl, at the hearing.

At the hearing, CalPERS presented the testimony of a CalPERS' staff member to testify regarding CalPERS' determination. The CalPERS witness explained that in calculating a monthly retirement allowance under option 1, CalPERS uses an actuarial formula that considers the likelihood that CalPERS will have to pay out a lump sum from a member contribution. That is, the formula considers the likelihood that the member will die before depleting his or her member contribution account. If a member retires at a young age, it is unlikely that there will be a balance in the member contribution account at the time the member dies, and therefore, unlikely that CalPERS will have to pay out a lump sum from the member's contribution account. If a member is older at the time of retirement, the possibility of his or her dying before depleting the member contribution account increases, and therefore, the possibility that CalPERS will have to pay out a lump sum from the member's contribution account increases. Therefore, if a member chooses option 1, the older the member is when he or she retires, the lower the monthly retirement allowance will be. Because Respondent elected option 1, her age at the time of retirement was a factor in calculating her monthly retirement allowance.

At the hearing, Respondent's counsel submitted a trial brief entitled, "Respondent's Statement of Issues;" it was marked as Exhibit A for identification. In paragraph one of the trial brief, Respondent admitted the factual allegations in the Statement of Issues. Based on Respondent's admission, the facts CalPERS alleged in the Statement of Issues were adopted as established facts. Respondent offered absolutely no evidence, no exhibits and no testimony at the hearing.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ rejected Respondent's assertion that CalPERS and Respondent made a mutual mistake or that CalPERS should be estopped from recouping the overpayment caused by Respondent misrepresenting her date of birth.

First, the ALJ found that Respondent could not identify any mistake made by CalPERS. The ALJ also found that Respondent did not make a correctable mistake. In choosing among the various options, Respondent failed to make the inquiry that would be made by a reasonable person in like or similar circumstances as required in Government Code section 20160, subdivision (a)(3.) A reasonable person, who did not know the

differences among the various options, would have inquired about the differences and how each option would affect his or her retirement benefits. Thus, within the terms of Government Code section 20160, subdivision (a)(3), Respondent's election, by definition, did not constitute an error.

The ALJ further found that CalPERS should not be estopped from recouping overpayments to Respondent because Respondent did not establish that CalPERS made any representation concerning Respondent's choice between one option rather than another, and CalPERS did not engage in any conduct that it intended Respondent to act on. Respondent could not have relied on CalPERS' conduct because CalPERS did not engage in any conduct concerning Respondent's election of option 1.

In the Proposed Decision, the ALJ concludes that Respondent did not make a correctable mistake and that CalPERS properly recovered the overpayment of \$2,803.58 from Respondent and in so holding, the ALJ denied Respondent's appeal.

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

June 17, 2020

Austa Wakily
Senior Attorney