

ATTACHMENT C

RESPONDENT'S ARGUMENT

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9 **BOARD OF ADMINISTRATION**
 10 **CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM**

11 In re the Appeal of Adjustment and
 12 Overpayment of Retirement Benefits of
 13 RITA K. PALO, Respondent

14 AGENCY CASE NO. 2019-0611
 15 OAH No. 2019100348 (Govt.Code §11509)
 16 **RESPONDENT'S ARGUMENT IN**
 17 **OPPOSITION TO ADOPTING PROPOSED**
 18 **DECISION OF THE A.L.J. (ATTACHMENT**
 19 **"C")**
 20 Hearing Date: June 17, 2020 10:00 a.m.
 21 Agenda Item: 9a8

22 **NOTE**

23 This argument is submitted late by virtue of the fact that after the Agenda items was set
 24 for June 17, 2020 the COVID-19 shelter in place orders as well as the Emergency Orders of the
 25 Judicial Council and the Supreme Court of California took place. Respondent's office effectively
 26 closed down on March 14, 2020 and Respondent's counsel, a sole practitioner, effectively
 27 closed down his office for the duration of the S.I.P. Directives of the Governor.

28 As a result, Respondent only received the CalPERS notification and packet on June 11,
 2020. This response is respectfully submitted within 24 hours of receipt of notification and
 exhibits appended to that notification.

PREFATORY COMMENT

1 Throughout this case the parties have variously been referred to as Appellant,
2 Respondent, Complainant, Plaintiff, Petitioner, and various other appellations, often leading to
3 confusion as to who is who in this litany. For clarification and simplicity, RITA PALO suggests
4 that in lieu of various guises, she simply be referred to as "PALO" and CalPERS be referred to
5 as "CalPERS."

6 **FACTS**

7 The parties have little dispute as to what happened in this case. They are outlined in
8 CalPERS' Statement of Issues (**EXHIBIT "1"**) and PALO'S Statement of Issues (**EXHIBIT "2"**).

9 At the hearing itself, the stipulations, testimony, and preliminary arguments were
10 presented. **The only problem is that neither PALO nor CalPERS ordered a copy of the**
11 **transcript and PALO believes the ALJ did not read the transcript if it exists because there**
12 **is no reference to any portions of it anywhere within his proposed decision.**

13 On February 13, 2020, within three days of the hearing, PALO drafted her initial
14 summary and argument pertaining to her recollection of what transpired at the hearing
15 (**EXHIBIT "3"**). On March 11, 2020, PALO submitted her closing brief (**EXHIBIT "4"**).

16 **ARGUMENT IN OPPOSITION TO THE A.L.J.'S PROPOSED DECISION**

17 The amazing this in this case is that the parties have spent countless hours and reams
18 of paper arguing over **\$2,800!** This is a matter which was well within the jurisdiction of the Small
19 Claims Court – and what is even more absurd is that the parties are threatening to move this
20 case into Superior Court via a Petition for Writ of Administrative Mandate!!

21 Even more bizarre, given PALO'S age, the way her "election" is currently set up, it is
22 unquestioned that if / when PALO dies, CalPERS will spend many thousands of dollars more in
23 benefits to her survivor than if CalPERS and the A.L.J. had simply considered PALO's offer to
24

1 reverse the "election" and roll it back to "unmodified." Had this been done, PALO's rights to
2 benefits would end when she died rather than when her designated residuary beneficiary dies.

3 Instead, the A.L.J. devoted 30 pages of a lengthy, prolix, and inherently wrong opinion,
4 which would have been clarified had the parties referenced the unordered transcript instead of
5 relying on their memories. The A.L.J. artificially created several "straw men" in order to knock
6 them down, made impermissible leaps of faith and "logic," and, at the end of the day, created an
7 inequitable and intolerable muddle of a decision which should satisfy absolutely no one.

8
9 Wherefore, PALO respectfully prays that the CalPERS Board of Administration **REJECT**
10 the Proposed Decision of the Administrative Law Judge, refer this matter for a Settlement
11 Conference, or give thoughtful consideration to PALO'S suggested resolution which will be the
12 simplest and most equitable and beneficial resolution for both parties.

13 Dated: June 11, 2020

Respectfully submitted,

HUGO N. GERSTL
Attorney for RITA PALO

14
15
16 **PROOF OF SERVICE**

17 State of California, County of Monterey: I am employed in the county referenced above. I am
18 over the age of eighteen years and not a party to the within action. My business address is 2460
19 Garden Road, Suite C, Monterey, CA 93940. On February 7, 2020, I served the within
RESPONDENT'S ARGUMENT IN OPPOSITION TO ADOPTING PROPOSED DECISION OF
THE A.L.J. (ATTACHMENT "C") on the following party(s) or their counsel:

20 Matthew G. Jacobs, General Counsel
21 Austa Wakily, Senior Attorney
22 P.O. Box 942707
Sacramento, CA 94229-2707

EMAIL: Austa.Wakily@calpers.ca.gov

23 By: E-mail: I caused the document(s) referred to above to be transmitted by Electronic Mail (E-
24 mail) to the E-mail addresses described above. I declare under penalty of perjury under the laws
25 of the State of California that the foregoing is true and correct. Executed at Monterey, California,
26 June 11, 2020.

HUGO N. GERSTL, Declarant

EXHIBIT 1

1 MATTHEW G. JACOBS, GENERAL COUNSEL
AUSTA WAKILY, SENIOR ATTORNEY, SBN 257424
2 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811
3 P. O. Box 942707, Sacramento, CA 94229-2707
Telephone: (916) 795-3675
4 Facsimile: (916) 795-3659
5 Attorneys for California Public
Employees' Retirement System
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7
8

9 BOARD OF ADMINISTRATION

10 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

11 In the Matter of the Appeal of Adjustment) AGENCY CASE NO. 2019-0611
and Overpayment of Retirement Benefits)
of) OAH NO.
12)
RITA K. PALO,) STATEMENT OF ISSUES
13)
Respondent.) Hearing Date:
14) Hearing Location: Palm Desert, CA
15) Prehearing Conf.: None Scheduled
Settlement Conf.: None Scheduled

16 I

17 California Public Employees' Retirement System (CalPERS) makes and files
18 this Statement of Issues in its official capacity as such and not otherwise.

19 II

20 Respondent Rita K. Palo (respondent Palo) became a member of CalPERS by
21 way of her employment with Salinas Valley State Prison, California Department of
22 Corrections and Rehabilitation on June 10, 1998.

23 III

24 On August 1, 2002, respondent Palo signed a Beneficiary Designation form
25 naming her CalPERS beneficiaries.

EXHIBIT 1

1 Respondent Palo represented to CalPERS that her birthdate was
2 March 1, 1942, on the Beneficiary Designation form.

3 IV

4 On May 11, 2004, CalPERS received respondent Palo's application for industrial
5 disability retirement. Respondent Palo elected an Option 1 allowance in her
6 application.

7 Respondent Palo again represented to CalPERS that her birthdate was
8 March 1, 1942, on the application.

9 V

10 CalPERS approved the application and placed respondent Palo on disability
11 retirement effective May 16, 2004.

12 VI

13 In 2017, CalPERS received information showing that respondent Palo's date of
14 birth is March 1, 1932.

15 VII

16 On June 9, 2017, August 17, 2017 and September 28, 2017, CalPERS sent
17 letters to respondent Palo informing her that the date of birth she used on her
18 Beneficiary Designation form and application for industrial disability retirement did not
19 match the date of birth with the Social Security Administration. CalPERS requested a
20 copy of her Birth Certificate, Passport or Driver's License in each letter.

21 VIII

22 On October 5, 2017, respondent Palo's counsel sent a letter informing CalPERS
23 that "[M]s. Palo's retirement was not based on age or the time she spent working for
24 the California Prison system, but related to an industrial accident" (Emphasis in
25 original.)

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IX

On October 26, 2017, CalPERS sent a letter to respondent Palo's counsel which states in pertinent part:

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. The 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. (emphasis added)

X

On January 23, 2018, CalPERS sent another letter to respondent Palo informing her of the discrepancy in her birthdate and requested a copy of her Birth Certificate, Passport or Driver's License.

XI

On February 14, 2018, respondent Palo's counsel sent a letter to CalPERS providing a copy of respondent Palo's Driver's License. Respondent Palo's Driver's License matched the March 1, 1932 birthdate provided by Social Security Administration.

XII

On February 27, 2018, CalPERS sent a letter to respondent Palo informing her that CalPERS had updated her birthdate on her account to match the birthdate on her Driver's License resulting in an adjustment in her retirement allowance (a decrease of \$19.18 in retirement allowance per month and an overpayment of \$2,803.58) effective May 16, 2004 through February 28, 2018.

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1 XIII

2 On March 12, 2018, respondent Palo's counsel sent a letter to CalPERS
3 requesting that it reverse its determination within 10 days and requested a government
4 claim form.

5 XIV

6 On March 27, 2018, CalPERS sent a letter to respondent Palo's counsel which
7 states in pertinent part:

8 Ms. Palo's age or years of service credit at the time of
9 retirement was not a factor in calculating her
10 Unmodified Allowance. However, Ms. Palo did not
11 elect the Unmodified Allowance option at retirement,
12 she elected the *Option 1 Allowance*. The Option 1
13 Allowance reduces a member's Unmodified Allowance
and is calculated using the *member's age at*
retirement and the amount of contributions in the
member's account, providing for a payout of any
remaining contributions at member's death to one of
[sic] more beneficiaries.

14 The original *Option 1* factor using Ms. Palo's incorrect
15 date of birth of March 1, 1942 was 0.99531. [¶] . . . [¶]

16 Increasing Ms. Palo's age by ten years impacts her
17 *Option 1 factor*, since she is expected to live ten
18 fewer years making it more likely that the *Option 1*
19 benefit would be paid out to a beneficiary. The correct
Option 1 factor using Ms. Palo's corrected birthdate of
20 *March 01, 1932* is 0.98984. [¶] . . . [¶] (Emphasis in
original.)

21 XV

22 On March 28, 2018, CalPERS sent a letter to respondent Palo informing her that
23 "[Her] account has been adjusted. Deductions in the amount of \$346.96 will begin on
24 [her] 5/1/2018 warrant until the overpayment is paid in full."

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XVI

On or about April 3, 2018, respondent Palo, through her counsel, submitted a Government Claim form to the Department of General Services' Government Claims Program, Office of Risk and Insurance Management.

XVII

CalPERS is governed by the California Public Employees' Retirement Law, and the following provisions of the Government Code were in effect at all times and are relevant to this appeal:

Section 20160 provides:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

(b) Subject to subdivisions (c) and (d), the board 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.

1 (c) The duty and power of the board to correct
2 mistakes, as provided in this section, shall terminate
3 upon the expiration of obligations of this system to the
party seeking correction of the error or omission, as
those obligations are defined by Section 20164.

4 (d) The party seeking correction of an error or
5 omission pursuant to this section has the burden of
6 presenting documentation or other evidence to the
board establishing the right to correction pursuant to
subdivisions (a) and (b).

7 (e) Corrections of errors or omissions pursuant to this
8 section shall be such that the status, rights, and
9 obligations of all parties described in subdivisions (a)
10 and (b) are adjusted to be the same that they would
11 have been if the act that would have been taken, but
12 for the error or omission, was taken at the proper time.
However, notwithstanding any of the other provisions
of this section, corrections made pursuant to this
section shall adjust the status, rights, and obligations
of all parties described in subdivisions (a) and (b) as of
the time that the correction actually takes place if the
board finds any of the following:

13 (1) That the correction cannot be performed in a
14 retroactive manner.

15 (2) That even if the correction can be performed in a
16 retroactive manner, the status, rights, and obligations
17 of all of the parties described in subdivisions (a) and
(b) cannot be adjusted to be the same that they would
have been if the error or omission had not occurred.

18 (3) That the purposes of this part will not be
19 effectuated if the correction is performed in a
retroactive manner.

20 Section 20161 provides:

21 Notwithstanding any other provision of this part or of
22 Section 13943.2 or 16302.1 to the contrary, the
following shall apply:

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1 (a) When there has been a payment of death benefits,
2 a return of accumulated contributions, a contribution
3 adjustment, or a deposit of contributions, this system
4 may refrain from collecting an underpayment of
5 accumulated contributions if the amount to be
6 collected is two hundred fifty dollars (\$250) or less.

7 (b) When there has been a payment of death benefits,
8 a return of accumulated contributions, a contribution
9 adjustment, or a deposit of contributions, and there is
10 a balance of fifty dollars (\$50) or less remaining
11 posted to a member's individual account, or an
12 overpayment of fifty dollars (\$50) or less was received,
13 this system may dispense with a return of
14 accumulated contributions.

15 (c) When there is a positive or negative balance of two
16 hundred fifty dollars (\$250) or less remaining posted to
17 a member's individual account, or the balance
18 exceeds two hundred fifty dollars (\$250) but the
19 difference to the monthly allowance unmodified by any
20 optional settlement is less than five dollars (\$5), this
21 system may dispense with any recalculation of, or
22 other adjustment to, benefit payments.

23 (d) The dollar amounts specified in subdivisions (a)
24 and (c) shall be adjusted in accordance with any
25 changes in the dollar amounts specified in Section
13943.2.

Section 20163, subdivision (a) provides:

If more or less than the correct amount of
contribution required of members, the state, or
any contracting agency, is paid, proper
adjustment shall be made in connection with
subsequent payments, or the adjustments may be
made by direct cash payments between the
member, state, or contracting agency concerned
and the board or by adjustment of the employer's
rate of contribution. Adjustments to correct any
other errors in payments to or by the board,
including adjustments of contributions, with
interest, that are found to be erroneous as the
result of corrections of dates of birth, may be
made in the same manner. Adjustments to correct
overpayment of a retirement allowance may also
be made by adjusting the allowance so that the
retired person or the retired person and his or her

1 beneficiary, as the case may be, will receive the
2 actuarial equivalent of the allowance to which the
3 member is entitled. Losses or gains resulting from
4 error in amounts within the limits set by the California
5 Victim Compensation and Government Claims Board
6 for automatic writeoff, and losses or gains in greater
7 amounts specifically approved for writeoff by the
8 California Victim Compensation and Government
9 Claims Board, shall be debited or credited, as the
10 case may be, to the reserve against deficiencies in
11 interest earned in other years, losses under
12 investments, and other contingencies. (Emphasis
13 added.)

8 **Section 20164:**

9 (a) The obligations of this system to its members
10 continue throughout their respective memberships;
11 and the obligations of this system to and in respect to
12 retired members continue throughout the lives of the
13 respective retired members, and thereafter until all
14 obligations to their respective beneficiaries under
15 optional settlements have been discharged. The
16 obligations of the state and contracting agencies to
17 this system in respect to members employed by them,
18 respectively, continue throughout the memberships of
19 the respective members, and the obligations of the
20 state and contracting agencies to this system in
21 respect to retired members formerly employed by
22 them, respectively, continue until all of the obligations
23 of this system in respect to those retired members,
24 respectively, have been discharged. The obligations of
25 any member to this system continue throughout his or
her membership, and thereafter until all of the
obligations of this system to or in respect to him or her
have been discharged.

(b) For the purposes of payments into or out of the
retirement fund for adjustment of errors or omissions,
whether pursuant to Section 20160, 20163, or 20532,
or otherwise, the period of limitation of actions shall be
three years, and shall be applied as follows:

(1) In cases where this system makes an erroneous
payment to a member or beneficiary, this system's
right to collect shall expire three years from the date of
payment.

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1 (2) In cases where this system owes money to a
2 member or beneficiary, the period of limitations shall
not apply.

3 (c) Notwithstanding subdivision (b), in cases where
4 payment is erroneous because of the death of the
5 retired member or beneficiary or because of the
6 remarriage of the beneficiary, the period of limitation
7 shall be 10 years and shall commence with the
8 discovery of the erroneous payment.

9 (d) Notwithstanding subdivision (b), where any
10 payment has been made as a result of fraudulent
11 reports for compensation made, or caused to be
12 made, by a member for his or her own benefit, the
13 period of limitation shall be 10 years and that period
14 shall commence either from the date of payment or
15 upon discovery of the fraudulent reporting, whichever
16 date is later.

17 (e) The board shall determine the applicability of the
18 period of limitations in any case, and its determination
19 with respect to the running of any period of limitation
20 shall be conclusive and binding for purposes of
21 correcting the error or omission.

22 XVIII

23 CalPERS conducted a review of respondent Palo's account and determined a
24 discrepancy in her birthdate. The birthdate on respondent Palo's retirement account
25 was March 1, 1942, and the birthdate on her Driver's License is March 1, 1932, which
matched the birthdate provided by Social Security Administration.

Consequently, CalPERS made an adjustment effective May 16, 2004 through
February 28, 2018, resulting in a decrease in retirement allowance of \$19.18 per month
and an overpayment of \$2,803.58.

XIX

By letter dated June 21, 2019, respondent Palo was notified of CalPERS'
determination and was given appeal rights.

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This appeal is limited to the issue of whether CalPERS was correct in making an adjustment in respondent Palo's retirement allowance effective May 16, 2004 through February 28, 2018, that resulted to a decrease of \$19.18 per month and overpayment of \$2,803.58.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Dated ~~OCT 04 2018~~ BY 
ANTHONY SUINE, Chief
Benefit Services Division

EXHIBIT 2

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3 2460 Garden Road, Suite C
4 Monterey, CA 93940
5 Telephone: (831) 649-0669
6 Facsimile: (831) 649-8007
7 Email: Hugo@gerstllaw.com
8 Attorney for: Respondent RITA K. PALO

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**BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM**

In re the Appeal of Adjustment and
Overpayment of Retirement Benefits of
RITA K. PALO, Respondent

AGENCY CASE NO. 2019-0611
OAH No. 2019100348 (Govt. Code §11509)

RESPONDENT'S STATEMENT OF ISSUES

Hearing Date: February 11, 2020; 10:00 a.m.
Hearing Location: Palm Desert City Hall
Council Chambers Conference Room
73510 Fred Waring Drive, Palm Desert, CA

Respondent RITA K. PALO makes and files her Statement of Issues as follows:

1. Respondent admits the statements contained in CalPERS' statement of issues ## II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVIII, and XIX.

Respondent affirmatively asserts as follows:

2. The Reason for the "Incorrect Date of Age" is when Respondent went to Northern California from the Los Angeles Area, in or about in or 1977-78 she had been working in and around Los Angeles for several years as a Registered Nurse (RN). Her last position prior to moving north was with Orange County Hospital, Neonatal Intensive Care. (The name of the facility was changed after Respondent left)

1 3. Respondent relocated because her children were in Monterey County and wanted her
2 to reside near her. She immediately looked for a position at the Hospitals and found one at
3 Salinas Valley Memorial Healthcare ("SVMH") in the ICU-CCU unit. Respondent has never
4 worked as a Floor Nurse in any medical facility.

5 4. Respondent secured an interview with the Nursing Director at SVMH. While she was
6 filling out the paperwork for the interview, Respondent overheard the Nursing Director on the
7 phone, telling someone, "I would never hire someone for ICU-CCU who is 40 years old."

8 5. Respondent was 40 at the time. She erased the birthdate and took 10 years off her
9 age on paper, substituting 1942 for 1932. Respondent was interviewed and offered a position
10 immediately following the Nursing Director's checking respondent's references from Orange
11 County Hospital. The interview was about 10 minutes in length. Respondent reported for work in
12 2 days and worked there for 10 years, during which time, she went back to College and
13 eventually got her MSN, then went on to finish out her Doctorate. She finished all the
14 course work, but declined to publish a dissertation for the doctorate, because she had become
15 very discouraged at the amount of time and effort it would take, since she was already actually
16 50 years old.
17

18 6. In or about 2002 (Respondent does not recall the precise date or even the precise
19 year. The year is based on CalPERS Exhibit 3, page 1) Respondent moved to Soledad CTF
20 and worked for six months covering for an employee who was on leave. When the six months
21 were over, respondent applied for position at the newly-built Salinas Valley Prison medical
22 facility and took a position as Head Nurse in the Medical Unit. The facility had six offices.
23 Respondent took care of the patient population in the emergency unit, and in an area where
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1 they did diagnostic treatment. There were 10 beds and a mental facility across the campus, a
2 mile away. There was a doctor in charge and four nurses.

3 7. The primary issue in this case is whether what Respondent is receiving is related to
4 her age or to the industrial accident, which is why Respondent had to retire in the first place.

5 8. When Respondent took her position at Salinas Valley Prison, it was almost a mile of
6 walking distance from the Salinas Valley Prison parking lot to the medical building. This was
7 physically taxing to Respondent. Her position required assisting in rendering emergency care to
8 the prison population, as well as daily activities and taking care of the prison population. This
9 required hospital care and visits to the prison population in order to provide the population with
10 tuberculosis preventative vaccine.
11

12 9. In or about May 2004 (Respondent does not remember the precise date),
13 Respondent worked from 6:30 a.m. to 4:00 p.m. She was getting off shift and the doctor on duty
14 offered her a ride in his cart to the employee parking lot, a mile away. Respondent got into the
15 cart. A female correctional officer, a lieutenant, came up and said that she needed a ride and
16 that she would drive. There was only room for two persons in the front seat, so respondent sat
17 in the back seat.
18

19 10. The correctional officer could not get the cart in gear. She attempted to do so
20 several times. When at last she shoved it into gear, the cart shot forward, and Respondent flew
21 off the rear seat, and landed on her left hip. Several witnesses were coming out of the Medical
22 Unit at the time of the incident.

23 11. Respondent suffered severe and debilitating permanent personal injuries as
24 a direct and proximate result of the incident. Her left hip was fractured and not-displaced but
25 unstable; the L2 vertebra in her spine, was fractured in a non-displaced position. This has left
26

1 Respondent in a compromised position, in constant for pain and physical limitations. As a result,
2 she has been constantly treated by medical doctors and chiropractors. Respondent was
3 recently advised by physicians after a bone density test that her left hip is losing placement, and
4 she is a candidate for left hip replacement. As a result, Respondent, who does not want hip
5 replacement surgery at her advanced age, is being extremely cautious and conservative in her
6 movements.

7
8 12. Respondent presently sees a chiropractor monthly for pain and limited physical
9 activity, such as walking uphill, climbing stairs, and painful cramping in her legs. In all the years,
10 since the accident, she has paid out of her own pocket and medical insurance which she pays
11 for, all the medical care that she has received.

12 13. During the period following the accident, Respondent was receiving no money. She
13 was sent to several doctors, all of whom concurred that she was seriously and permanently
14 disabled. Respondent remembers going to a heavysset African-American doctor (with
15 CalPERS?) who recommended that she consult with a Workers Compensation attorney. That
16 doctor is now deceased. Respondent contacted a Workers Compensation attorney in Salinas.
17 Respondent and the attorney went to the Workers Compensation Appeals Board. She and the
18 attorney were there for several minutes. Afterward, the attorney spoke to the Workers
19 Compensation Judge and her attorney told her, "Your disability has been worked out and
20 everything has been resolved."
21

22 14. The person who gave Respondent the papers to sign for the election for benefits
23 was a correctional officer. She was very brusque and did not explain anything about options to
24 the Respondent. No one explained Respondent's options to her. *CalPERS Exhibit 4 is entitled*
25 *"Disability Retirement Election Application. It is a 6-page document. The first two pages relate*
26

1 entirely to Respondent's disabilities. At page 3, Section E, states "Option Elections." **Signally,**
2 **there is absolutely no explanation of the differences between Option 1, Option 2, Option**
3 **2W, Option 3, Option 3W, Unmodified Allowance, Option 4 (several choices). The only**
4 **"warning," the paragraph immediately following "Section E," states, in pertinent part, "I**
5 **understand that ... by electing Option 2W, 3W, or 4, I forfeit my right to an increase in my**
6 **allowance based on the conditions described on page 21 and 22 of this booklet."** Since
7 Respondent did not elect Option 2W, 3W, or 4, she reasonably believed it was
8 unnecessary to read the remainder of the booklet. There is no indication anywhere on the
9 6-page application form that Respondent had been explained her rights or the
10 differences between the options. Exhibit 4 was signed on May 3, 2004, very shortly after
11 the accident. Respondent was in constant pain, a fact known to the correction officer
12 who presented the 6-page Exhibit 4 to her, and she was unable to concentrate on this
13 lengthy document. In fact, Respondent did not receive her first payment until December
14 2005, 19 months later! (CalPERS Exhibit 6, Page 1). (Emphases supplied).

15
16 15. By several months after the accident (May 2004), Respondent, who had signed the
17 paperwork as directed by the correctional officer, was still not getting any benefits. She
18 telephoned CalPERS and asked when she would be retired. The woman on the phone told
19 Respondent, "You will be retired when I say you're retired."

20
21 16. Respondent then contacted her present legal counsel, who telephoned an upper
22 level supervisor at CalPERS. Shortly after this, Respondent started receiving her disability
23 retirement benefits. (Exhibits 5 and 6, CalPERS evidence binder).

24 17. Respondent changed her date of birth when she applied for a position at
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1 Salinas Valley Memorial Healthcare. When her work records were sent to Salinas Valley Prison,
2 the date of birth was the same as had been recorded 10 years previously. Respondent did not
3 deliberately change her records when she went to work at Salinas Valley Prison. She did not
4 have a choice in the matter and never even saw the paperwork.

5 18. To the best of Respondent's knowledge, in March 2018, she had been receiving
6 \$3,488.80 per month. On March 30, 2018, CalPERS reduced the payment to \$3,469.62 per
7 month. By May, 2018 CalPERS had reduced to payments to \$3,192.15 per month. This
8 continued until January 2019. On January 2, 2019, Respondent received \$3,511.21. In February
9 2019, Respondent received \$3,539.11 and that continued through April, 2019. In May 2019,
10 CalPERS increased Respondent's monthly benefits to \$3609.97. That is what she currently
11 receives. These amounts are based on bank statements, since CalPERS has made direct
12 deposits to my account since the first payment.
13

14 19. Respondent was never advised of the difference between signing a document for
15 Unmodified Allowance or Option 1 Allowance, and was acting on the assumption that her
16 employer and CalPERS had vastly superior knowledge to that of the Respondent vis-à-vis the
17 difference that would be incurred by such an election.
18

19 20. It is uncontested that Respondent's retirement was based entirely on her disability
20 resulting from the 2004 accident.
21

22 LEGAL DISCUSSION

23 Critical to an understanding of this case is the statement on Paragraph XIV of
24 CalPERS' statement:

25 "Ms. Palo's age or years of service credit at the time of retirement was not a factor in
26 calculating her unmodified allowance. However, Ms. Palo did not elect the unmodified
27 allowance option at retirement, she elected the Option 1 Allowance, The Option 1
28 Allowance reduces a member's Unmodified Allowance and is calculated using the

1 member's age at retirement and the amount of contributions in the member's account,
2 providing for a payout of any remaining contributions at member's death to one of [sic]
3 more beneficiaries. ...

4 "Increasing Ms. Palo's age by ten years impacts her Option 1 factor, *since she is*
5 *expected to live ten fewer years making it more likely that the Option 1 benefit would be*
6 *paid out to a beneficiary*".¹ (Emphases supplied).

7 **I. CalPERS SHOULD, IN EQUITY, CORRECT THE MUTUAL MISTAKE OF THE**
8 **PARTIES AND READJUST RESPONDENT'S OPTION ELECTION.**

9 Respondent's error is correctible and pursuant to Government Code §20180 the Board
10 has the discretion to correct errors upon any terms it deems just.

11 When the reason of a rule ceases, so should the rule itself, Cal. Civ. Code §3510.

12 In *Button v. Bd. of Administration*, (1981) 122 Cal. App. 3d 730, 736–38, the court held:

13 "Appellant contends that if he actually was disabled when he retired, then his and
14 respondent's belief that he was not disabled was a mistake of fact. As a result, he should
15 now be allowed to "correct" his status. We agree.

16 "In *Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565, 571, section 20180
17 was applied to allow PERS to reclassify certain employees retroactively and then to
18 assess them for the differences in their respective past contributions. Section 20180 was
19 read to indicate that errors in the system arising for any reason should be rectified, if
20 possible, by the adjustment procedure set forth in Section 20165.

21 "*Rodie v. Board of Administration*, supra, 115 Cal.App.3d 559, 567, applied the
22 Campbell interpretation to facts similar to the instant case. In *Rodie* the retiree knew
23 when he retired that he was eligible for both disability and service benefits; he elected a
24 disability retirement. The following year he applied for and was awarded federal Social
25 Security disability benefits only to discover that his state benefits were then reduced
26 correspondingly. Because there would be no such reduction if he were receiving service
27 benefits, Mr. Rodie applied for a status change. The court held that "section 20180 is
28 available to correct an employee's election to retire for disability rather than service,
where such election results from 'inadvertence, oversight, mistake of fact, mistake of
law, or other cause. The court stated that it could "discern no reason for treating an
employee's mistaken choice between two types of retirement to which he is entitled by

¹ Actually the figure is not 10 years' difference. According to the current Social Security Life Expectancy tables, the difference is 5.6 years for a Caucasian female. (11.4 years for someone born March 1, 1942, 5.8 years for someone born March 1, 1932).

1 reason of past services differently from any other mistake depriving him of benefits to
2 which he is fairly entitled.

3 "We find without merit respondent's contention that section 20180 applies only when the
4 action was 'required to be taken' in the first place, and that appellant has not established
5 that PERS was 'required' to grant him disability at the time he retired. Although PERS
6 would not have been required to grant appellant disability until it determined that his
7 claim had merit, nonetheless it would have been required to process his application and
8 make that determination.

9 "Section 20180 dictates that PERS' interests in administrative and actuarial efficiency
10 are not of overriding importance so as to allow honest mistakes to remain uncorrected.
11 The section equally applies to post-retirement changes in status. Although it may be
12 argued that *Campbell* applied to members as opposed to retirees and to reclassification
13 as opposed to status changes, section 20180 expressly applies to retired members as
14 well as active members.

15 "As was noted in *Campbell*, 'pension statutes are to be liberally interpreted in favor of the
16 applicant so as to effectuate, rather than defeat, their avowed purpose of providing
17 benefits for the employee and his family' (Citation).

18 "Based on the element of mistake, this court concurs with the *Rodie* holding and
19 appellant should prevail on the section 20180 issue. The facts of the instant case
20 present a stronger case of mistake than *Rodie*. In *Rodie*, the retiree knew that he was
21 eligible for either disability or service status yet elected to receive lesser disability
22 benefits; whereas appellant did not initially realize he may have been eligible to apply for
23 disability.

24 "Respondent also contends that appellant's mistake was one of judgment, and claims
25 that appellant was negligent in not knowing that he was disabled. Again, the instant
26 situation is less judgmental and suggestive of negligence than in *Rodie*. If Mr. *Rodie* had
27 undertaken sufficient inquiry, he could have easily avoided his error. Here, there is no
28 evidence that appellant's condition was amenable of his retirement.

"In light of the clear legislative intent to compensate in a certain manner those
employees who are disabled at the time they retire (see section 20001), and given the
express language of section 20180, it is unreasonable to attribute to the Legislature an
intention to preclude an *738 otherwise eligible employee from receiving a disability
pension on the sole ground that his disabling condition was not diagnosed as such at the
time of retirement." - *Button v. Bd. of Admin.* (1981) 122 Cal. App. 3d 730, 736-38

Due process requires that administrative hearings be full and fair, *Scott v. Meese* (1985)

174 Cal. App. 3d 249, 256.

1 "The doctrine of equitable estoppel may be applied against the government where
2 justice and right require it but that an estoppel will not be applied against the government
3 if to do so would effectively nullify "a strong rule of policy, adopted for the benefit of the
4 public. [Citation]. The tension between these twin principles makes up the doctrinal
5 context in which concrete cases are decided.' After a review of a number of cases the
6 [Supreme Court] phrased the rule governing the application of equitable estoppel against
7 the government as follows: 'The government may be bound by an equitable estoppel in
8 the same manner as a private party when the elements requisite to such an estoppel
9 against a private party are present and, in the considered view of a court of equity, the
10 injustice which would result from a failure to uphold an estoppel is of sufficient dimension
11 to justify any effect upon public interest or policy which would result from the raising of
12 an estoppel.' (3 Cal.3d at pp. 496—497).

8 "The elements which must be present in order to invoke equitable estoppel are: '(1) the
9 party to be estopped must be apprised of the facts; (2) he must intend that his conduct
10 shall be acted upon, or must so act that the party asserting the estoppel high a right to
11 believe it was so intended; (3) the other party must be ignorant of the true state of facts;
12 and (4) he must rely upon the conduct to his injury.' (Citation).

11 "Applying the foregoing principles to the instant case, the city would be clearly estopped
12 from seeking petitioners' reclassification to miscellaneous membership as of the date
13 they initially became members of the system. All of the requisite elements of equitable
14 estoppel are present insofar as the city is concerned. The city was apprised of the facts.
15 The city knew that petitioners were being employed by the police department as animal
16 control officers at the time it erroneously advised them they would be entitled to
17 retirement benefits as local safety members. The fact that the advice may have been
18 given in good faith does not preclude the application of estoppel. Good faith conduct of a
19 public officer or employee does not excuse inaccurate information negligently given.
20 (Citations). In the instant case the erroneous representations that petitioners would be
21 entitled to local safety memberships if they accepted city employment was given without
22 verifying its accuracy either by advice from the board or any other qualified person.

18 "All of the other requisite elements of equitable estoppel against the city were
19 established by uncontradicted evidence. The city manifestly intended its erroneous
20 representations to be acted upon and petitioners had a right to believe the city so
21 intended. Petitioners were ignorant of the fact that the city's advice was erroneous.
22 Petitioners relied upon the representations to their injury by relinquishing other
23 employment to accept city employment and by paying over the years the greater
24 contributions required of safety members. Petitioner Crumpler served as animal control
25 officer for over 20 years. During those years he paid safety member contributions and
26 arranged his personal financial affairs in the expectation he would ultimately receive the
27 retirement benefits of a safety member. Petitioner Ingold relinquished federal civil
28 service employment with 15 years accrued federal pension rights to accept city
employment on the representation that his city pension rights would be that of a safety
member.

Crumpler v. Bd. of Admin. (1973) 32 Cal. App. 3d 567, 581—83

1 brother. Albert was avowedly anti-Nazi. His real-life efforts at saving victims of the Third Reich
2 exceeded that of the much more famous Oskar Schindler.

3 After the war, Albert fell on hard times and was unable to find work, solely because of his
4 last name and his relationship to Hermann. When interviewed by the media, he said, "It is
5 indeed wonderful that so many people are saying such nice things about me now. I am sure
6 that when I die, they will spend a great deal of money buying beautiful flowers for my grave. But
7 I will have no need of money then. I need the money they would spend now, when I have a wife
8 and child to support."

9
10 Similarly, Respondent's need for what seems like a paltry amount which was seized by
11 CalPERS, is critically serious for her now. It will do her no good in the world to come.

12 Dated: February 7, 2020.

Respectfully submitted,

13 HUGO N. GERSTL, Attorney for Respondent

14
15 **PROOF OF SERVICE**

16 State of California, County of Monterey: I am employed in the county referenced above. I am
17 over the age of eighteen years and not a party to the within action. My business address is 2460
18 Garden Road, Suite C, Monterey, CA 93940. On February 7, 2020, I served the within
RESPONDENT'S STATEMENT OF ISSUES on the following party(s) or their counsel:

19 Matthew G. Jacobs, General Counsel
20 Austa Wakily, Senior Attorney
P.O. Box 942707
Sacramento, CA 94229-2707 **EMAIL: Austa.Wakily@calpers.ca.gov**

21 By: E-mail: I caused the document(s) referred to above to be transmitted by Electronic Mail (E-
22 mail) to the E-mail addresses described above.

23 I declare under penalty of perjury under the laws of the State of California that the
24 foregoing is true and correct. Executed at Monterey, California, February 7, 2020.

25
26 _____
HUGO N. GERSTL, Declarant

EXHIBIT 3

Exhibit 3 is a one-page Beneficiary Designation dated August 1, 2002, which was approved on October 12, 2002. This document does **not** make an election of an option. It says, "I hereby designate the following person(s) who survive me as BENEFICIARIES for Death Benefits under the Public Employees Retirement Law **in the event of my death prior to retirement.** ..." You are correct that this beneficiary designation was made almost two years prior to the accident, so it really is **not** relevant to the present dispute.

Exhibit 4 (pages 1-6) is the relevant document at issue. It was dated, signed, and notarized on **May 3, 2004** and was received by CalPERS on May 11, 2004. It is entitled "**Disability Retirement Election Application.**" It is based on **Industrial Disability Retirement. Contrary to CalPERS testimony at the hearing, there is no reference to Publication 35.** At the bottom left-hand corner of Page 1, the form is **PERS-BSD-369-D (6/02).**

Section A (page 1) simply states who the claimant is. Section B (page 1) states where the claimant worked, what she did, and the date of the final compensation period (May 15, 2004). Section C (Page 1) describes the Workers Compensation carrier, the adjuster, the claim number, and the address. Section D (Page 2) describes how the accident happened, the claimant's injuries, and how it impacted her life. It is uncontradicted that Palo's retirement was related to an industrial accident. It is conceded by CalPERS that in the event of disability retirement, the age of the retiree is irrelevant to the benefits to which she is entitled.

In fact, in his opening observation, ALJ Walker said, "It seems to me that if the claimant understated her age, she is actuarially likely to die earlier rather than later, in which event Ms. Palo's stating she was born on March 1, 1942 when she was actually born on March 1, 1932 would mean CalPERS would end up paying less than had her statement been true."

The contested part, Section E, begins on page 3. At the top of the page it states: "**I elect the following retirement payment option. (Please check one only).** *I understand that my election of option is irrevocable and that by electing Option 2W, 3W, or 4 I forfeit my right to an increase in my allowance based on the conditions described on page 21 and 22 of this booklet. Option 1 is checked.* Kathleen Lanctot is named as the sole beneficiary. There is nothing else checked in Section E. (Emphasis supplied by HNG).

Section F (Page 4) designates Kathleen Lanctot as sole beneficiary. Section H (Page 5) is to be filled out by the employer. Section I (Page 5) is labeled Tax Withholding Election) The letters "NA" are scrolled across the page.

Section J (Page 6) states, "I hereby certify under penalty of perjury that the information submitted hereon is true and correct to the best of my knowledge. I understand that to request cancellation of this application I must notify CalPERS before the mailing of my first retirement allowance check. I am not married. Palo's signature is notarized by Rosemary E. Michels, a Notary Public in Monterey County, whose commission expired on May 5, 2004, two days after she notarized Palo's signature. Section K (Page 6) states: "Employer-Originated Application. (To be completed if the employer is submitting the application." **There appears to be some writing in that section, but it is completely illegible.**

Turning to EXHIBIT 21, Publication 35, Contrary to the testimony of the witness and contrary to the position of CalPERS, there is nothing in Publication 35 that says that if you state the wrong birthdate this will result in lowering your payments if you have selected anything other than “Unmodified Allowance.” The only section of Publication 35 that deals with this situation appears at page 66 of Publication 35:

“Changing Your Option Election or Beneficiary After Retirement.

“There are limited situations when you can change your beneficiary or option after retirement. If there is a change in your marital status, or your designated beneficiary dies, you may be entitled to elect a new benefit and designate a new beneficiary. **This will result in a reduction of your allowance.** If this occurs, contact CalPERS to request a *Changing Options and Beneficiaries After Retirement* form (PERS-PRS-411).” (Emphases supplied by HNG.

The entirety of pages 21-22 of Publication 35 reads as follows:

Section E - Option Election (This section should not be completed by the employer.

This section will tell CalPERS which retirement allowance option you have chosen. Please keep in mind that the **option chosen will be calculated based on payroll information on file when your application is submitted.** The amount at retirement may be adjusted after final payroll information is received. Option elections are lifetime monthly allowances.

You need to decide if you want the **Option 1, Option 2, Option 2W, Option 3, Option 3W, Unmodified Allowance, or Option 4.** More information on each of these choices is provided here to assist you in making your decision. *The retirement estimate you should have received provided you with a projection of the retirement benefits you and your beneficiary would receive for each of these choices.* (Emphasis provided by HNG).

Your election choices are:

- **Option 1** - Upon your death, any unused member contributions in your account will be paid to your beneficiary in a lump sum. Option 1 does not provide a continuing allowance to a beneficiary. You may name more than one person as beneficiary by completing the *Lump Sum Beneficiary Designation* form in this package. (Option 1 is not available to members who have all State Second Tier service, since you did not make member contributions.) *You may change your beneficiary at any time by submitting a revised designation form.* (Emphasis provided by HNG).

Option 2- The same retirement allowance you receive will be paid to your beneficiary for life. If Survivor Continuance (see Section G) applies and your beneficiary is not your eligible survivor, the beneficiary's allowance will not include the survivor continuance portion.

Your retirement allowance will increase back to the Unmodified Allowance amount if:

- your beneficiary dies; or
- your non-spouse beneficiary waives entitlement to the Option 2 benefit; or

- your beneficiary is your spouse and upon divorce, legal separation, or annulment you provide CalPERS with a *judgment* that awards you the entire interest in your CalPERS benefits; **and**
- **you inform CalPERS.**
- **Option 2W** - As an alternative to Option 2, you may elect the slightly higher allowance under Option 2W. However, your allowance will not increase back to the Unmodified Allowance amount under the scenarios shown in Option 2.
- **Option 3** - In this option, one-half of your monthly retirement allowance will be paid to your beneficiary for life. If Survivor Continuance applies (see Section G) and your beneficiary is not your eligible survivor, the beneficiary's allowance will not include the Survivor Continuance portion.
 - Your retirement allowance will increase back to the Unmodified Allowance amount **if:**
 - your beneficiary dies; **or**
 - your non-spouse beneficiary waives entitlement to the Option 3 benefit; **or**
 - your beneficiary is your spouse and upon a divorce, legal separation, or annulment you provide CalPERS with a *judgment* that awards you the entire interest in your CalPERS benefits; **and**
 - **you inform CalPERS.**
- **Option 3W** - As an alternative to Option 3, you may elect to receive the slightly higher allowance under Option 3W. However, your allowance will not increase back to the Unmodified Allowance amount under the scenarios shown in Option 3.
- **The Unmodified Allowance** - This is the highest monthly allowance you can receive. However, it does not provide a continuing allowance to a beneficiary, and there is **no return of any unused member** contributions after your death.
- **Option 4** - Option 4 allows you to choose a more customized benefit, as long as the amount to your beneficiary is not greater than the benefit provided under Option 2W. See *Retirement Option 4* (PF.RS.PUB-18) for more information about this option. There is no provision under any Option 4 calculation for your allowance to increase back to the Unmodified Allowance amount provided in Options 2 and 3.

The following are the types of Option 4 allowances currently available.

- **Option 2W & I Combined** - The retirement allowance you receive will be paid to your beneficiary. Upon your death and the death of your beneficiary, any remaining balance of your contributions will be paid to your secondary beneficiary.
- **Option 3W & I Combined** - One-half of your monthly retirement allowance will be paid to

your beneficiary. Upon your death and the death of your beneficiary, any remaining balance of your contributions will be paid to your secondary beneficiary. {If you elect the 2W & 1 Combined or 3W & I Combined Option 4 allowance, you must complete the *Lump Sum Beneficiary Designation* form for your Option I balance.)

- **Specific Dollar Amount to Beneficiary** - You can specify the *dollar amount* of your retirement allowance to be paid to your beneficiary upon your death.
- **Specific Percentage to Beneficiary** - You can specify the *percentage* of your Unmodified Allowance to be paid to your beneficiary upon your death.
- **Reduced Allowance for Fixed Period of Time** - You can elect to receive a specific dollar amount or percentage of your Unmodified Allowance for a specific length of time. After this period you will receive an increased allowance based on the actuarial equivalent of your remaining benefit.

For information on changing your option election or beneficiary after retirement, see page 66.

- **Beneficiary Information** - (DO NOT complete this section if you are electing Option 4 with multiple lifetime beneficiaries.) Enter the **name, birth date, sex, Social Security number, relationship, and address** of the beneficiary you designate to receive continuing benefits after your death.

Multiple Lifetime Beneficiaries - Unlike the other options that limit you to one beneficiary, this option allows you to provide a lifetime benefit to more *than one* beneficiary. You can give each beneficiary an equal share or designate specific dollar amounts or percentage.

- **Option 4 Court-Ordered Community Property**-This option only applies to very specific cases where you are required by court order to elect an Option 4 to provide a community property interest to your former spouse equal to their community property interest. CalPERS will determine the community property interest at the time of your retirement using the method described in your court order.

This option also gives you the opportunity to name another beneficiary for your share of the benefit. For your remaining share of the benefit you may elect the Unmodified Allowance or Option I, or you may provide for another lifetime beneficiary by electing either Option 2W or 3W. If you have questions about your court order or your benefits, please contact the CalPERS Member Services Division Community Property Unit at (916) 326-3551.

- ---

Once you have completed this Section, be sure you review the Required Documents Checklist carefully to determine which beneficiary or survivor documentation you will need to submit with your application.

PALO's unchallenged sworn testimony is that she never received Publication 35 or any explanation of what her election of options meant. CalPERS concedes that it has no direct proof by way of a signed receipt that she ever received Publication 35, but "assumes" that she received it, relying on Exhibit 20, pages 17-18 dated 7/21/2004, 13:30:29, which

states, in pertinent part:

“Process Category Type: No category.

DivP Analyst Name: Wyatt, Tracy

Note Text: Mbr inquiry very upset that her adjuster has not sent us the records and is in essence holding up her case. Called and left msgs for the adjuster Andre Pickett, his supervisor and fellow adjuster, Art Sciciliano who mbr states her atty spoke to last week. Art called back to say that Andre was on vacation last week and he did speak with mbr’s attorney. Andre is at lunch but Art checked the file and says it looks like Andre mailed the meds this week. He will have Andre call me back. Will hold sending another request. *Meanwhile the 35 wasn’t showing in system. Mbr faxed a copy to me which I have received. Attaching a pink and will send to be imaged.*” (Emphasis provided by HNG)

The difficulty with CalPERS’ reliance on this note is:

1. CalPERS representative testified that Exhibit 4 is *a part of* Publication 35.
2. There is no showing as to whether or not PALO only sent the part she claims she filled out and signed, Exhibit 4, or the *entirety* – 68 pages – of a publication she claims she never received.
3. Tracy Wyatt was not called by CalPERS to testify as to what he meant when he sent the statement, “Meanwhile the 35 wasn’t showing in system. Mbr faxed a copy to me which I have received. Attaching a pink and will send to be imaged.”
4. Exhibit 20 appears to be an incomplete document at best and the entries are misaligned. The first entry after 1/8/2003 (page 18) is dated 5/6/2004 (page 18). The next entry is dated 7/20/2004 (page 18). more than two months later. **The next entry, 7/21/2004 at 13:49:07** appears to be a continuation of the **7/21/2004 at 13:30:29** (Same operative, Tracy Wyatt), which states, “Spoke to Andre. He says that he returned the 92 with medicals attached on 05/13. Advised him that I don’t have a copy of the 92 *and only records that the ER sent us*. He will recopy the medicals and use the 92 as a coversheet.” (Emphasis supplied by HNG). This is followed by the 7/21/2004 keynote entry.
5. But the following entry is **7/21/2004 at 12:03:24, which is 1 ½ hours before the keynote entry**. It says, “See casenotes for update. Spoke to mbr and gave her my direct line. The entry after that is dated **8/12/2004 at 16:16:29** and also involves Tracy Wyatt. No mention of any form except “Dr. Bozzo’s 1372 which is supported by Dr. Bronsvag’s 07/2004 report. Case is ready for admin review process.”

Thus, there is absolutely **no** evidence that PALO received any counseling – meaningful or otherwise – concerning the consequences of her electing any particular option. And CalPERS has not produced any *admissible* evidence to contradict PALO’S sworn testimony that she never received the entirety of Publication 35.

But even assuming, without in any way conceding, that PALO *did* received Publication 35, **it is meaningless when it comes to “advising” her about the consequences of her electing Option 1.**

For example, **Exhibit 4**, Page 3, Section E, top paragraph states: “*I understand that my election of option is irrevocable and that by electing Option 2W, 3W, or 4 I forfeit my*

right to an increase in my allowance based on the conditions described on page 21 and 22 of this booklet.”

Pages 21-23 of Publication 35, to which this sentence refers, is either totally inconsistent with that statement or is further ambiguous and confusing by virtue of the reference to Page 66 of Publication 35, found at the bottom of page 22 of Publication 35. Thus, Publication 35 *raises more questions than it answers*.

Publication 35 was authored entirely by CalPERS and is an integral part of a contract of adhesion. *Cal. Civ. Code §1654* states, in pertinent part, “In cases of uncertainty the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.”

“Where ... the written agreement has been prepared entirely by [one party], it is a well established rule of construction that any ambiguities must be construed against the drafting [party] and in favor of the nondrafting [party]. (369 *Pacific Lbr. Co. v. Ind. Acc. Com.* (1943) 22 Cal.2d 410, 422...) Moreover, the rule requiring the resolution of ambiguities against the drafting party applies with peculiar force in the case of a contract of adhesion. Here the party of superior bargaining power not only prescribes the words of the instrument but the party who subscribes to it lacks the economic strength to change such language.” (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819, fn. 16). - *Sandquist v. Lebo Auto., Inc.* (2016) 1 Cal. 5th 233, 248; *Juarez v. Wash Depot Holdings, Inc.* (2018) 24 Cal. App. 5th 1197, 1203; *Cavalry SPV I, LLC v. Watkins* (2019) 36 Cal. App. 5th 1070, 1098.

CONCLUSION

The relief requested by Appellant Rita Palo should be GRANTED as a matter of both law and equity.

EXHIBIT 4

1 Hugo N. Gerstl, CSB #37927
2 Law Offices of Hugo N. Gerstl, Inc.
3 2460 Garden Road, Suite C
4 Monterey, CA 93940
5 Telephone: (831) 649-0669
6 Facsimile: (831) 649-8007
7 Email: Hugo@gerstllaw.com
8 Attorney for: Appellant RITA K. PALO

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**BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM**

In re the Appeal of Adjustment and
Overpayment of Retirement Benefits of
RITA K. PALO,

Appellant

AGENCY CASE NO. 2019-0611
OAH No. 2019100348 (Govt.Code §11509)

APPELLANT'S CLOSING BRIEF¹

Hearing Date: February 11, 2020; 10:00 a.m.
Hearing Location: Palm Desert City Hall
Council Chambers Conference Room
73510 Fred Waring Drive, Palm Desert, CA

**AGREED TESTIMONY OF RITA PALO ADOPTING THE STATEMENTS IN HER VERIFIED
STATEMENT OF ISSUES**

Appellant RITA PALO (hereafter "Appellant") concedes that she provided an "Incorrect
Date of Birth" in 1977-78 when she moved to Northern California from the Los Angeles Area.
She had been working in and around Los Angeles for several years as a Registered Nurse
(RN). Her last position prior to moving north was with Orange County Hospital, Neonatal
Intensive Care. (The name of the facility was changed after Appellant left) - ¶2, Statement of
Issues (hereafter all numbers refer to paragraph numbers contained in the Statement of Issues).

APPELLANT RITA PALO'S CLOSING BRIEF

In re CalPERS and PALO – Agency Case No. 2019-0611

EXHIBIT 4

1 Appellant relocated because her children were in Monterey County and wanted her to reside
2 near them. Appellant immediately looked for a position at the Hospitals and found one at
3 Salinas Valley Memorial Healthcare ("SVMH") in the ICU-CCU unit. Appellant has never worked
4 as a Floor Nurse in any medical facility. (§§3).

5 Appellant secured an interview with the Nursing Director at SVMH. While she was
6 filling out the paperwork for the interview, Appellant overheard the Nursing Director on the
7 phone, telling someone, "I would never hire someone for ICU-CCU who is 40 years old." (§§4).
8 Appellant was 40 at the time. She erased the birthdate and took 10 years off her age on paper,
9 substituting 1942 for 1932. Appellant was interviewed and offered a position immediately
10 following the Nursing Director's checking Appellant's references from Orange County Hospital.
11 The interview was about 10 minutes in length. Appellant reported for work in 2 days and worked
12 there for 10 years, during which time, she went back to College and eventually got her MSN,
13 then went on to finish out her Doctorate. She finished all the course work, but declined to
14 publish a dissertation for the doctorate, because she had become very discouraged at the
15 amount of time and effort it would take, since she was already actually 50 years old. (§§5)

16 In or about 2002 (Appellant does not recall the precise date or even the precise
17 year. The year is based on CalPERS Exhibit 3, page 1) Appellant moved to Soledad CTF and
18 worked for six months covering for an employee who was on leave. When the six months were
19 over, Appellant applied for position at the newly-built Salinas Valley Prison medical facility and
20 took a position as Head Nurse in the Medical Unit. The facility had six offices. Appellant took
21 care of the patient population in the emergency unit, and in an area where they did diagnostic
22
23
24

25 ¹ In the initial Statement of Issues and other documents, RITA PALO was erroneously referred to as "Appellant."
26

1 treatment. There were 10 beds and a mental facility across the campus, a mile away. There
2 was a doctor in charge and four nurses. (¶6)

3 When Appellant took her position at Salinas Valley Prison, it was almost a mile of
4 walking distance from the Salinas Valley Prison parking lot to the medical building. This was
5 physically taxing to Appellant. Her position required assisting in rendering emergency care to
6 the prison population, as well as daily activities and taking care of the prison population. This
7 required hospital care and visits to the prison population in order to provide the population with
8 tuberculosis preventative vaccine. (¶8)

9
10 In or about May 2004 (Appellant does not remember the precise date), Appellant
11 worked from 6:30 a.m. to 4:00 p.m. She was getting off shift and the doctor on duty offered her
12 a ride in his cart to the employee parking lot, a mile away. Appellant got into the cart. A female
13 correctional officer, a lieutenant, came up and said that she needed a ride and that she would
14 drive. There was only room for two persons in the front seat, so Appellant sat in the back seat.
15 (¶9). The correctional officer could not get the cart in gear. She attempted to do so several
16 times. When at last she shoved it into gear, the cart shot forward, and Appellant flew off the rear
17 seat, and landed on her left hip. Several witnesses were coming out of the Medical Unit at the
18 time of the incident. (¶10).

19
20 Appellant suffered severe, debilitating, and permanent personal injuries as
21 a direct and proximate result of the incident. Her left hip was fractured (not-displaced but
22 unstable); the L2 vertebra in her spine, was fractured in a non-displaced position. This has left
23 Appellant in a compromised position, in constant for pain and physical limitations. As a result,

24
25 The parties are in agreement that she is actually the Appellant.
26

1 she has been constantly treated by medical doctors and chiropractors. Appellant was recently
2 advised by physicians after a bone density test that her left hip is losing placement, and she is a
3 candidate for left hip replacement. As a result, Appellant, who does not want hip replacement
4 surgery at her advanced age, is extremely cautious and conservative in her movements (§11)
5 Appellant presently sees a chiropractor monthly for pain and limited physical activity, such as
6 walking uphill, climbing stairs, and painful cramping in her legs. In all the years, since the
7 accident, she has paid out of her own pocket and medical insurance which she pays for, all the
8 medical care that she has received. (§12)

9
10 During the period following the accident, Appellant was receiving no money. She
11 was sent to several doctors, all of whom concurred that she was seriously and permanently
12 disabled. Appellant remembers going to a heavysset African-American doctor (with CalPERS?)
13 who recommended that she consult with a Workers Compensation attorney. That doctor is now
14 deceased. Appellant contacted a Workers Compensation attorney in Salinas. Appellant and the
15 attorney went to the Workers Compensation Appeals Board. She and the attorney were there
16 for several minutes. Afterward, the attorney spoke to the Workers Compensation Judge and her
17 attorney told her, "Your disability has been worked out and everything has been resolved." (§13).

18
19 The person who gave Appellant the papers to sign for the election for benefits
20 (approximately 1 week post-accident, when Appellant was in constant pain and was not able to
21 understand anything that was said to her) was a correctional officer. She was very brusque and
22 did not explain anything about options to the Appellant. No one explained Appellant's options to
23 her. *CalPERS Exhibit 4 is entitled "Disability Retirement Election Application. It is a 6-page*
24 *document. The first two pages relate entirely to Appellant's disabilities. At page 3, Section E,*
25 *states "Option Elections." Signally, there is absolutely no explanation of the differences*

1 *between Option 1, Option 2, Option 2W, Option 3, Option 3W, Unmodified Allowance,*
2 *Option 4 (several choices). The only “warning,” the paragraph immediately following*
3 *“Section E,” states, in pertinent part, “I understand that ... by electing Option 2W, 3W, or*
4 *4, I forfeit my right to an increase in my allowance based on the conditions described on*
5 *page 21 and 22 of this booklet.” Since Appellant did not elect Option 2W, 3W, or 4, she*
6 *reasonably believed it was unnecessary to read the remainder of the booklet. There is no*
7 *indication anywhere on the 6-page application form that Appellant had been explained*
8 *her rights or the differences between the options. Exhibit 4 was signed on May 3, 2004,*
9 *very shortly after the accident. Appellant was in constant pain, a fact known to the*
10 *correction officer who presented the 6-page Exhibit 4 to her, and she was unable to*
11 *concentrate on this lengthy document. In fact, Appellant did not receive her first payment*
12 *until December 2005, 19 months later! (CalPERS Exhibit 6, Page 1). (Emphases*
13 *supplied). (¶14).*

15 By several months after the accident (which occurred in May 2004), Appellant, who had
16 signed the paperwork as directed by the correctional officer, was still not getting any benefits.
17 She telephoned CalPERS and asked when she would be retired. The woman on the phone told
18 Appellant, *“You will be retired when I say you’re retired.”* (¶15). Appellant then contacted her
19 present legal counsel, who telephoned an upper level supervisor at CalPERS. Shortly after this,
20 Appellant started receiving her disability retirement benefits. (Exhibits 5 and 6, CalPERS
21 evidence binder). (¶16).

23 Appellant changed her date of birth when she applied for a position at
24 Salinas Valley Memorial Healthcare. When her work records were sent to Salinas Valley Prison,
25 the date of birth was the same as had been recorded 10 years previously. Appellant did not

1 deliberately change her records when she went to work at Salinas Valley Prison. She did not
2 have a choice in the matter and never even saw the paperwork.(¶17).

3 To the best of Appellant's knowledge, in March 2018, she had been receiving
4 \$3,488.80 per month. On March 30, 2018, CalPERS reduced the payment to \$3,469.62 per
5 month. By May, 2018 CalPERS had reduced to payments to \$3,192.15 per month. This
6 continued until January 2019. On January 2, 2019, Appellant received \$3,511.21. In February
7 2019, Appellant received \$3,539.11 and that continued through April, 2019. In May 2019,
8 CalPERS increased Appellant's monthly benefits to \$3609.97. That is what she currently
9 receives. These amounts are based on bank statements, since CalPERS has made direct
10 deposits to her account since the first payment. (¶18).

11 Appellant was never advised of the difference between signing a document for
12 Unmodified Allowance or Option 1 Allowance, and was acting on the assumption that her
13 employer and CalPERS had vastly superior knowledge to that of the Appellant vis-à-vis the
14 difference that would be incurred by such an election. (¶19). It is uncontested that Appellant's
15 retirement was based entirely on her disability resulting from the 2004 accident. (¶20).

16
17 **CalPERS' POSITION AND OBSERVATION BY THE ADMINISTRATIVE LAW JUDGE**

18 CalPERS' position is that because she made an election to grant benefits to here
19 beneficiaries when she died, she was not entitled to the full amount she would receive *but for*
20 the fact that she elected to have her benefits continue after her death. CalPERS concedes that
21 Appellant's entitlement to benefits is based entirely on the accident which caused her disability,
22 and *but for* her election to have her benefits continue after her death, her misstatement of her
23 age would play absolutely no part in the amount of benefits she was entitled to receive.
24

1 During the hearing, the Administrative Law Judge pointed out that *"It seems to me that*
2 *if the claimant understated her age, she is actuarially likely to die earlier rather than later,*
3 *in which event Ms. Palo's stating she was born on March 1, 1942 when she was actually*
4 *born on March 1, 1932 would mean CalPERS would end up paying less than had her*
5 *statement been true."* All other things being equal, if Appellant has understated her age by ten
6 years when she applied for employment at Salinas Valley Hospital, according to Life
7 Expectancy Tables, she would most likely receive less in ultimate benefits, since she would be
8 more likely to die sooner than CalPERS projected based on the misstatement of her age.
9

10 At the hearing, Appellant made it clear that benefits given to her heirs after she died
11 would do her no good whatever, since she need the benefits during her lifetime. She formally
12 offered to amend any election by way of reformation of her "election" based on mistake
13 engendered by failure of the authority who took down her "election" to explain what she would
14 be gaining or losing by "electing" to have benefits continue to go to her heirs after her death.

15 Statistically, such a reformation would have the equitable effect that Appellant would
16 ultimately most likely be paid less and CalPERS would ultimately most likely pay less.

17 This would bring things into balance and would give practical meaning to the axiom
18 "He (or she) who seeks equity must do equity." As stated by a unanimous Supreme Court *en*
19 *banc*, nearly 70 years ago:
20

21 "With respect to the terms which may be imposed upon the party as a condition to his
22 obtaining the relief in accordance with the rule, that is, the 'equity' which he must do, it is
23 undoubtedly true, as said by Vice-Chancellor Wigam, that the court obtains no authority
24 from this principle to impose any arbitrary conditions not warranted by the settled
25 doctrines of equity jurisprudence; the court cannot deprive a plaintiff of his full equitable
26 rights, under the pretense of awarding to the defendant something to which he has no
27 equitable right, something which equity jurisprudence does not recognize. The principle
28 only requires the plaintiff to do 'equity.' According to its true meaning, therefore, the
terms imposed upon the plaintiff, as the condition of his obtaining the relief, must consist

1 of the awarding or securing to the defendant something to which he is justly entitled by
2 the principles and doctrines of equity, although not perhaps by those of the common law,
3 something over which he has a distinctively equitable right." - *Stein v. Simpson* (1951)
37 Cal. 2d 79, 83.

4 "It is a well-accepted maxim that 'he who seeks equity must do equity,'" *In re Gardenhire*
5 209 F.3d 1145, 1152 (9th Cir. 2000); *Kaping v. Barrett Daffin Frappier Treder & Weiss,*
6 *LLP*, No. 217CV00697JAMCKDPS, 2017 WL 2505194, at *6 (E.D. Cal. June 9, 2017).

6 AN EXAMINATION OF THE DOCUMENTS IN THE RECORD

7 **Exhibit 3** is a one-page Beneficiary Designation dated August 1, 2002, which was
8 approved on October 12, 2002. This document does **not** make an election of an option. It says,
9 "I hereby designate the following person(s) who survive me as BENEFICIARIES for Death
10 Benefits under the Public Employees Retirement Law *in the event of my death prior to*
11 *retirement. ...*" This beneficiary designation was made *almost two years prior to the accident,*
12 so it really is not relevant to the present dispute.

13 **Exhibit 4** (pages 1-6), the relevant document at issue, was dated, signed, and notarized
14 on May 3, 2004 and was received by CalPERS on May 11, 2004. It is entitled "Disability
15 Retirement Election Application." It is based on Industrial Disability Retirement. Contrary to
16 CalPERS testimony at the hearing. There is *no reference to Publication 35.* At the bottom left-
17 hand corner of Page 1, the form is PERS-BSD-369-D (6/02).

18 Section A (page 1) simply states who the claimant is. Section B (page 1) states where
19 the claimant worked, what she did, and the date of the final compensation period (May 15,
20 2004). Section C (Page 1) describes the Workers Compensation carrier, the adjuster, the claim
21 number, and the address. Section D (Page 2) describes how the accident happened, the
22 claimant's injuries, and how it impacted her life. It is uncontradicted that Palo's retirement was
23

1 related to an industrial accident. CalPERS concedes that in the event of disability retirement, the
2 age of the retiree is irrelevant to the benefits to which she is entitled.

3 The contested part, Section E, begins on page 3. At the top of the page it states: "I elect
4 **the following retirement payment option. (Please check one only).** I understand that my
5 election of option is irrevocable and that by electing **Option 2W, 3W, or 4** I forfeit my right to an
6 increase in my allowance based on the conditions described on page 21 and 22 of this booklet.
7 **Option 1 is checked.** Kathleen Lanctot is named as the sole beneficiary. There is nothing else
8 checked in Section E. (Emphases supplied).

9
10 Section F (Page 4) designates Kathleen Lanctot as sole beneficiary. Section H (Page 5)
11 is to be filled out by the employer. Section I (Page 5) is labeled Tax Withholding Election) The
12 letters "NA" are scrolled across the page.

13 Section J (Page 6) states, "I hereby certify under penalty of perjury that the information
14 submitted hereon is true and correct to the best of my knowledge. I understand that to request
15 cancellation of this application I must notify CalPERS before the mailing of my first retirement
16 allowance check. I am not married. Palo's signature is notarized by Rosemary E. Michels, a
17 Notary Public in Monterey County, whose commission expired on May 5, 2004, two days after
18 she notarized Palo's signature. Section K (Page 6) states: "Employer-Originated Application.
19 (To be completed if the employer is submitting the application." There appears to be some
20 writing in that section, but it is completely illegible.
21

22 **Turning to EXHIBIT 21, Publication 35, Contrary to the testimony of the witness
23 and contrary to the position of CalPERS, there is nothing in Publication 35 that says that
24 if you state the wrong birthdate this will result in lowering your payments if you have**

1 selected anything other than “Unmodified Allowance.” The only section of Publication 35
2 that deals with this situation appears at page 66 of Publication 35:

3 **“Changing Your Option Election or Beneficiary After Retirement.** “There are limited
4 situations when you can change your beneficiary or option after retirement. If there is a change
5 in your marital status, or your designated beneficiary dies, you may be entitled to elect a new
6 benefit and designate a new beneficiary. **This will result in a *reduction* of your allowance.** If
7 this occurs, contact CalPERS to request a ***Changing Options and Beneficiaries After***
8 ***Retirement*** form (PERS-PRS-411).” (Emphases supplied).

9
10 The entirety of pages 21-22 of Publication 35 reads as follows:

11 **Section E - Option Election (This section should not be completed by the employer.**

12 “This section will tell CalPERS which retirement allowance option you have chosen. Please
13 keep in mind that the **option chosen will be calculated based on payroll information on file**
14 **when your application is submitted.** The amount at retirement may be adjusted after final
15 payroll information is received. Option elections are lifetime monthly allowances.

16 “You need to decide if you want the **Option 1, Option 2, Option 2W, Option 3, Option 3W,**
17 **Unmodified Allowance, or Option 4.** More information on each of these choices is provided
18 here to assist you in making your decision. ***The retirement estimate you should have***
19 ***received provided you with a projection of the retirement benefits you and your***
20 ***beneficiary would receive for each of these choices.*** (Emphasis provided by HNG).

21
22 “Your election choices are:

23 **“Option 1 -** Upon your death, any unused member contributions in your account will be
24 paid to your beneficiary in a lump sum. Option 1 does not provide a continuing allowance
25 to a beneficiary. You may name more than one person as beneficiary by completing the

1 Lump Sum Beneficiary Designation form in this package. (Option I is not available to members
2 who have all State Second Tier service, since you did not make member contributions.) **You**
3 **may change your beneficiary at any time by submitting a revised designation form.**
4 (Emphasis provided).

5 “**Option 2-** The same retirement allowance you receive will be paid to your beneficiary for
6 life. If Survivor Continuance (see Section G) applies and your beneficiary is not your eligible
7 survivor, the beneficiary's allowance will not include the survivor continuance portion.

8
9 “Your retirement allowance will increase back to the Unmodified Allowance amount if:
10 your beneficiary dies; or your non-spouse beneficiary waives entitlement to the Option 2
11 benefit; or your beneficiary is your spouse and upon divorce, legal separation, or annulment
12 you provide CalPERS with a *judgment* that awards you the entire interest in your CalPERS
13 benefits; and you inform Ca1PERS.

14 “**Option 2W** - As an alternative to Option 2, you may elect the slightly higher allowance
15 under Option 2W. However, your allowance will not increase back to the Unmodified Allowance
16 amount under the scenarios shown in Option 2.

17 • “**Option 3** - In this option, one-half of your monthly retirement allowance will be paid to
18 your beneficiary for life. If Survivor Continuance applies (see Section G) and your beneficiary is
19 nor your eligible survivor, the beneficiary's allowance will not include the Survivor Continuance
20 portion.

21
22 “Your retirement allowance will increase back to the Unmodified Allowance amount if:

- 23 • your beneficiary dies; or
- 24 • your non-spouse beneficiary waives entitlement to the Option 3 benefit; or

- your beneficiary is your spouse and upon a divorce, legal separation, or annulment you provide CalPERS with a *judgment* that awards you the entire interest in your CalPERS benefits; and
- you inform CalPERS.

“**Option 3W** - As an alternative to Option 3, you may elect to receive the slightly higher allowance under Option 3W. However, your allowance will not increase back to the Unmodified Allowance amount under the scenarios shown in Option 3.

“*The Unmodified Allowance - This is the highest monthly allowance you can receive. However, it does not provide a continuing allowance to a beneficiary, and there is no return of any unused member contributions after your death.* (Emphasis supplied).

“**Option 4** - Option 4 allows you to choose a more customized benefit, as long as the amount to your beneficiary is not greater than the benefit provided under Option 2W. See **Retirement Option 4** (PF.RS-PUB-18) for more information about this option. There is no provision under any Option 4 calculation for your allowance to increase back to the Unmodified Allowance amount provided in Options 2 and 3.

“The following are the types of Option 4 allowances currently available.

“**Option 2W & I Combined** - The retirement allowance you receive will be paid to your beneficiary. Upon your death and the death of your beneficiary, any remaining balance of your contributions will be paid to your secondary beneficiary.

“**Option 3W & I Combined** - One-half of your monthly retirement allowance will be paid to your beneficiary. Upon your death and the death of your beneficiary, any remaining balance of your contributions will be paid to your secondary beneficiary. {If you elect the 2W & I Combined or 3W & I Combined Option 4 allowance, you must complete the *Lump Sum*

1 *Beneficiary Designation* form for your Option 1 balance.)

2 **“Specific Dollar Amount to Beneficiary** - You can specify the *dollar amount* of your
3 retirement allowance to be paid to your beneficiary upon your death.

4 **“Specific Percentage to Beneficiary** - You can specify the *percentage* of your Unmodified
5 Allowance to be paid to your beneficiary upon your death.

6 **“Reduced Allowance for Fixed Period of Time** - You can elect to receive a specific dollar
7 amount or percentage of your Unmodified Allowance for a specific length of time. After this
8 period you will receive an increased allowance based on the actuarial equivalent of your
9 remaining benefit.

10 *For information on changing your option election or beneficiary after retirement, see page 66.*

11 **“Beneficiary Information** - (DO NOT complete this section if you are electing Option 4 with
12 multiple lifetime beneficiaries.) Enter the **name, birth date, sex, Social Security number,**
13 **relationship, and address** of the beneficiary you designate to receive continuing benefits after
14 your death.

15 **“Multiple Lifetime Beneficiaries** - Unlike the other options that limit you to one
16 beneficiary, this option allows you to provide a lifetime benefit to *more than one*
17 beneficiary. You can give each beneficiary an equal share or designate specific dollar
18 amounts or percentage.

19 **“Option 4 Court-Ordered Community Property**-This option only applies to very specific
20 cases where you are required by court order to elect an Option 4 to provide a community
21 property interest to your former spouse equal to their community property interest. CalPERS will
22 determine the community property interest at the time of your retirement using the method
23 described in your court order.

1
2 "This option also gives you the opportunity to name another beneficiary for your share of
3 the benefit. For your remaining share of the benefit you may elect the Unmodified Allowance or
4 Option I, or you may provide for another lifetime beneficiary by electing either Option 2W or 3W.
5 If you have questions about your court order or your benefits, please contact the CalPERS
6 Member Services Division Community Property Unit at (916) 326<3551.
7

8
9 ***"Once you have completed this Section, be sure you review the Required***
10 ***Documents Checklist carefully to determine which beneficiary or survivor***
11 ***documentation you will need to submit with your application."***
12

13 PALO's unchallenged sworn testimony is that she never received Publication 35 or
14 any explanation of what her election of options meant. CalPERS concedes that it has no
15 direct proof by way of a signed receipt that she ever received Publication 35, but
16 "assumes" that she received it, relying on Exhibit 20, pages 17-18 dated **7/21/2004,**
17 **13:30:29**, which states, in pertinent part:

18 "Process Category Type: No category.

19 "DivP Analyst Name: Wyatt, Tracy
20

21 "Note Text: Mbr inquiry very upset that her adjuster has not sent us the records and is
22 in essence holding up her case. Called and left msgs for the adjuster Andre Pickett, his
23 supervisor and fellow adjuster, Art Sciliano who mbr states her atty spoke to last week.
24 Art called back to say that Andre was on vacation last week and he did speak with mbr's
25 attorney. Andre is at lunch but Art checked the file and says it looks like Andre mailed the
26 meds this week. He will have Andre call me back. Will hold sending another request.
27 *Meanwhile the 35 wasn't showing in system. Mbr faxed a copy to me which I have
28 received. Attaching a pink and will send to be imaged.*" (Emphasis provided)

1 The difficulty with CalPERS' reliance on this "note" is:

- 2 1. CalPERS' representative, Ms. Hinch, testified that Exhibit 4 is a *part of* Publication
3 35.
- 4 2. There is no showing as to whether or not PALO only sent the part she claims she
5 filled out and signed, Exhibit 4, or the *entirety* – 68 pages – of a publication she
6 claims she never received.
- 7 3. Tracy Wyatt was not called by CalPERS to testify as to what he meant when he
8 sent the statement, "Meanwhile the 35 wasn't showing in system. Mbr faxed a
9 copy to me which I have received. Attaching a pink and will send to be imaged."
10 Thus, there is no competent, admissible evidence to support this conclusion.
- 11 4. Exhibit 20 appears to be an incomplete document at best and the entries are
12 misaligned. The first entry after 1/8/2003 (page 18) is dated 5/6/2004 (page 18).
13 The next entry is dated 7/20/2004 (page 18). more than two months later. **The**
14 **next entry, 7/21/2004 at 13:49:07** appears to be a continuation of the **7/21/2004**
15 **at 13:30:29** (Same operative, Tracy Wyatt), which states, "Spoke to Andre. He
16 says that he returned the 92 with medicals attached on 05/13. Advised him that I
17 don't have a copy of the 92 *and only records that the ER sent us*. He will recopy
18 the medicals and use the 92 as a coversheet." (Emphasis supplied). This is
19 followed by the 7/21/2004 keynote entry.
- 20 5. But the following entry is **7/21/2004 at 12:03:24**, which is **1½ hours before the**
21 **keynote entry**. It says, "See casenotes for update. Spoke to mbr and gave her
22 my direct line. The entry after that is dated **8/12/2004 at 16:16:29** and also
23 involves Tracy Wyatt. No mention of any form except "Dr. Bozzo's 1372 which is
24
25
26
27
28

1 supported by Dr. Bronsvag's 07/2004 report. Case is ready for admin review
2 process."

3 ***Thus, there is absolutely no evidence that PALO received any counseling –***
4 ***meaningful or otherwise – concerning the consequences of her electing any***
5 ***particular option. And CalPERS has not produced any admissible evidence to***
6 ***contradict PALO'S sworn testimony that she never received the entirety of***
7 ***Publication 35.***

8
9 But even assuming, without in any way conceding, that PALO *did* received
10 Publication 35, ***it is meaningless when it comes to "advising" her about the***
11 ***consequences of her electing Option 1.***

12 For example, Exhibit 4, Page 3, Section E, top paragraph states: "*I understand that*
13 *my election of option is irrevocable and that by electing Option 2W, 3W, or 4 I forfeit my*
14 *right to an increase in my allowance based on the conditions described on page 21 and 22*
15 *of this booklet.*"

16 Pages 21-23 of Publication 35, to which this sentence refers, is either totally
17 inconsistent with that statement or is further ambiguous and confusing by virtue of the
18 reference to Page 66 of Publication 35, found at the bottom of page 22 of Publication 35.
19 Thus, Publication 35 *raises more questions than it answers.*

20
21 Publication 35 was authored entirely by CalPERS and is an integral part of a contract of
22 adhesion. *Cal. Civ. Code §1654* states, in pertinent part, "In cases of uncertainty the language
23 of a contract should be interpreted most strongly against the party who caused the uncertainty
24 to exist."

1 "Where ... the written agreement has been prepared entirely by [one party], it is a well
2 established rule of construction that any ambiguities must be construed against the drafting
3 [party] and in favor of the nondrafting [party]. (369 *Pacific Lumber Co. v. Industrial Accident*
4 *Commission* (1943) 22 Cal.2d 410, 422). Moreover, the rule requiring the resolution of
5 ambiguities against the drafting party applies with peculiar force in the case of a contract of
6 adhesion. Here the party of superior bargaining power not only prescribes the words of the
7 instrument but the party who subscribes to it lacks the economic strength to change such
8 language." (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819, fn. 16). - *Sandquist v. Lebo*
9 *Auto., Inc.* (2016) 1 Cal. 5th 233, 248; *Juarez v. Wash Depot Holdings, Inc.* (2018) 24 Cal. App.
10 5th 1197, 1203; *Cavalry SPV I, LLC v. Watkins* (2019) 36 Cal. App. 5th 1070, 1098.

11
12 Critical to an understanding of this case is the statement on Paragraph XIV of
13 CalPERS' statement:

14 "Ms. Palo's age or years of service credit at the time of retirement was not a factor in
15 calculating her unmodified allowance. However, Ms. Palo did not elect the unmodified
16 allowance option at retirement, she elected the Option 1 Allowance, The Option 1
17 Allowance reduces a member's Unmodified Allowance and is calculated using the
18 member's age at retirement and the amount of contributions in the member's account,
19 providing for a payout of any remaining contributions at member's death to one of [sic]
20 more beneficiaries. ...

21 "Increasing Ms. Palo's age by ten years impacts her Option 1 factor, since she is
22 expected to live ten fewer years making it more likely that the Option 1 benefit would be
23 paid out to a beneficiary".² (Emphases supplied).

24 LEGAL DISCUSSION

25 ² Actually the figure is not 10 years' difference. According to the current Social Security Life Expectancy tables, the
26 difference is 5.6 years for a Caucasian female. (11.4 years for someone born March 1, 1942, 5.8 years for someone
27 born March 1, 1932).

1 **I. CalPERS SHOULD, IN EQUITY, CORRECT THE MUTUAL MISTAKE OF THE**
2 **PARTIES AND READJUST RESPONDENT’S OPTION ELECTION.**

3 Appellant’s error is correctible. Pursuant to Government Code §20180 the Board has the
4 discretion to correct errors upon any terms it deems just.

5 When the reason of a rule ceases, so should the rule itself, Cal. Civ. Code §3510.

6 In *Button v. Bd. of Administration*, (1981) 122 Cal. App. 3d 730, 736–38, the court held:

7 “Respondent contends that if he actually was disabled when he retired, then his and
8 respondent’s belief that he was not disabled was a mistake of fact. As a result, he should
9 now be allowed to “correct” his status. We agree.

10 “In *Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565, 571, section 20180
11 was applied to allow PERS to reclassify certain employees retroactively and then to
12 assess them for the differences in their respective past contributions. Section 20180 was
13 read to indicate that errors in the system arising for any reason should be rectified, if
14 possible, by the adjustment procedure set forth in Section 20165.

15 “*Rodie v. Board of Administration*, supra, 115 Cal.App.3d 559, 567, applied the
16 Campbell interpretation to facts similar to the instant case. In *Rodie* the retiree knew
17 when he retired that he was eligible for both disability and service benefits; he elected a
18 disability retirement. The following year he applied for and was awarded federal Social
19 Security disability benefits only to discover that his state benefits were then reduced
20 correspondingly. Because there would be no such reduction if he were receiving service
21 benefits, Mr. Rodie applied for a status change. The court held that “section 20180 is
22 available to correct an employee’s election to retire for disability rather than service,
23 where such election results from ‘inadvertence, oversight, mistake of fact, mistake of
24 law, or other cause. The court stated that it could “discern no reason for treating an
25 employee’s mistaken choice between two types of retirement to which he is entitled by
26 reason of past services differently from any other mistake depriving him of benefits to
27 which he is fairly entitled.

28 “We find without merit respondent’s contention that section 20180 applies only when the
action was ‘required to be taken’ in the first place, and that appellant has not established
that PERS was ‘required’ to grant him disability at the time he retired. Although PERS
would not have been required to grant appellant disability until it determined that his
claim had merit, nonetheless it would have been required to process his application and
make that determination.

 “Section 20180 dictates that PERS’ interests in administrative and actuarial efficiency
are not of overriding importance so as to allow honest mistakes to remain uncorrected.
The section equally applies to post-retirement changes in status. Although it may be

1 argued that *Campbell* applied to members as opposed to retirees and to reclassification
2 as opposed to status changes, section 20180 expressly applies to retired members as
well as active members.

3 "As was noted in *Campbell*, 'pension statutes are to be liberally interpreted in favor of the
4 applicant so as to effectuate, rather than defeat, their avowed purpose of providing
benefits for the employee and his family' (Citation).

5 "Based on the element of mistake, this court concurs with the *Rodie* holding and
6 appellant should prevail on the section 20180 issue. The facts of the instant case
7 present a stronger case of mistake than *Rodie*. In *Rodie*, the retiree knew that he was
8 eligible for either disability or service status yet elected to receive lesser disability
benefits; whereas appellant did not initially realize he may have been eligible to apply for
disability.

9 "Respondent also contends that appellant's mistake was one of judgment, and claims
10 that appellant was negligent in not knowing that he was disabled. Again, the instant
11 situation is less judgmental and suggestive of negligence than in *Rodie*. If Mr. *Rodie* had
undertaken sufficient inquiry, he could have easily avoided his error. Here, there is no
evidence that appellant's condition was amenable of his retirement.

12 "In light of the clear legislative intent to compensate in a certain manner those
13 employees who are disabled at the time they retire (see section 20001), and given the
14 express language of section 20180, it is unreasonable to attribute to the Legislature an
15 intention to preclude an *738 otherwise eligible employee from receiving a disability
pension on the sole ground that his disabling condition was not diagnosed as such at the
time of retirement." - *Button v. Bd. of Admin.* (1981) 122 Cal. App. 3d 730, 736–38

16 Due process requires that administrative hearings be full and fair, *Scott v. Meese* (1985)

17 174 Cal. App. 3d 249, 256.

18
19 "The doctrine of equitable estoppel may be applied against the government where
20 justice and right require it but that an estoppel will not be applied against the government
21 if to do so would effectively nullify "a strong rule of policy, adopted for the benefit of the
22 public. [Citation]. The tension between these twin principles makes up the doctrinal
23 context in which concrete cases are decided.' After a review of a number of cases the
24 [Supreme Court] phrased the rule governing the application of equitable estoppel against
25 the government as follows: 'The government may be bound by an equitable estoppel in
26 the same manner as a private party when the elements requisite to such an estoppel
27 against a private party are present and, in the considered view of a court of equity, the
28 injustice which would result from a failure to uphold an estoppel is of sufficient dimension
to justify any effect upon public interest or policy which would result from the raising of
an estoppel.' (3 Cal.3d at pp. 496—497).

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"The elements which must be present in order to invoke equitable estoppel are: '(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel high a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' (Citation).

"Applying the foregoing principles to the instant case, the city would be clearly estopped from seeking petitioners' reclassification to miscellaneous membership as of the date they initially became members of the system. All of the requisite elements of equitable estoppel are present insofar as the city is concerned. The city was apprised of the facts. The city knew that petitioners were being employed by the police department as animal control officers at the time it erroneously advised them they would be entitled to retirement benefits as local safety members. The fact that the advice may have been given in good faith does not preclude the application of estoppel. Good faith conduct of a public officer or employee does not excuse inaccurate information negligently given. (Citations). In the instant case the erroneous representations that petitioners would be entitled to local safety memberships if they accepted city employment was given without verifying its accuracy either by advice from the board or any other qualified person.

"All of the other requisite elements of equitable estoppel against the city were established by uncontradicted evidence. The city manifestly intended its erroneous representations to be acted upon and petitioners had a right to believe the city so intended. Petitioners were ignorant of the fact that the city's advice was erroneous. Petitioners relied upon the representations to their injury by relinquishing other employment to accept city employment and by paying over the years the greater contributions required of safety members. Petitioner Crumpler served as animal control officer for over 20 years. During those years he paid safety member contributions and arranged his personal financial affairs in the expectation he would ultimately receive the retirement benefits of a safety member. Petitioner Ingold relinquished federal civil service employment with 15 years accrued federal pension rights to accept city employment on the representation that his city pension rights would be that of a safety member.

Crumpler v. Bd. of Admin. (1973) 32 Cal. App. 3d 567, 581-83

II. CalPERS CAN ONLY COLLECT OVERPAYMENTS IT MADE WITHIN THE THREE-YEAR STATUTE OF LIMITATIONS.

"(b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows: (1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment." - Cal. Gov't Code §20164

1 **III .THE DESIRE OF A TESTATOR TO CHANGE THE DISPOSITIVE PROVISIONS**
2 **OF HIS OR HER WILL WHILE HE OR SHE IS STILL ALIVE SHOULD BE**
3 **HONORED.**

4 Appendix A contains the pertinent portions of *Placentia v. Strazicich* (2019) 42 Cal. App.
5 5th 730, 734–45) as well as the published portion of *Wilkin v. Nelson* (2020) (2020) – Cal.App.
6 5th -, - Cal.Rptr. 3d - 2020 WL 913496, at *1–9 in support of Appellant’s position that she
7 should be allowed to amend or reform her election to harmonize with her true desires.

8 **CONCLUSION**

9 Respondent’s Palo’s retirement was not based on age or the time she spent working for
10 the California Prison system, but was related to an industrial accident when a Correctional
11 Officer could not properly drive the Doctors’ cart and ended up throwing Ms. Palo off the cart.
12 She landed on her left hip, and broke the L2 in her back. Although this condition has continued
13 to give Ms. Palo several substantial problems through the years, she has managed to go on
14 with her life. Thus, this matter is simply to determine whether or not Respondent is entitled to
15 the refund of her money which she claims was wrongfully seized by CalPERS. Respondent
16 does not wish to cheat CalPERS out of one dime. Conversely, Respondent does not, herself,
17 wish to be cheated out of her earned benefits. The solution is relatively simple and entirely just:
18 Allow Respondent to make her election for the unmodified option allowance nunc pro tunc. This
19 achieves full equity: Respondent’s beneficiaries receive less when she dies, but *she* is paid the
20 benefits *she* earned when she was working and alive. The relief requested by Appellant Rita
21 Palo should be GRANTED as a matter of both law and equity.
22

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24 Dated: March 11, 2020

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HUGO N. GERSTL, Attorney for Appellant