

**ATTACHMENT A**

**RESPONDENT'S PETITION FOR RECONSIDERATION**

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8 BEFORE THE BOARD OF ADMINISTRATION  
 9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
 10 STATE OF CALIFORNIA

11 In the Matter of the Appeal Regarding

12 MICHELE Y. WILLIAMS,

13 Petitioner,

14 v.

15 DIVISION OF ADULT PAROLE  
 16 OPERATIONS, CALIFORNIA  
 DEPARTMENT OF CORRECTIONS AND  
 17 REHABILITATION,

18 Respondents.

) Case No.: 2018-0725

) OAH No.: 2018120183

) **PETITION FOR RECONSIDERATION**

19 In the Matter of the Appeal Regarding

20 MICHAEL COTTLE,

21 Petitioner,

22 v.

23 IRONWOOD STATE PRISON,  
 24 CALIFORNIA DEPARTMENT OF  
 CORRECTIONS AND REHABILITATION,

25 Respondents.

) Case No.: 2018-0721

) OAH No.: 2018120134

1 **TO ALL PARTIES:**

2 **I. INTRODUCTION**

3 Petitioners Michele Y. Williams ("Williams") Michael Cottle ("Cottle") (collectively  
4 "Petitioners") file this Petition for Reconsideration on the grounds that the decision by the  
5 California Public Employees' Retirement System Board of Administration ("Board") to uphold  
6 the retirement contribution adjustments in their entirety in both Williams' and Cottle's cases  
7 were based on legal error and factual findings made in and omitted in error. Petitioners assert  
8 that: (1) the Board's Decision contravenes the plain language of California Government Code  
9 section 20163(b); 2) the Board's Decision incorrectly applies *Campbell v. Board of*  
10 *Administration* to justify a result; (3) the Board's Decision incorrectly applies California  
11 Government Code section 20164(b); (4) the evidence on which the ALJ based her determinations  
12 did not meet a preponderance of the evidence standard; and (4) Administrative Law Judge  
13 Marcie Larson's credibility determinations failed to meet the requirements of Government Code  
14 section 11425.50. Accordingly, Appellant urges the Board to reverse its decision and revoke the  
15 retirement contribution adjustments imposed by California Public Employees' Retirement  
16 System ("CalPERS") on Petitioners in their entirety.

17 **II. GENERAL STATEMENT OF FACTS**

18 Marcie Larson, Administrative Law Judge, Office of Administrative Hearings (OAH),  
19 State of California, heard this consolidated matter on October 23, 2019 in Sacramento,  
20 California. Charles Glauberman represented CalPERS, Nicholas J. Gleichman represented  
21 Cottle, and Carolyn Park represented Williams. ALJ Larson found no good cause for California  
22 Department of Corrections and Rehabilitation's (CDCR) failure to appear at the evidentiary  
23 hearing, and held that the instant matter would proceed as a default against CDCR. (HT, p.17:9-  
24 21.) Cottle and Williams are both employees of the California Department of Corrections and  
25 Rehabilitation's (CDCR).

26 No dispute exists as to the fact that Petitioners' pension plans were underfunded due to  
27 CDCR failing to properly enroll Petitioners in the appropriate benefit plan due to the clerical  
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1 mistake of assigning Petitioners in the incorrect retirement formula tier. In both cases, CalPERS  
2 attempts to collect the arrears stemming from this clerical mistake made by CDCR.

### 3 III. ISSUE

4 The issue for Board determination is whether CalPERS, in accordance with the Public  
5 Employees' Retirement Law (PERL), may make a mandatory adjustment of respondent's  
6 underpaid retirement contributions, which occurred as a result of CDCR placing Petitioners in  
7 the incorrect retirement formula.

### 8 IV. ARGUMENT

#### 9 **A. CalPERS Has No Authority to Contravene the Plain Language of California** 10 **Government Code section 20163(b).**

11 CalPERS has no authority to contravene the plain language of California Government  
12 Code section 20163(b). Courts look to the plain language of the PERL for interpretation. (See,  
13 e.g. *Metro. Water Dist. v. Superior Court* (2004) 32 Cal. 4th 491, 502; *Welch v. State Teachers'*  
14 *Ret. Sys.* (2012) 203 Cal. App. 4th 1, 18.) Where the Legislature makes express statutory  
15 distinctions, the courts "must presume it did so deliberately, giving effect to the distinctions,  
16 unless the whole scheme reveals the distinction is unintended." (*Metro. Water Dist. v. Superior*  
17 *Court* (2004) 32 Cal. 4th 491, 502.) Here, the plain language of California Government Code  
18 section 20163(b) prohibits CalPERS from making adjustments (collecting from a member) when  
19 less than the correct amount of normal contributions was paid by a member if the board finds  
20 that the error was not known to the member and was not the result of erroneous information  
21 provided by him or her to this system or to his or her employer. The legislative history shows  
22 that the Legislature deliberately created this statutory distinction by its 1970 amendment to the  
23 statute. (*Campbell v. Board of Administration* (1980) 103 Cal. App. 3d 565, 571-572.)

24 Specific statutory provisions are to be construed to avoid, if possible, anomalous or  
25 absurd results that contravene the Legislature's presumed intent (*Diamond Multimedia Systems,*  
26 *Inc. v. Superior Court* (1999) 19 Cal. 4th 1036, 1047). Here, it is unconscionable and absurd to  
27 force Cottle and Williams to pay (with interest) for the clerical error, which all parties  
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1 acknowledge solely on the part of CDCR, in direct violate of a law which specifically prohibits  
2 such an action.

3 ALJ Larson acknowledges that pursuant to Government Code section 20163, CalPERS's  
4 duty to correct mistakes extends to errors that result in an underpayment of retirement  
5 contributions. While there is a limited exception that allows CalPERS to forgive the normal  
6 contributions of a member, this exception only applies to minor calculation errors, and does not  
7 apply to errors of law in classification. (See *Campbell v. Board of Administration* (1980) 103  
8 Cal.App.3d 565.) This exception does not apply in the instant cases. CDCR's mistake of placing  
9 respondent in the wrong retirement formula tier is akin to an error in classification. As a result,  
10 CalPERS may not forgive the contributions respondent is required to make as a member entitled  
11 to First Tier retirement benefits.

12 **B. *Campbell v. Board of Administration* Is Distinguishable From These Cases.**

13 The case of *Campbell v. Board of Administration*, which CalPERS relies on to justify the  
14 adjustments, is distinguishable from the Cottle and Williams cases. (*Campbell v. Board of*  
15 *Administration* (1980) 103 Cal. App. 3d 565.) In *Campbell*, a group of employees was  
16 reclassified pursuant to an out of class claim. As a result of being reclassified to a different *job*  
17 classification, they were retroactively entered into a new tier of the system in correlation with  
18 their new class. (*Campbell v. Board of Administration* (1980) 103 Cal. App. 3d 565, 567.) The  
19 *Campbell* court upheld the adjustments in that case based on a job reclassification, while in the  
20 instant cases, the adjustments were based on Petitioners' employer mistakenly placing Petitioners  
21 in the incorrect retirement formula tier. -

22 The *Campbell* court reasoned that while the underlying statute seeks to protect members  
23 from clerical errors, like entering a "1" where an "I" should go, or mechanical errors, the  
24 reclassification 'error' at the heart of claim in *Campbell* is not the type of 'error' that the statute  
25 was meant to shield members from. (*Id.* At 570.) Here, CalPERS acknowledges clerical errors  
26 that were made by CDCR, not job classification error.

27 The *Campbell* case is further distinguishable in that the employees in *Campbell* stipulated  
28 to their knowledge of the misclassification. (*Id.* at 571, fn 4.) Indeed, the employecs in *Campbell*

1 were pursuing reclassification, and could therefore not claim to be unaware of the mistake at  
2 issue. Here, the facts establish that Cottle had no knowledge of the error until August or  
3 September 2001, and Williams first learned of the error in August 2011. (HT, p.127; Exhibit 36,  
4 p.11.) The *Campbell* court makes a crucial observation regarding members' inability to discover  
5 mistakes made by the employer. It points out that "detail as to member rates is not readily  
6 accessible to a member, particularly at the time of employment, and he frequently will be  
7 unaware of an error in his rate of contribution." (*Campbell v. Board of Administration* (1980)  
8 103 Cal. App. 3d at 570.) This observation helps explain why, despite his thoroughness and  
9 record keeping, Cottle did not notice the error immediately. Once the discrepancy was  
10 discovered, Cottle and Williams contacted CalPERS to notify them of the error and to rectify the  
11 error. (HT, p.127; Exhibit 36, p.11.)

12 Third, there was no argument by the employees in *Campbell* that the statute of limitations  
13 had run. Chan's testimony verified that CalPERS first knew of the error that DAPO made of  
14 place Williams in the wrong retirement formula as early as August 24, 2011, as indicated in the  
15 Cost Information Request for Williams, but did not attempt collect until August 23, 2014, when  
16 CalPERS issued notice of a mandatory adjustment to Respondent Williams. (HT, pp.64:18-  
17 66:16; Exhibits 24 -25.) Chan stated that CalPERS' delay in acting on the discovery of the error  
18 was due to the implementation of a new system and attendant backlog. (*Id.*)

19 **C. CalPERS Is Time-Barred from Making Retirement Contribution Adjustments for**  
20 **Cottle and Williams Pursuant to California Government Code section 20164(b).**

21 California Government Code section 20164(b) establishes a clear statute of limitations of  
22 three years. CalPERS ignored this issue in its Post-Hearing Brief. Nevertheless, ALJ Larson  
23 erroneously found that CDCR did not violate the statute of limitations. California Government  
24 Code section 20164(b) states: "In cases where this system makes an erroneous payment to a  
25 member or beneficiary, this system's right to collect shall expire three years from the date of  
26 payment." ALJ Larson failed to toll the statute from the date of payment and instead tolled the  
27 statute from the time that CDCR discovered their errors.

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**D. CalPERS' Sole Witness Was Not Credible.**

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 2 CalPERS' sole witness at the Hearing, Esther Chan ("Chan"), was evasive and unable to  
 3 articulate what authority she relied on to interpret allows CalPERS to make an adjustment and  
 4 collect from the CalPERS member the underpaid amount in spite of the plain language of  
 5 California Government Code section 20163(b). Chan initially testified that said interpretation  
 6 was gleaned from "Decrings" and then testified that the interpretation came from a CalPERS  
 7 internal document which was neither included in CalPERS' evidence in this matter nor provided  
 8 to Cottle or Williams at any time (HT, pp.91:11-96:19.) California Government Code section  
 9 11340.5(a) provides that "[n]o state agency shall issue, utilize, enforce, or attempt to enforce any  
 10 guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other  
 11 rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion,  
 12 bulletin, manual, instruction, order, standard of general application, or other rule has been  
 13 adopted as a regulation and filed with the Secretary of State. . ." CalPERS failed to show that the  
 14 CalPERS internal document, which CalPERS purports to have relied on to make adjustments to  
 15 the accounts of Cottle and Williams, was adopted as a regulation and filed with the Secretary of  
 16 State.

17 Moreover, ALJ Larson states in the Proposed Decision that "Ms. Chan explained that it  
 18 was CalPERS's practice to notify employees of their right to change from the Second to First  
 19 Tier"; yet no documentation of such notification to Cottle or Williams was submitted into  
 20 evidence.

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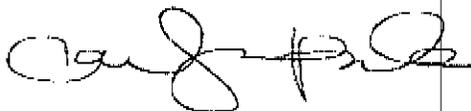
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**V. CONCLUSION**

Petitioners Cottle and Williams respectfully request this Petition be granted.

Respectfully submitted,

SERVICE EMPLOYEES INTERNATIONAL UNION  
(SEIU) Local 1000



DATED: May 18, 2020

By: \_\_\_\_\_

CAROLYN PARK  
Attorney for Petitioners,  
MICHELE Y. WILLIAMS  
MICHAEL COTTLE

**DECLARATION OF SERVICE**

1  
2 CASE NAME: *Michael Cottle v. Ironwood State Prison, California Department of*  
*Corrections & Rehabilitation*  
3 CASE NUMBER: OAH No. 2018-120134 / Agency No. 2018-0721 *consolidated with*  
CASE NAME: *Michele Y. Williams, et al. v. CalPERS*  
4 CASE NUMBER: OAH CASE NO.: 2018120183 / AGENCY CASE NO.: 2018-0725  
5 COURT NAME: Office of Administration Hearings

6 I am a citizen of the United States and employed in the County of Sacramento,  
7 California. I am over the age of eighteen (18) years and not a party to the above-entitled action.  
My business address is 1808 14<sup>th</sup> Street, Sacramento, California 95811.

8 I am familiar with Service Employees International Union's practice whereby the mail is  
9 sealed, given the appropriate postage and placed in a designated mail collection area. Each day's  
mail is collected and deposited in a United States mailbox after the close of each day's business.

10 On May 18, 2020, I caused the following document(s) to be served:

**PETITION FOR RECONSIDERATION**

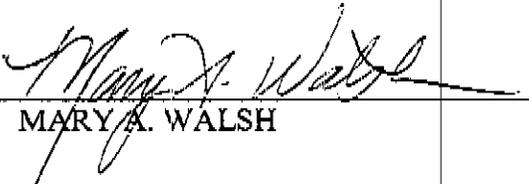
11  
12  
13  (BY FACSIMILE) placing a true copy thereof into a facsimile machine addressed  
14 to the person and address shown below, which transmission receipt is attached hereto.

15  (BY ELECTRONIC SERVICE) Via TRO mandating electronic service. The  
16 document was served electronically and the transmission was reported as complete and without  
error.

17 Charles H. Glauberman  
18 Senior Staff Attorney, CalPERS  
19 P.O. Box 94707  
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20 [REDACTED]  
Fax: (916) 795-3659

21  
22 I declare under penalty of perjury under the laws of the State of California that the  
foregoing is true and correct and that this Declaration was executed on May 18, 2020, at  
23 Sacramento, California.

24   
25 MARY A. WALSH  
26  
27  
28

**DECLARATION OF SERVICE**

Michael Cottle v. Ironwood State Prison, CDCR - OAH No. 2018-120134 / Agency No. 2018-0721  
Michele Y. Williams, et al. v. CalPERS - OAH No. 2018-120183 / Agency No. 2018-0725