

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Michael G. Cottle and Michele Y. Williams (referred to individually as Respondent Cottle and Respondent Williams; referred to collectively as Respondents) petition the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated March 10, 2020. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondents contend in their Petition, that the Board's decision improperly interpreted Government Code sections 20163(b) and 20164(b), improperly applied case law, and that the ALJ improperly determined the evidence and witness credibility. The first two contentions were argued before the ALJ, considered and dismissed. All four contentions were previously argued at the time the Board considered and adopted the ALJ's decision.

### *The Proposed Decision Correctly Applies the Public Employees' Retirement Law*

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

The ALJ rejected Respondents' arguments that the exception articulated in section 20163(b) required CalPERS to forgive the underpayments. The ALJ determined that, "[w]hile there is a limited exception that allows CalPERS to forgive the normal contributions of a member, this exception only applies to minor calculation errors, and does not apply to errors of law in classification."<sup>1</sup> (See Proposed Decision, p. 20 ¶10.) Accordingly, the ALJ held that Respondents are responsible for their contribution underpayments.

Respondents incorrectly contend that being forced to fund their own pensions contravenes the language and meaning of Government Code section 20163(b).<sup>2</sup> CalPERS' interpretation of the Public Employees' Retirement Law (PERL) is entitled to great weight and deference. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1565; *City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 539.) Here, CalPERS correctly interpreted and applied section 20163(b). Under section 20163(b), CalPERS can only forgive minor calculation errors, and not errors in member classification. (See *Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565, 571.) Further, CalPERS can only forgive minor calculation errors if the member did not cause the error, and the member was unaware of the error. (Section 20163(b).)

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<sup>2</sup> All future statutory references are to the Government Code unless otherwise noted.

Under section 21070.5, when a state industrial member returns to state service after a break of at least 90 days, that member must be enrolled into First Tier. Under that section, such a state industrial member may only be enrolled into Second Tier if he or she files an election with the Board within 180 days of hire. Since neither Respondent elected Second Tier, their respective placements in Second Tier classifications were legally erroneous.

Section 20160(b) requires CalPERS to “correct all actions taken as a result of errors or omissions of . . . any state agency or department.” Pursuant to section 20163, CalPERS’ duty to fix mistakes extends to errors resulting in an underpayment of a member’s or employer’s retirement contributions. As a result, CalPERS was required to fix Respondents’ erroneous Second Tier classifications.

As noted above, section 20163(b) allows for CalPERS to forgive contribution errors, but that exception only applies to minor calculation errors, and not errors in classification like what happened to Respondents. (See *Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565; referred to as “*Campbell*.”) The error here was not a minor calculation error but was instead a misclassification resulting in Respondents’ incorrect placement into Second Tier. In their argument, Respondents attempt to distinguish their situation from *Campbell*. Respondents claim they were ignorant of their erroneous Second Tier classification, while the members in *Campbell* were aware of their misclassification. In *Campbell*, though, the members did not know their classification was incorrect, but knew that their seven percent rate of contribution was less than the nine percent of their desired classification. The court in *Campbell* indicated that knowledge of paying less in one classification than one would in another may be sufficient to show knowledge under section 20163(b). (See footnote 4 from *Campbell, supra*, at 572.) Just like the members in *Campbell*, Respondents both knew that their Second Tier contribution rate was zero instead of the five percent required of First Tier members.

Respondent Cottle testified at hearing that he knew in 2010 that he was not making retirement contributions, and even contacted CalPERS about converting from Second Tier to First Tier. Respondent Williams’s pay stubs and member statements all show her First Tier classification prior to and through 2007. When she switched jobs, Respondent Williams’s pay stubs and member statements showed her Second Tier classification without retirement contributions from 2007 through 2011.

Respondents both knew that they were not contributing towards their respective retirements. Hence, even if section 20163(b) applies to legal classification errors, Respondents had the knowledge sufficient to preclude the relief provided for under that section.

### *There Is No Statute of Limitations for an Administrative Reclassification Proceeding*

Respondents are required to pay their own contributions resulting from their misclassification and resulting reclassification. Respondents contend that the three-year statute of limitation from Government Code section 20164 absolves them of their pension contribution responsibility. However, Section 20160 requires all errors or

omissions be fixed by CalPERS, including misclassifications, and subsection (e) requires that corrections be retroactive, regardless of section 20164. (See *City of Oakland v. Public Employees' Retirement System, et al.* (2002) 95 Cal.App.4th 29; referred to as *City of Oakland*.)

The *City of Oakland* court expressed a preference under section 20160 for retroactive correction of errors. (*Ibid* at 42.). The court explained what re-classification requires by stating:

A reclassification means the individual members of the class must have their particular years of service under a particular class adjusted. This means such members, or their employers, or both, are asked to make increased contributions to PERS to make up for the retirement contributions they should have been paying all along, in order to earn the more generous pension benefits. (See *Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565, 163 Cal.Rptr. 198 [employees tried to avoid paying the higher contributions required by retroactive reclassification])

(*Id.* at 40-41; citations omitted.)

With respect to the applicable statute of limitations, or lack thereof, the *City of Oakland* court noted that “the last part of this statute (§ 20164, subd. (d)) provides that the PERS Board’s determination of which period of limitation applies, and regarding ‘the running of any period of limitation *shall be conclusive and binding for purposes of correcting the error or omission.*” (*Id.* at 43, emphasis in original.) The court went on to state:

[g]iven that the People, in the exercise of their reserved initiative powers vested *plenary* authority in the PERS Board in order to prevent state officials from using retirement funds improperly, and given that the Legislature has vested the PERS Board with the explicit power to resolve statute of limitations questions, we believe the courts must defer to the PERS Board in such cases, absent some showing of an arbitrary, irrational, exercise of such power.”

(*Id.* at 45, emphasis in original.)

The court further explained that section 20164’s limitations regarding civil actions “demonstrate the Legislature knows how to draft limits applicable to specific type of cases when it wants to.” (*City of Oakland, supra*, at 50-51.) The requirement that CalPERS retroactively correct errors makes “it abundantly clear that there is no limitation period applicable to the administrative reclassification proceeding.” (*City of Oakland, supra*, at 50.) The *City of Oakland* court concluded by stating that section 20164’s three-year statute of limitations applies to civil actions and not administrative proceedings, and “it is inappropriate to import the mistake statute of limitations into an administrative reclassification proceeding.” (*City of Oakland, supra*, at 50-51; see also *Krolkowski v. San Diego Employees' Retirement System* (2018) 24 Cal.App. 5<sup>th</sup> 537,

557-561 [the statute of limitations does not apply when recoupment is obtained through an administrative process]; and 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 430, p. 547 [“[t]he general and special statutes of limitation referring to actions and special proceedings are applicable only to judicial proceedings; they do not apply to administrative proceedings.”].)

The enrollment error and subsequent retroactive reclassification requires Respondents to pay the “contributions they should have been paying all along.” (See *City of Oakland, supra*, at 40-41; see *Barrett v. Stanislaus County Retirement System* (1987) 189 Cal.App.3d 1593.) There is no statute of limitations barring Respondents’ administrative reclassification proceeding, and the ALJ correctly decided this issue after Respondents and CalPERS briefed this issue. Respondents cannot receive a retirement that they do not fund. (*Barrett v. Stanislaus County Retirement System* (1987) 189 Cal.App.3d 1593.) Like all other First Tier members, Respondents must pay contributions commensurate with their First Tier classification.

#### *The Proposed Decision Is Sound and Applies the Law to the Facts*

Respondents allege that CalPERS ignored the law on this issue and instead relied on a purported un-adopted regulation. Given the opportunity to review all documents on which CalPERS relied through pre-hearing discovery, neither Respondent requested any discovery documents from CalPERS. Presented with this issue in Respondents’ post-hearing briefs, the ALJ determined that the argument did not merit her consideration, and instead ruled that CalPERS acted in accordance with the PERL and applicable case law. Respondents’ contention that CalPERS acted outside of the PERL and case law is without merit. Similarly, the contentions that the ALJ’s determinations on the evidence did not meet a preponderance of the evidence standard, and credibility determinations fail to meet statutory requirements, are without merit.

#### *The Petition for Reconsideration Should be Denied*

No new evidence or arguments have been presented by Respondents that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the April 22, 2020, meeting properly applied the law and was well reasoned and based on the credible evidence presented at hearing.

June 17, 2020

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