ATTACHMENT E

THE PROPOSED DECISION

ATTACHMENT E

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

In the Matter of the Appeal Regarding Mandatory Contribution Adjustment of:

MICHAEL G. COTTLE and IRONWOOD STATE PRISON, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondents.

Case No. 2018-0721

OAH No. 2018120134

PROPOSED DECISION

Marcie Larson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 23, 2019, in Sacramento, California.[1]

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[1] This matter was consolidated with In the Matter of the Appeal Regarding Mandatory Contribution Adjustment of Michele Y. Williams and Division of Adult

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED March 11, 2020

Charles H. Glauberman, Senior Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Nicholas J. Gleichman, Staff Attorney with State Employees International Union 1000, represented respondent Michael G. Cottle, who appeared at the hearing.

There was no appearance by or on behalf Ironwood State Prison (Ironwood), or the California Department of Corrections and Rehabilitation (Department). Ironwood and the Department were duly served with a Notice of Hearing. The matter proceeded as a default against Ironwood and the Department pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record remained open for the parties to file closing briefs. On January 23, 2019, the parties submitted closing briefs. Reply briefs were filed on February 11, 2020.[2] The matter was submitted for decision on February 11, 2020.

ISSUE

On December 16, 1998, respondent first became a member of CalPERS through his employment with the California Housing Finance Agency (Agency). Respondent enrolled in the State Second Tier retirement formula miscellaneous of 1.25 percent at age 65 (Second Tier). Respondent separated from his employment on March 4, 2000.

Parole Operations, Department of Corrections and Rehabilitation, Case No. 2018-0725; OAH No. 2018120183. A separate Proposed Decision issued for the matter.

[2] CalPERS's closing brief, Exhibit 44 and reply brief, Exhibit 45 and respondents' closing briefs, Exhibit RR and the reply brief, Exhibit SS, were admitted as argument.

He returned to state service on April 7, 2009, through his employment at Ironwood. On March 21, 2011, respondent transferred to a position with the Department. Ironwood and the Department enrolled respondent in the Second Tier. Respondent did not elect to be placed in Second Tier.

On November 25, 2013, CalPERS discovered respondent was placed under the incorrect retirement formula upon his employment with Ironwood, and upon his transfer to the Department. Respondent should have been placed in the First Tier retirement formula of 2.0 percent at age 55 (First Tier). As a result of the mistake, respondent underpaid his retirement contributions. The cost to respondent for the retirement contribution adjustment was $22,148.83.

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

FACTUAL FINDINGS

1. On December 16, 1998, respondent became a member of CalPERS through his employment as an Associate Programmer Analyst (Specialist) with the Agency. He was enrolled under the Second Tier retirement formula. On March 4, 2000, respondent separated from employment with the Agency.

2. From April 7, 2009, through March 20, 2011, respondent was employed by Ironwood as an Associate Information Systems Analyst. Ironwood did not offer respondent an option, and placed him in Second Tier. No retirement contributions were taken out of respondent's pay.

3. On or about January 25, 2010, CalPERS sent respondent a letter informing him that he was eligible to change from the Second Tier to First Tier retirement formula. The letter explained that respondent became "eligible to make this change to the First Tier formula following legislation (SB 400) that became effective January 1, 2000." He was also informed that First Tier would provide him with a "higher level of benefits at retirement than [his] current State Second Tier retirement formula." Esther Chan, an Associate Governmental Program Analyst for CalPERS in the Member Account Management Division Service Credit Purchase and Election Section, testified at hearing. She reviews retirement tier conversion and contribution adjustments. Ms. Chan explained that it was CalPERS's practice to notify employees of their right to change from the Second to First Tier.

The same day, respondent called CalPERS. "Customer Touch Point" notes concerning the call documented that respondent was informed that he was enrolled in Second Tier and no retirement contributions were taken from his pay. Respondent informed the CalPERS employee that $800 was being taken out of his pay and believed the money was being sent to CalPERS. Respondent testified at hearing that he contacted CalPERS because he was trying to understand the CalPERS retirement system.

4. On March 21, 2011, respondent transferred to a position with the Department. Upon his transfer, the Department erroneously enrolled respondent in Second Tier. No retirement contributions were taken out of respondent's pay through April 30, 2014.

5. On November 1, 2011, CalPERS created a "Request for Cost Information to Convert Past State Second Tier Service" form (Cost form), for respondent. The Cost form was prepared based upon an inquiry from respondent for a cost estimate to

convert state service time earned in Second Tier, to First Tier. The request for a cost estimate was placed in a CalPERS work queue.

6. On December 29, 2011, respondent called CalPERS and requested paperwork for a Second to First Tier conversation. Respondent was informed that CalPERS had recently implemented a new computer system which consolidated CalPERS technology into a "single web-based application." Respondent was informed that as a result of the transition to the new system, there were "significant delays" in services such as cost estimates. CalPERS estimated completing respondent's cost estimate in the spring of 2012.

7. On or about November 25, 2013, CalPERS completed its review of respondent's request for a cost estimate for Second to First Tier conversion. During the course of reviewing respondent's employment history, CalPERS discovered that Ironwood and the Department should have placed respondent in the First Tier. Ms. Chan explained that pursuant to Government Code section 21070.5, subdivision (a), when an employee has a break in state service for more than 90 days, upon return to state service, the employer must place the employee in First Tier, unless the employee elects to be placed in Second Tier. Upon respondent's return to state service on April 7, 2009, and upon his transfer to the Department on March 21, 2011, respondent was enrolled in Second Tier. He should have been enrolled in First Tier.

8. Respondent testified at hearing that he first learned of the mistake Ironwood and the Department made when he received a letter dated November 25, 2013, from CalPERS, which provided the following in pertinent part:

Thank you for your inquiry regarding conversion of your State Second Tier Miscellaneous or Industrial credited service to State First Tier retirement formula.

Upon reviewing your employment history, you have separated from your employer under State Second Tier formula and re-employed with another State Agency after more than 90 days. The Public Employees* Retirement Law (PERL) Government Code 21070.5 (a) states, in part:

First Tier for New Hires - January 1, 2000 or later
"Notwithstanding any other provision of this article, a person who, on or after January 1, 2000, becomes a state miscellaneous or state industrial member of the system because the person... (2) returns to employment with the state from a break in service of more than 90 days..."

Your current employer should have placed you under the State First Tier retirement formula. Since you have requested a Tier Conversion cost packet, we have calculated the lump sum cost for your entire second tier service periods. However, if you decide not to pursue converting to the first tier retirement formula, CalPERS is required to correct your service credit from April 7, 2009 until your employer begins reporting your payroll under the correct first tier retirement formula. A Contribution Adjustment (G.C.21070.5) payment option will be provided when [the] account is rectified.

> You may submit another Tier Conversion request for your past second tier service any time prior to your retirement.

The same day, CalPERS sent respondent a second letter with attachments including information in Tier Conversion election choices, cost benefit estimates, and installment plan information.

9. After receiving the November 25, 2013 letter from CalPERS, respondent contacted a personnel specialist with the Department to confirm whether the Department made a mistake. Between December 2013, and March 2014, respondent also contacted CalPERS several times to obtain information on the impact of the mistakes Ironwood and the Department made.

10. On March 21, 2014, respondent visited CalPERS's Sacramento Regional Office to discuss the issues related to the retirement formula he should be placed in. Respondent explained that he had not elected to be placed in the Second Tier upon his return to state service and that he was not placed in the First Tier by Ironwood and the Department as required. Respondent asked CalPERS to provide him with any document the Department submitted showing that he had elected to be placed in the Second Tier. Respondent also contended that he should not be required to pay for the cost of the conversion from the Second to First Tier.

11. In March 2014, respondent sent several emails to the Department concerning the Department's failure to place him in the First Tier as required. The Department contended respondent had submitted a request to be placed in the Second Tier. However, by letter dated May 5, 2014, CalPERS informed respondent that there was no record of a State Second Tier Retirement Election (Election) the Department allegedly submitted. CalPERS informed respondent that if he believed he

completed the Election he should contact the Department for a copy. The Department had no record of respondent electing to be placed in the Second Tier.

12. On November 12, 2014, CalPERS sent respondent a contribution adjustment cost letter and Election for the period of April 7, 2009, through April 30, 2014. The letter states in part:

> During an administrative review of your retirement account, it was discovered your retirement contributions are underpaid, and require a mandatory adjustment in accordance with Government Code Sections 21073 and 21051 of the Public Employees' Retirement Law (PERL). Your employer, the State of California, Department of Corrections California State Prison - Ironwood from April 7, 2009 through July 31, 2010 and Department of Corrections from March 21, 2011 through April 30, 2014, reported payroll under the incorrect retirement benefit formula. You were reported as having a 0% contribution rate. However, you should have been reported under the retirement benefit formula with a 5% contribution rate, for all earnings in excess of $513.00 and for all subsequent employment in this position on and after April 7, 2009. Please note member contribution rates have changed based on your bargaining unit. Your contribution adjustment reflects those changes in accordance to Government Code 21073.1 of the PERL, as the California Public Employees' Retirement System (CalPERS) has a fiduciary responsibility to all participants

and employers to ensure retirement benefits are fully funded.

Enclosed is an election form for you to complete to indicate the method you would prefer to pay your mandatory contribution adjustment. Please complete the election form and indicate whether you wish to make lump sum payment, partial payment, or if you would like to increase the monthly payroll deduction amount. Please note once a pre-tax payroll deduction schedule is established, it may not be altered, paid in full, or canceled as long as you remain employed by a CalPERS covered employer, if we do not receive a reply within 60 days of the date of this letter, we will automatically establish a taxed payroll deduction schedule as indicated on the attached election form, starting with the next available payroll period.

Effective in May 2014, the Department placed respondent in the First Tier, the correct retirement formula. CalPERS requested respondent remit a total of $22,148.83, for his portion of retirement contributions for the period of time he was erroneously in in the Second Tier. Respondent was also given the option to pay the contribution pursuant to a payment plan made through pre-tax payroll deductions in the amount of $184.97 per month for 180 months. The payment plan amount included an interest rate of 6 percent through the completion of the payments.

13. After receipt of the November 12, 2014 contribution adjustment cost letter and Election, respondent contacted CalPERS on several occasions and contended that Government Code section 20283, subdivision (a), which states "retirement

arrearages cannot be collected from [him] when the arrearages are the result of a failure of the employer." Respondent contended that his employer is at fault for placing him in the Second Tier. Respondent requested that CalPERS reconsider collecting arrearages from him due to his employers' failure to place him in the correct retirement tier.

14. On December 12, 2014, CalPERS sent respondent a letter regarding applicability of Government Code section 20283 to the contribution adjustment made on his CalPERS account, and why it would not apply to the contribution adjustment made on his CalPERS account. CalPERS explained that Government Code section 20283 "only applies when the employer fails to report enrollment and payroll within the 90 day duration of membership qualification." CalPERS quoted Government Code section 20283, subdivision (a), in pertinent part:

> Any employer that fails to enroll an employee into membership when he or she became eligible, or within 90 days thereof, when the employer knows or can reasonably be expected to have known of that eligility [*sic*] shall be required to pay all arrears costs for member contributions and administrative costs of five hundred dollars ($500) per member as a reimbursement to this system's current year budget.

CalPERS further explained that Government Code section 20283 applies when an employer fails to enroll an employee's membership. Based on a review of respondent's account, Government Code section 20283 arrears does not apply because Ironwood reported respondent's membership timely, on April 13, 2009. Rather, Ironwood "used an inaccurate account code that caused an incorrect member

contribution rate," which was "corrected by making a contribution adjustment by [CalPERS] Service Credit Costing Section." CalPERS further explained that pursuant to Government Code section 20160, CalPERS must "correct errors made by an employer or by the system."

15. By letter dated January 9, 2015, respondent informed CalPERS that he would not authorize CalPERS or the State of California, to "collect any monies from [him] regarding retirement account arrearages until such time that CalPERS and/or the State of California has afforded [him] due process under the law and a finding by proper legal authority is established." CalPERS did not receive an authorization from respondent for the arrearages payments.

16. By letter dated January 14, 2015, CalPERS informed respondent that pursuant to the "Mandatory Contribution Adjustment," effective on February 1, 2015, CalPERS had authorized the Department "to begin 180 monthly taxed deductions at $184.97." Respondent was not provided with any appeal right.

17. On August 19, 2016, respondent filed a Petition for Writ of Mandate in the Superior Court of California, County of Sacramento. In his Petition, respondent challenged the mandatory adjustment. The parties, including the Department, agreed to dismiss that matter so that respondent could proceed with an administrative appeal.

18. By letter dated May 24, 2018, CalPERS addressed respondent's request to "appeal the mandatory contribution adjustment made by [CalPERS] to [his] account." CalPERS explained that the Department "used an inaccurate account code that resulted in [respondent] being placed in the Second Tier instead of the First Tier for the period of "April 7, 2009, through April 30, 2014." As a result, "[n]o retirement

contributions were taken from [his] earnings for this period of employment, therefore, [his] retirement account was underpaid." CalPERS "corrected the error by processing a mandatory contribution adjustment in the amount of $22,148.83." CalPERS also explained that Government Code section 20160 required CalPERS to "correct errors made by an employer or by the System," and that "[o]nce the error is discovered, CalPERS must take action to correct the error." CalPERS provided respondent with information regarding the appeal process.

19. On December 5, 2018, Donald R. Martinez, Chief of the Member Account Management Division signed and thereafter filed the Statement of Issues.[3] The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

LEGAL CONCLUSIONS

1. CalPERS is governed by the provisions of the Public Employees' Retirement Law (PERL), Government Code section 20000, et seq. In accordance with Government Code section 20134 of the PERL, the hearing in this matter was conducted under the Administrative Procedure Act (APA), Government Code section 11500 et seq.

2. As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of

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3 The parties stipulated to the admission of the following paragraphs in the Statement of Issues: I, II, III, IV, V, VI, VII, VIII up to the word "Office" on line 3, IX, X, XI, XII, XIII, XIV, and XV.

going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051). CalPERS bears the burden of proof in this matter, as it is CalPERS who asserts that an error was made and that respondent must reimburse CalPERS for the contribution adjustment. (Evid. Code, § 500.) Respondent bears the burden with respect to any defense he may have against repayment. (*Ibid.*)

Retirement Contributions

3. CalPERS members are required to make contributions toward their retirement in accordance with laws and regulations pertaining to their retirement plan. Members' contributions are deducted from their compensation. (Gov. Code, §20771.) The contribution amounts are set by statute. (*See* Gov. Code, §§ 20677.4-20683.91.) At issue in this matter are the First and Second Tier retirement formulas. The Second Tier benefit formula is 1.25 percent at 65. (Gov. Code, § 21076.) The First Tier benefit formula is 2 percent at 55. (Gov. Code, § 21354.1.) Respondent is a member of the First Tier formula by virtue of his employment with Ironwood. As set forth in Factual Findings 1 through 19, respondent never elected to be enrolled in the Second Tier.

4. Government Code section 21051 provides:

> (a) A member electing to receive credit for service subject to this section shall contribute, in accordance with Section 21050, an amount equal to the following:
>
> (1) The contributions the member would have made to the system for the period for which current service credit is granted, assuming that the rate of contribution under his or her employer's formula at the rate age applicable to him or

her at the beginning of his or her first subsequent period of service in membership and his or her compensation earnable on that date had applied to the member during the period for which credit is granted.

(2) The interest that would have accrued on those contributions if they had been deposited at the beginning date of his or her first subsequent period of service in membership, from that date until the date of completion of payments.

(3) If the member is authorized under Section 21050 to contribute in other than a lump-sum payment, interest on the unpaid balance of the amounts payable under paragraphs (1) and (2), which interest shall begin to accrue as of the date of the election to receive credit.

(b) The beginning date of the first subsequent period of service, for purposes of computation of contributions and interest, shall be deemed to be the end of the period of service credited for a member who has no subsequent return to service.

5. Government Code section 21070.5, subdivision (a), relates to the retirement tiers of employees hired on January 1, 2000, or later and provides:

Notwithstanding any other provision of this article, a person who, on or after January 1, 2000, becomes a state miscellaneous or state industrial member of the system

because the person (1) is first employed by the state, (2) returns to employment with the state from a break in service of more than 90 days, or (3) returns to employment with the state after ceasing to be a member pursuant to Section 20340 or 21075, shall be subject to the benefits provided by Section 21354.1, unless the person elects within 180 days of membership as a state miscellaneous or state industrial member to be subject to the Second Tier benefits provided for in Section 21076 or 21076.5, as applicable. This section shall only apply to state miscellaneous and state industrial members who are (1) excluded from the definition of state employee in subdivision (c) of Section 3513, (2) employed by the executive branch of government and are not members of the civil service, or (3) included in the definition of state employee in subdivision (c) of Section 3513. (Emphasis added.)

6. As set forth in Factual Findings 1 through 19, CalPERS established by a preponderance of the evidence that upon respondent's return to state service on April 7, 2009, he should have been placed in the First Tier retirement formula, which provided the 2 percent at 55 years of age retirement benefit formula. Both Ironwood and the Department erroneously placed respondent in the Second Tier, which provided for a reduced benefit of 1.25 percent at 65 years of age retirement benefit formula. The mistake resulted in an underpayment of contributions by respondent in the amount of $22,148.83, which includes the required interest payments.

Correction of Errors and Adjustments

7. Government Code section 20160 provides for the correction of errors and omissions made by members, employers, and CalPERS. Government Code 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.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate 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.

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

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but 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:

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

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations 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.

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

8. Government Code section 20163 relates to the method of making adjustments and provides:

(a) 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 beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled. Losses or gains resulting from error in amounts within the limits set by the Department of General Services for automatic writeoff, and losses or gains in greater amounts specifically approved for writeoff by the Department of General Services, shall be debited or credited, as the case may be, to the reserve against deficiencies in interest earned in other years, losses under investments, and other contingencies.

(b) No adjustment shall be made because less than the correct amount of normal contributions was paid by a member if the board finds that the error was not known to the member and was not the result of erroneous information provided by him or her to this system or to his or her employer. The failure to adjust shall not preclude action under Section 20160 correcting the date upon which the person became a member.

(c) The actuarial equivalent under this section shall be computed on the basis of the mortality tables and actuarial interest rate in effect under this system on December 1,

> 1970, for retirements effective through December 31, 1979. Commencing with retirements effective January 1, 1980, and at corresponding 10-year intervals thereafter, or more frequently at the board's discretion, the board shall change the basis for calculating actuarial equivalents under this article to agree with the interest rate and mortality tables in effect at the commencement of each 10-year or succeeding interval.

9. In this case, Government Code section 20160, subdivision (b), requires CalPERS to "correct all actions taken as a result of errors or omissions of . . . any state agency or department." As set forth in Factual Findings 1 through 19, it is undisputed that Ironwood and the Department erred by placing respondent in the Second Tier rather than the First Tier as required. Government Code section 20160 requires CalPERS to correct this error and obtain additional payment from respondent to fully fund his First Tier retirement benefits.

10. Additionally, pursuant to Government Code section 20163, CalPERS's duty to correct mistakes extends to errors that result in an underpayment of retirement contributions. While 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. (See *Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565.) Respondent contends the exception should be applied to his case. However, the exception does not apply. Ironwood and the Department's mistake of placing respondent in the wrong retirement formula tier is akin to an error in classification. As a result, CalPERS may not

forgive the contributions respondent is required to make as a member entitled to First Tier retirement benefits.

11. Respondent also contends that Government Code section 20283, prohibits CalPERS from collecting the arrears from respondent. Government Code section 20283, subdivision (a) provides:

> Any employer that fails to enroll an employee into membership when he or she becomes eligible, or within 90 days thereof, when the employer knows or can reasonably be expected to have known of that eligibility shall be required to pay all arrears costs for member contributions and administrative costs of five hundred dollars ($500) per member as a reimbursement to this system's current year budget.

As set forth in Factual Findings 1 through 19, Ironwood and the Department timely enrolled respondent into membership. As a result, Government Code section 20283, subdivision (a), does not prohibit CalPERS from collecting the arrears from respondent.

12. Respondent also argues that CalPERS is barred from collecting arrears from respondent by the three-year statute of limitations set forth in Government Code section 20164, which provides in pertinent part:

> [¶]...[¶]
>
> (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.
>
> [¶]...[¶]
>
> (e) The board shall determine the applicability of the period of limitations in any case, and its determination with respect to the running of any period of limitation shall be conclusive and binding for purposes of correcting the error or omission.

The three-year statute of limitations does not apply to administrative proceedings, such as CalPERS's action to collect from respondent the mandatory adjustment of underpaid retirement contributions. (See *City of Oakland* v. *Public Employees' Retirement System, et. al* (2002) 95 Cal.App. 4th 29, at 50-51; see also *Krolikowski v. San Diego Employees' Retirement System* (2018) 24 Cal.App. 5th 537, 557-56.) Additionally, assuming arguendo that the three-year statute of limitations did apply in respondent's case, as set forth in Factual Findings 1 through 19, CalPERS acted within three years of discovering the mistake in November 2013. By April 2014, respondent was placed in the First Tier and in November 2014, CalPERS began the process of collecting arrears from respondent.

Conclusion

13. By reason of the foregoing Factual Findings and Legal Conclusions, CalPERS established by a preponderance of the evidence, that in accordance with the PERL, it may make a mandatory adjustment of respondent's underpaid retirement contributions, which occurred as a result of Ironwood and the Department placing respondent in the incorrect retirement formula. Respondent's retirement account was underfunded by $22,148.83. As a result, respondent must pay the retirement contribution adjustment.

ORDER

The appeal of respondent Michael Cottle is DENIED.

DATE: March 10, 2020

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Marcie Larson
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MARCIE LARSON

Administrative Law Judge

Office of Administrative Hearings

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

In the Matter of the Appeal Regarding Mandatory Contribution Adjustment of:

MICHELE Y. WILLIAMS and DIVISION OF ADULT PAROLE OPERATIONS, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondents.

Case No. 2018-0725

OAH No. 2018120183

PROPOSED DECISION

Marcie Larson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 23, 2019, in Sacramento, California.[1]

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[1] This matter was consolidated with In the Matter of the Appeal Regarding Mandatory Contribution Adjustment of Michael G. Cottle, and Ironwood State Prison, Department of Corrections and Rehabilitation, Case No. 2018-0721; OAH No. 2018120134. A separate Proposed Decision has issued for the matter.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED March 11, 2020
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Charles H. Glauberman, Senior Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Carolyn Park, Staff Attorney with State Employees International Union 1000, represented respondent Michele Y. Williams,[2] both of whom appeared at the hearing telephonically.

There was no appearance by or on behalf the Division of Adult Parole Operations, California Department of Corrections and Rehabilitation (Department). The Department was duly served with a Notice of Hearing. The matter proceeded as a default against the Department pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record remained open for the filing of closing briefs. On January 23, 2019, the parties submitted closing briefs. Reply briefs were filed on February 11, 2020.[3] The matter was submitted for decision on February 11, 2020.

ISSUE

On April 12, 2000, respondent became a member of CalPERS through her employment with the State Compensation Insurance Fund (SCIF). Respondent was enrolled in the State First Tier retirement formula miscellaneous, 2 percent at age 55

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[2] For a period of time between 2004 and 2012, respondent went by the name Michele Sanders.

[3] CalPERS's closing brief, Exhibit 44 and reply brief, Exhibit 45 and respondents' closing briefs, Exhibit RR and the reply brief, Exhibit SS, were admitted as argument.

(First Tier). On October 15, 2007, respondent transferred to a position with the Department and was erroneously enrolled under the State Second Tier retirement formula miscellaneous, 1.25 percent at age 65 (Second Tier). Respondent did not elect to be placed in Second Tier.

On or about August 23, 2014, CalPERS completed an administrative review of respondent's retirement account and discovered that the Department placed in the incorrect retirement formula. Respondent should have remained in the First Tier. As a result of the mistake, respondent underpaid her retirement contributions. The cost to respondent for the retirement contribution adjustment was $9,094.64.

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

FACTUAL FINDINGS

1. On April 12, 2000, respondent became a member of CalPERS through her employment with SCIF. Respondent was enrolled in the First Tier. On June 5, 2006, respondent transferred to the Employment Development Department (EDD). Respondent was again enrolled in the First Tier.

2. On October 15, 2007, respondent transferred to the Department. She was erroneously enrolled under the Second Tier. Respondent did not elect to be enrolled in Second Tier.

3. On August 19, 2011, respondent contacted CalPERS. "Customer Touch Point" notes concerning the contact documented that respondent explained that CalPERS had not been taking contributions from her paycheck. Respondent also explained she had been in the First Tier since her hire date, but the "smartdesk" showed she was in the Second Tier.

4. Esther Chan, an Associate Governmental Program Analyst for CalPERS in the Member Account Management Division Service Credit Purchase and Election Section, testified at hearing. She reviews retirement tier conversion and contribution adjustments. Ms. Chan explained that as a result of respondent's inquiry regarding her retirement tier, on August 24, 2011, CalPERS staff prepared a "Cost Information Request" to upload to respondent's file and create a workflow queue to research the issue. CalPERS also prepared a "Request for Action," which explained respondent had been switched from First Tier to Second Tier in 2007. CalPERS staff was asked to review the account to determine if respondent was "eligible for arrears."

5. Between October and November 2011, respondent contacted the Department on many occasions to explain that she never elected to be placed in the Second Tier. Respondent also requested information on how the Department was going to correct the mistake. On November 9, 2011, respondent contacted CalPERS. The Customer Touch Point notes concerning the contact documented that respondent explained she was working with the Department on the issue.

6. Ms. Chan explained that in 2011, CalPERS implemented a new computer system that consolidated CalPERS technology into a "single web-based application." As a result, there was delay in researching certain types of requests, including issues related to retirement tier conversions.

7. In January 2012, respondent exchanged emails with Department staff regarding the status of how the Department would address the error of placing her in the Second Tier. Respondent had not received any information about how much money, if any, she would be responsible to pay as a result of the mistake. Department Personnel staff informed respondent, on January 18, 2012, that the coding mistake had been corrected and she was placed in the First Tier. Respondent was also informed that an "accounts receivable" would be "set-up to retrieve the payments that are due." The Department was waiting to receive the information from the State Controller's Office (SCO).

8. By August 23, 2014, CalPERS completed an administrative review of respondent's retirement account. Ms. Chan explained that respondent was a member of CalPERS in the First Tier when she transferred to the Department in 2007. As a result, she did not have to take any action to enroll in the First Tier. However, the Department did not enter the right account code for the SCO so that respondent was enrolled into the correct retirement tier. When she transferred to the Department, she was erroneously placed in the Second Tier.

9. Upon completion of an administrative review of respondent's retirement account, on August 23, 2014, CalPERS sent respondent a contribution adjustment cost letter and Second Tier Retirement Election for the period of October 15, 2007, through December 31, 2011. The letter states in relevant part:

> During an administrative review of your retirement account, it was discovered retirement contributions are underpaid, and require a mandatory adjustment. Your employer, the State of California, Department of Corrections Paroles and Community Services Division, reported payroll for your

employment after October 15, 2007 under the incorrect retirement benefit formula. You were reported as having a 0% contribution rate. As such, you should have been reported in the retirement benefit formula with a 5% contribution rate, for all earnings in excess of $513.00 and for all subsequent employment in this position on and after October 15, 2007. Please note member contribution rates have changed based on your bargaining unit. Your contribution adjustment reflects those changes in accordance to Government Code 21073.1.

Enclosed is an election form for you to complete to indicate the method you would prefer to pay your mandatory contribution adjustment. Please complete the election form and indicate whether you wish to make lump sum payment, partial payment, or if you would like to increase the monthly payroll deduction amount. Please note once a pre-tax payroll deduction schedule is established, it may not be altered, paid in full, or canceled as long as you remain employed by a CalPERS covered employer. If we do not receive a reply within 60 days of the date of this letter, we will automatically establish a taxed payroll deduction schedule as indicated on the attached election form, starting with the next available payroll period.

[¶...¶]

The lump sum cost to respondent for the underfunded contributions was $8,922.19, with interest calculated through October 31, 2014. Respondent was not provided any information regarding her right to appeal CalPERS's determination and mandatory contribution adjustment.

10. On October 9, 2014, respondent contacted CalPERS and requested a breakdown of the contributions owed and calculation of balance. CalPERS responded to the request by letter dated October 10, 2014. CalPERS provided respondent a service credit breakdown of the contribution adjustment calculation for the period of October 15, 2007, to December 31, 2011, which totaled $8,922.19 through October 31, 2014. CalPERS also explained:

> In accordance with Government Code Section 21073(a) of the Public Employees' Retirement Law (PERL), which states:
>
> (a) A member who elects prior to January 1, 2000, to receive service credit under Section 21353, as authorized by subdivision (c) of Section 21070, for time during which he or she was subject to Section 21077, shall contribute in a lump sum or by installments, over the period and subject to minimum payments as may be prescribed by regulations of the board, an amount equal to the contributions he or she would have made had he or she not been subject to Section 21077, plus an amount equal to the interest, to the date of completion of payments, that would have been credited to those contributions.

The same day, respondent faxed a letter to CalPERS disputing that she owed money not taken out of her pay for her First Tier retirement. Respondent explained that the Department made the mistake by placing her in the Second Tier retirement. Respondent asked for an extension to respond to CalPERS before the mandatory adjustment collection occurred.

11. By letter dated December 17, 2014, CalPERS acknowledged respondent's appeal of the mandatory contribution adjustment and also provided an updated Contribution Adjustment Election. CalPERS informed respondent that no extension could be provided, because "CalPERS cannot cease and desist from appropriately recouping contribution owed to the State of California, consistent with the [PERL]. To do otherwise would be a gift of public funds." CalPERS also explained that:

> In accordance with Government Code Section 20160 (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...(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...
>
> Government Code section 21051 states what members must contribute. 'The contributions the member would have made to the systems...and interest that would have accrued on those contributions if they had been deposited at the beginning date....' All contributions and interest are deposited into your retirement account and help fund your retirement.

CalPERS provided respondent an updated service credit breakdown of the contribution adjustment calculation for the period of October 15, 2007, to December 31, 2011, which totaled $9,094.64 through December 31, 2014.

12. On January 26, 2015, respondent signed and faxed to the Department a completed election to repay Mandatory Contribution Adjustment form (Contribution form) authorizing CalPERS to deduct the underpaid retirement contributions from her salary. The Contribution form was also forwarded to CalPERS.

13. By letter dated February 13, 2015, CalPERS acknowledged receipt of the signed Contribution form. CalPERS confirmed that a total of $75.98 would be taken from respondent's monthly salary, effective on March 1, 2015, for a total of 180 months. The total contribution would be $9,094.64. The payment schedule included interest through completion of the payments at a rate of 6 percent.

14. On August 19, 2016, respondent filed a Petition for Writ of Mandate in the Superior Court of California, County of Sacramento. In her Petition, respondent challenged the mandatory adjustment. The parties, including the Department, agreed to dismiss that matter so that respondent could proceed with an administrative appeal.

15. By letter dated May 24, 2018, CalPERS addressed respondent's request to "appeal the mandatory contribution adjustment made by [CalPERS] to [her] account." CalPERS explained that the Department "used an inaccurate account code that resulted in [respondent] being placed in the Second Tier instead of the First Tier for the period of "October 15, 2007 through December 31, 2011." As a result, "[n]o retirement contributions were taken from [her] earning for this period of employment, therefore, [her] retirement account was underpaid." CalPERS "corrected the error by

processing a mandatory contribution adjustment in the amount of $9,094.64." CalPERS also explained that Government Code section 20160 requires CalPERS to "correct errors made by an employer or by the System," and that "[o]nce the error is discovered, CalPERS must take action to correct the error." CalPERS provided respondent with information regarding the appeal hearing process.

16. On December 5, 2018, Donald R. Martinez, Chief of the Member Account Management Division signed and thereafter filed the Statement of Issues.[4] The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

LEGAL CONCLUSIONS

1. CalPERS is governed by the provisions of the Public Employees' Retirement Law (PERL), Government Code section 20000, et seq. In accordance with Government Code section 20134 of the PERL, the hearing in this matter was conducted under the Administrative Procedure Act (APA), Government Code section 11500 et seq.

2. As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051). CalPERS bears the burden of proof in this matter, as it is CalPERS who asserts that an error was made and

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4 The parties stipulated to the admission of the following paragraphs in the Statement of Issues: I, II, III, IV, VII, VIII, IX, X, XIII, XIV, XV, XVI and XVII.

that respondent must reimburse CalPERS for the contribution adjustment. (Evid. Code, § 500.) Respondent bears the burden with respect to any defense she may have against repayment. (*Ibid.*)

Retirement Contributions

3. CalPERS members are required to make contributions toward their retirement in accordance with laws and regulations pertaining to their retirement plan. Members contributions are deducted from the member's compensation. (Gov. Code, § 20771.) The contribution amounts are set by statute. (See Gov. Code, §§ 20677.4-20683.91.) At issue in this matter are the First and Second Tier retirement formulas. The Second Tier benefit formula is 1.25 percent at 65. (Gov. Code, § 21076.) The First Tier benefit formula is 2 percent at 55. (Gov. Cod § 21354.1.) As set forth in Factual Findings 1 through 16, respondent is a member of the First Tier formula by virtue of her initial employment with SCIF on April 12, 2000. Respondent never elected to be enrolled in the Second Tier.

4. Government Code section 21051 provides:

> (a) A member electing to receive credit for service subject to this section shall contribute, in accordance with Section 21050, an amount equal to the following:
>
> (1) The contributions the member would have made to the system for the period for which current service credit is granted, assuming that the rate of contribution under his or her employer's formula at the rate age applicable to him or her at the beginning of his or her first subsequent period of service in membership and his or her compensation

earnable on that date had applied to the member during the period for which credit is granted.

(2) The interest that would have accrued on those contributions if they had been deposited at the beginning date of his or her first subsequent period of service in membership, from that date until the date of completion of payments.

(3) If the member is authorized under Section 21050 to contribute in other than a lump-sum payment, interest on the unpaid balance of the amounts payable under paragraphs (1) and (2), which interest shall begin to accrue as of the date of the election to receive credit.

(b) The beginning date of the first subsequent period of service, for purposes of computation of contributions and interest, shall be deemed to be the end of the period of service credited for a member who has no subsequent return to service.

5. Government Code section 21070.5, subdivision (a), relates to the retirement tiers of employees hired on January 1, 2000, or later and provides:

Notwithstanding any other provision of this article, a person who, on or after January 1, 2000, becomes a state miscellaneous or state industrial member of the system because the person (1) is first employed by the state, (2) returns to employment with the state from a break in

service of more than 90 days, or (3) returns to employment with the state after ceasing to be a member pursuant to Section 20340 or 21075, shall be subject to the benefits provided by Section 21354.1, unless the person elects within 180 days of membership as a state miscellaneous or state industrial member to be subject to the Second Tier benefits provided for in Section 21076 or 21076.5, as applicable. This section shall only apply to state miscellaneous and state industrial members who are (1) excluded from the definition of state employee in subdivision (c) of Section 3513, (2) employed by the executive branch of government and are not members of the civil service, or (3) included in the definition of state employee in subdivision (c) of Section 3513.

6. As set forth in Factual Findings 1 through 16, CalPERS established by a preponderance of the evidence that when respondent transferred to the Department on October 15, 2007, she should have been placed in the First Tier retirement formula, which provided the 2 percent at 55 years of age retirement benefit formula. The Department erroneously placed respondent in the Second Tier, which provided for a reduced benefit of 1.25 percent at 65 years of age retirement benefit formula. The mistake resulted in an underpayment of contributions by respondent in the amount of $9,094.64, which includes the required interest payments.

Correction of Errors and Adjustments

7. Government Code section 20160 provides for the correction of errors and omissions made by members, employers, and CalPERS. Government Code 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.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate 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.

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

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but 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:

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

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations 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.

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

8. Government Code section 20163 relates to the method of making adjustments and provides:

(a) 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 beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled. Losses or gains resulting from error in amounts within the limits set by the Department of General Services for automatic writeoff, and losses or gains in greater amounts specifically approved for writeoff by the Department of General Services, shall be debited or credited, as the case may be, to the reserve against deficiencies in interest earned in other years, losses under investments, and other contingencies.

(b) No adjustment shall be made because less than the correct amount of normal contributions was paid by a member if the board finds that the error was not known to the member and was not the result of erroneous information provided by him or her to this system or to his or her employer. The failure to adjust shall not preclude action under Section 20160 correcting the date upon which the person became a member.

(c) The actuarial equivalent under this section shall be computed on the basis of the mortality tables and actuarial interest rate in effect under this system on December 1,

> 1970, for retirements effective through December 31, 1979. Commencing with retirements effective January 1, 1980, and at corresponding 10-year intervals thereafter, or more frequently at the board's discretion, the board shall change the basis for calculating actuarial equivalents under this article to agree with the interest rate and mortality tables in effect at the commencement of each 10-year or succeeding interval.

9. In this case, Government Code section 20160, subdivision (b), requires CalPERS to "correct all actions taken as a result of errors or omissions of . . . any state agency or department." As set forth in Factual Findings 1 through 16, it is undisputed that the Department erred by placing respondent in the Second Tier rather than the First Tier as required. Government Code section 20160 requires CalPERS to correct this error and obtain additional payment from respondent to fully fund her First Tier retirement benefits.

10. Additionally, pursuant to Government Code section 20163, CalPERS's duty to correct mistakes extends to errors that result in an underpayment of retirement contributions. While 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. (See *Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565.) Respondent contends the exception should be applied to her case. However, exception does not apply to respondent's case. The Department's mistake of placing respondent in the wrong retirement formula tier is akin to an error in classification. As a result, CalPERS may not

forgive the contributions respondent is required to make as a member entitled to First Tier retirement benefits.

11. Respondent also contends that Government Code section 20283 prohibits CalPERS from collecting the arrears. Government Code section 20283, subdivision (a) provides:

> Any employer that fails to enroll an employee into membership when he or she becomes eligible, or within 90 days thereof, when the employer knows or can reasonably be expected to have known of that eligibility shall be required to pay all arrears costs for member contributions and administrative costs of five hundred dollars ($500) per member as a reimbursement to this system's current year budget.

As set forth in Factual Findings 1 through 16, the Department timely enrolled respondent into membership. As a result, Government Code section 20283, subdivision (a) does not prohibit CalPERS from collecting the arrears from respondent.

12. Respondent also argues that CalPERS is barred from collecting arrears by the three-year statute of limitations set forth in Government Code section 20164, which provides in pertinent part:

> [¶]...[¶]
>
> (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.
>
> [¶]...[¶]
>
> (e) The board shall determine the applicability of the period of limitations in any case, and its determination with respect to the running of any period of limitation shall be conclusive and binding for purposes of correcting the error or omission.

The three-year statute of limitations does not apply to administrative proceedings such as CalPERS action to collect from respondent the mandatory adjustment of underpaid retirement contributions. (See *City of Oakland v. Public Employees' Retirement System, et. al* (2002) 95 Cal.App. 4th 29, at 50-51; see also *Krolikowski v. San Diego Employees' Retirement System* (2018) 24 Cal.App. 5th 537, 557-56.) Additionally, assuming arguendo that the three-year statute of limitations did apply in respondent's case, as set forth in Factual Findings 1 through 16, respondent notified CalPERS of the error in August 2011. CalPERS started the process of researching the issue by August 24, 2011. The error was corrected and respondent was placed in the First Tier by December 2011. By August 23, 2014, CalPERS completed an administrative review of respondent' retirement account, confirmed that respondent underfunded her First Tier retirement as a result of the mistake, and began the process of collecting arrears from respondent.

Conclusion

13. By reason of the foregoing Factual Findings and Legal Conclusions, CalPERS established by a preponderance of the evidence, that in accordance with the PERL, it may make a mandatory adjustment of respondent's underpaid retirement contributions, which occurred as a result of the Department placing respondent in the incorrect retirement formula. Respondent's retirement account was underfunded by $9,094.64. As a result, respondent must pay the retirement contribution adjustment.

ORDER

The appeal of respondent Michele Y. Williams is DENIED.

DATE: March 10, 2020

DocuSigned by:
Marcie Larson
F72F4585838541C...
MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings