

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

**In the Matter of the Appeal Regarding Final Compensation
Calculation of:**

TIMOTHY C. ASBURY, et al., Respondents

Agency Case No. 2020-0506

OAH Case No. 2020120099

PROPOSED DECISION

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on February 17, 2022.

Charles H. Glauberman, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS). Janelle F. Crandell, Attorney at Law, Goyette, Ruano & Thompson, PLC, represented all individual retiree member respondents (Members),¹ except respondent Karen E. Brown (Brown). Michael D. Youril, Attorney at

¹ The 18 individual retiree member respondents are Timothy C. Asbury; Karen E. Brown; Kenneth C. Dunn; Mary E. Fernandes; Susan D. Halverstadt-Taylor; Marc A. Ledonne; Rey M. Lopez; Noreen M. Nunes; Philip A. Revolinsky; Charlotte A. Strickland;

Law, Liebert Cassidy Whitmore, represented respondent County of Glenn (County). Brown failed to appear at hearing. Because Brown was duly served with a Notice of Hearing, the matter proceeded as a default against Brown pursuant to Government Code section 11520, subdivision (a).

Following hearing, the record was left open until May 31, 2022, for the submission of written closing briefs. On April 22, 2022, CalPERS filed its closing brief, marked as Exhibit 57. On May 13, 2022, the Members and the County filed their closing briefs, marked as Exhibits M1 and AA, respectively. On May 24, 2022, CalPERS filed its reply brief, marked as Exhibit 58. On May 31, 2022, the County filed a surreply brief, marked as Exhibit BB.

On May 31, 2022, exhibits 57, 58, AA, BB, and M1 were admitted as argument, the record was closed, and the matter was submitted for decision.

ISSUES

The parties all agree that the County inadvertently overreported employee compensation to CalPERS, resulting in the overpayment of retirement benefits to the Members. After discovery of the error during an audit, CalPERS sought to prospectively reduce the Members' retirement allowances and collect: (a) the overpayments for the most recent three years of retirement benefits from the Members; and (b) the

Lisa C. Teeter; Nancy A. Thuemler; M. Diane Valk; Sean S. Arlin; Alma M. Carney; Manuel J. Cesa; James A. Miranda; and Laurence R. Olsen.

remainder of the overpayments beyond the most recent three years from the County. The appeals here raise two global issues:²

1. Does recently-enacted Government Code section 20164.5³ apply, shifting liability for all collectible overpayments to the County?

2. If section 20164.5 does not apply, and CalPERS can collect overpayments for the most recent three years from the Members, may CalPERS nonetheless collect the remainder of overpayments from the County?

FACTUAL FINDINGS

Background and Jurisdiction

1. CalPERS manages a defined benefit plan for California state employees and employees of contracting public agencies. Benefits for its members are funded by member and employer contributions, and by interest and other earnings on those contributions. The amount of a member's contribution is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a rate to the payroll of the agency. Using certain actuarial

² The First Amended Statement of Issues raises an additional threshold issue of whether CalPERS correctly determined that the County had erroneously reported employee compensation to CalPERS. However, as noted above, the County's erroneous reporting is undisputed.

³ All further statutory references are to the Government Code, unless otherwise specified.

assumptions specified by law, the CalPERS Board sets employer contribution rates on an annual basis.

2. Generally, the amount of a member's service retirement allowance is calculated by applying a percentage figure based upon the member's age at retirement to the member's years of service and the member's "final compensation." Final compensation is a function of the member's highest "compensation earnable," which consists of the member's base payrate and any special compensation. In computing a member's retirement allowance, CalPERS staff may review payroll reported by the employer for the member to ensure that only those items allowed under the California Public Employees' Retirement Law (PERL) will be included in the member's final compensation for purposes of calculating the retirement allowance.

3. The County is a public agency that has contracted with CalPERS to provide retirement benefits for eligible County employees since June 1, 1948. That contract was most recently amended on April 1, 2012. The contract requires the County to pay contributions that include administrative costs incurred by CalPERS, the costs of special valuations, and the costs of periodic investigations/valuations required by the PERL. Additionally, the contract allows the CalPERS Board to periodically adjust the County and its employees' contributions based on amendments to the PERL or "as determined by the periodic investigation and valuation" required by the PERL.

4. In the early summer of 2018, CalPERS audited the County's payroll reporting for the period of July 1, 2012, through June 30, 2017, to determine compliance with the PERL and the California Public Employees' Pension Reform Act of 2013 (PEPRA). The review was limited to examining a sample of active and/or retired employee records during that period.

5. On June 14, 2018, CalPERS issued a draft audit report, and on December 6, 2018, it issued its final audit report. One of the audit findings was that the County had erroneously overreported certain employees' base payrates to CalPERS during the relevant period. Specifically, the County inadvertently included reportable items of special compensation in the base payrates and then reported them again as special compensation, resulting in double reporting of the items and inflated base payrates. In turn, the inflated base payrates caused inflated calculations of the affected employees' compensation earnable, final compensation, and retirement allowances.

Although the County misreported the base payrates for affected employees, the County correctly reported the total amount of each employee's earnings. Thus, individual employees did not pay any additional employee contributions due to the misreported base payrates.

6. The County acknowledged the reporting error. In early 2019, the County corrected the reporting error and provided CalPERS with a list of affected employees.

7. CalPERS subsequently determined that the County's reporting error caused the overpayment of retirement benefits to 56 County retirees. In late 2019, CalPERS then sought collection of the overpayments from 56 individual County retirees for the most recent three years.

8. In early 2020, CalPERS invoiced the County for the remainder of the overpayments that occurred more than three years prior to CalPERS' determination. More specifically, CalPERS issued an invoice to the County for each individual affected retiree with the following language:

Based on the retroactive payroll correction, we are limited
[to] collecting the overpayment from the member to three

years based on Government Code 20164(b)(1). In order to recover the entire overpayment to the system, we are invoicing you for the balance of the overpayment (Internal Revenue Procedure 2015-27, Section 3.02(3)).

9. Eighteen individual County retirees (the Members) and the County timely appealed CalPERS' determinations. On November 20, 2020, Renee Ostrander, in her official capacity as Chief of CalPERS' Employer Account Management Division, signed and thereafter filed a Statement of Issues for purposes of the appeals. On January 6, 2022, Ms. Ostrander, in her official capacity, signed and thereafter filed an Amended Statement of Issues, which additionally addresses the potential impact of recently-enacted Government Code section 20164.5, effective January 1, 2022. The matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.⁴

CalPERS' Collection/Debt Discharge Practices

10. Anthony Suine is CalPERS' Deputy Executive Officer over the Customer Service and Support Branch. In that position he oversees six CalPERS divisions,

⁴ The court previously issued a Proposed Decision dated May 14, 2021, granting the County's motion to dismiss on legal grounds. On July 14, 2021, the Board rejected that Proposed Decision. The Board did not identify any specific error(s), but nonetheless remanded to allow CalPERS to present evidence concerning its claim against the County at an administrative hearing. In deciding this matter on remand, the court gives no weight to its prior determinations in resolving the motion to dismiss and reconsiders the record as a whole.

including the Employer Account Management Division and the Member Account Management Division. Mr. Suine testified at hearing concerning CalPERS' collection and debt discharge practices.

11. Historically, CalPERS discharged any overpayment debt beyond the three-year limitation period in section 20164, subdivision (b), regardless of who caused the overpayment error. Such discharge was consistent with CalPERS' published discharge policies, which recognized that "debts owed that are beyond the relevant statute of limitation are not legally recoverable and no discretion for collection exists." When CalPERS discharges a debt, it is accounted for by assessing that debt to the broader CalPERS employer population through the annual valuation process.

12. In mid-2016 to early 2017, CalPERS changed its debt discharge practices. Since that time, CalPERS continues to discharge overpayment debts beyond the three-year limitation period caused by staff or member errors (absent fraud), but now invoices employers for overpayment debts beyond the three-year limitation period caused by employer errors.

13. The change in debt discharge practices resulted from CalPERS staff noticing that a majority of overpayments were caused by employer errors. That observation generated an internal discussion among CalPERS staff about shifting liability for such overpayments to employers. Ultimately, Mr. Suine directed CalPERS staff to start invoicing employers for overpayments to members beyond the three-year limitation period when the overpayments were caused by employer error.

14. Mr. Suine testified that the policy change was not a change in law, but merely a "procedural practice change." Additionally, Mr. Suine clarified that Internal Revenue Service (IRS) Guidelines were not an impetus for the policy change. He noted

that discharging a debt and thereby assessing that debt to the broader CalPERS employer population has always been a permissible correction method for overpayments under IRS Guidelines. Thus, CalPERS' prior practice of discharging all overpayment debts beyond the three-year limitation period in section 20164, subdivision (b), did not violate IRS Guidelines.

15. CalPERS did not memorialize its 2016-2017 change in debt discharge practices involving employers in a written policy, and it never presented it to the Board for review and approval. Additionally, CalPERS did not promulgate a regulation, issue a Circular Letter, or notify any control agencies. It also did not notify employers about the change, except through individual invoices issued to employers. The invoices were not sent to the employers' legal departments and did not provide any notification of appeal rights.

Analysis

ISSUE 1: APPLICABILITY OF RECENTLY-ENACTED SECTION 20164.5

16. The Members contend that section 20164.5, effective January 1, 2022, applies to this matter and shifts liability for all overpayments to the County. The County and CalPERS both argue that section 20164.5 does not apply under the facts of this case.

17. Under section 20164.5, if a miscalculation of retirement benefits occurs due to disallowed compensation, the employer may be liable to pay CalPERS the full cost of any overpayment and pay the impacted retiree a portion of the actuarial equivalent of any reduced retirement benefit as a penalty. "Disallowed compensation" is defined as:

compensation reported for a member by the state, school employer, or a contracting agency that the system subsequently determines is not in compliance with the California Public Employees' Pension Reform Act of 2013 (Article 4 (commencing with Section 7522) of Chapter 21 of Division 7 of Title 1), Section 20636 or 20636.1, or the administrative regulations of the system.

(§ 20164.5, subd. (a).) Section 20164.5 applies to determinations made on or after January 1, 2017, if an appeal has been filed and the member, the retired member, survivor, or beneficiary has not exhausted their administrative or legal remedies. (§ 20164.5, subd. (b).)

18. However, the employer's liability for the above-mentioned overpayments and penalties under section 20164.5 only applies if specific statutory conditions are all satisfied: (i) the compensation was reported to the system and contributions were made on that compensation while the member was actively employed; (ii) the compensation was agreed to in a memorandum of understanding or collective bargaining agreement between the employer and the recognized employee organization as compensation for pension purposes, and the employer and the recognized employee organization did not knowingly agree to compensation that was disallowed; (iii) the determination by the system that compensation was disallowed was made after the date of retirement; and (iv) the member was not aware that the compensation was disallowed at the time it was reported. (§ 20164.5, subd. (b)(3)(A).)

19. Here, there is no dispute that the County inadvertently overreported the Members' compensation to CalPERS. Such overreporting is not compliant with applicable law. At least at first blush, it appears to meet the general definition of

disallowed compensation outlined in section 20164.5, subdivision (a). However, for Members to receive the benefit of section 20164.5's liability shift, all four conditions outlined in section 20164.5, subdivision (b)(3)(A), must also be satisfied. Here, the Members do not satisfy condition (i), because they did not pay any additional contributions due to the misreported base payrates. Even if they had, they do not satisfy condition (ii), because the County's misreported base payrates constitute a payroll reporting error, and that error was never agreed to in a labor agreement.

20. Notably, on December 29, 2021, CalPERS issued Circular Letter 200-076-21, which clarifies that mere payroll errors that exceed what is provided under a labor agreement are not considered disallowed compensation for purposes of section 20164.5. That interpretation of the statute is reasonable, because the statute specifically targets mutual employer-employee organization mistakes about the classification of particular employee compensation for pension purposes. Mere payroll reporting errors would not meet section 20164.5, subdivision (b)(3)(A)(ii), because such errors would not reasonably be provided for under a labor agreement.

21. To be sure, the Members correctly note that the legislative findings accompanying section 20164.5 evince a general intent to hold employers, rather than impacted retirees, accountable for reporting disallowed compensation. But regardless of any sympathy for the Members' predicament, the court's analysis must be guided by the statutory text itself. The Legislature elected to shift liability to employers through section 20164.5 only when all specified conditions are met. Because those conditions are not met here, section 20164.5 does not apply. Thus, CalPERS is authorized to prospectively reduce the Members' retirement allowances and collect from Members overpayments for the most recent three years.

ISSUE 2: COLLECTION OF REMAINDER OF OVERPAYMENTS FROM THE COUNTY

22. As noted above, CalPERS also seeks to collect the remainder of the overpayments beyond the most recent three years from the County. The County raises several arguments in opposition: first, such collection is barred by the three-year limitation period in section 20164, subdivision (b); second, even if the limitation period does not apply, CalPERS lacks any statutory authority to collect from a party who did not receive the payments based on an assessment of fault; third, even if CalPERS had such authority, CalPERS' 2016-2017 policy change would constitute an unlawful underground regulation; and fourth, even if CalPERS' action was otherwise valid, CalPERS should be held responsible for its unreasonable delay in reducing the Members' prospective retirement allowances, which in turn increased the County's alleged overpayment liability. Because the County's first argument concerning the three-year limitation period in section 20164, subdivision (b), is dispositive, the court does not reach the remainder of the County's arguments.

Section 20164, subdivision (b)

23. The County argues that CalPERS' claim to collect from the County the balance of any overpayments to members beyond the most recent three years is precluded by the plain language of section 20164, subdivision (b).

Section 20164, subdivision (b), provides:

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.

24. The statute's plain language creates a three-year limitation period for collection of an erroneous overpayment. CalPERS acknowledges that section 20164, subdivision (b), limits its ability to collect overpayments from members beyond three years, but asserts that it can nonetheless collect it from the County. However, the statutory language does not constrain the limitation period's application to collection from members; it does not state "this system's right to collect *from members* shall expire three years from the date of payment." Nor does the statutory language constrain the limitation period's application to innocent parties who did not cause the erroneous overpayment. The statute merely specifies that CalPERS' *right to collect* shall expire three years from the date of payment. (*See O'Neill v. Tichy* (1993) 19 Cal.App.4th 114, 120 [in interpreting a statute of limitation, courts must give effect to the statute's "plain meaning" and "apply the statute as written"]; *People v. Bautista* (2008) 163 Cal.App.4th 762, 777 ["Under the standard rules of statutory construction, we will not read into the statute a limitation that is not there"].)

25. Additionally, CalPERS' interpretation conflicts with the Legislature's inclusion of a reference to section 20532, which only applies to contributions from employers. If section 20164, subdivision (b)'s limitation period only applied to members, there would have been no reason for the Legislature to reference section 20532.

26. In sum, the plain language of section 20164, subdivision (b), precludes CalPERS' collection claim against the County. CalPERS nonetheless contends that the three-year limitation period does not apply and/or is superseded on the following

grounds: (a) CalPERS' fiduciary duties to administer the defined benefit plan and correct errors; (b) CalPERS' statutory authority to adjust employer contributions; (c) CalPERS' contractual authority; (d) CalPERS' statutory authority to determine the applicability of the limitation period; (e) the limitation period does not apply to administrative proceedings; (f) even if the limitation period applies, collection is allowed by the discovery rule; (g) the limitation period is superseded by operation of IRS Guidelines; and (h) public policy supports allowing CalPERS' collection claim. Each argument is addressed below and found unavailing.

27. **(a) CalPERS' fiduciary duties to administer the defined benefit plan and correct errors:** CalPERS argues that it has a fiduciary duty to administer its defined benefit plan so as to minimize employer contributions, minimize administration costs, and pay only benefits authorized by law. As such, it also has a duty to correct errors, including overpayments, retroactively pursuant to sections 20160 (corrections of errors and omissions) and 20163 (adjustments to correct errors in contributions and other payments). Moreover, under section 20164, subdivision (a), "the obligations of the state and contracting agencies to this system in respect to retired members formerly employed by them, respectively, continue until all of the obligations of this system in respect to those retired members, respectively, have been discharged."

28. Although CalPERS' general fiduciary duties and the County's general obligations to CalPERS are undisputed, they may not be exercised or enforced in contravention of a limitation period enacted by the Legislature. (See *Alameda Cnty. Deputy Sheriff's Association v. Alameda Cnty. Employees' Retirement Association* (2020) 9 Cal.5th 1032, 1067 [an administrative agency may not exceed its scope of authority conferred by the Legislature; "[a]n administrative action that is unauthorized

or inconsistent with governing legislation is invalid.”].) The three-year limitation period outlined in section 20164, subdivision (b), expressly applies to “payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise ” Thus, CalPERS’ general fiduciary duties (including those set forth in sections 20160 and 20163) and the County’s general obligations to CalPERS (including those set forth in section 20164, subdivision (a)) cannot salvage CalPERS’ claim against the County.

29. **(b) CalPERS’ statutory authority to adjust employer contributions:**

CalPERS argues that it can collect the overpayments from the County as employer contributions pursuant to sections 20532 and 20536. That argument is unpersuasive.

30. Section 20532 does not apply to the facts of this case. Section 20532 provides:

The contracting agency shall make the contribution for its employees in this system, as recommended by the actuary and approved by the board and certified by it to the contracting agency.

The contribution may consist of fixed sums, percentages of compensation of contract members, or both, and shall be paid to this system as provided in the contract.

The actual contribution is subject to adjustment by the board as may be necessary on account of any additional prior service credits that the contracting agency may desire to provide for its employees in this system or on account of experience under this system as determined by periodical

investigation, valuation and determination required to be made by the board, including adjustments determined as necessary by the board, even after the total contributions determined, plus subsequent adjustments, if any, have been completely paid.

Here, CalPERS' collection claim against the County was not recommended by the actuary, approved by the Board, and certified by the Board to the County. This case simply does not involve a periodic investigation, valuation, and adjustment of employer contributions. Although CalPERS creatively attempts to characterize its claim against the County as seeking employer contributions within the meaning of section 20532, it actually seeks to collect from the County an overpayment to members on a dollar-for-dollar basis. The fact that it is seeking to collect a portion of the overpayment from the members' former employer does not transmute it into an employer contribution for purposes of section 20532.

31. Section 20536 also does not apply to the facts of this case. Section 20536, subdivision (a), provides:

The board may include each year in the contribution required of the contracting agency a reasonable amount, which may differ from agency to agency, to cover the costs of administering this system as it affects the active and retired employees of that agency. The board may also assess a contracting agency a reasonable amount to cover costs incurred because of the agency's failure to submit reports and forward contributions on a timely basis. The payments shall be credited to the current appropriation for

support of the board and available for expenditure by the board.

Here, CalPERS does not seek to recoup administrative costs, nor costs incurred because of the County's failure to submit reports or delay in forwarding contributions. Instead, it seeks to recover erroneous overpayments to the Members, which cannot reasonably be characterized as mere administrative costs.

32. In sum, sections 20532 and 20536 do not apply here. Even if they did, collection of the overpayments pursuant to those statutes would remain subject to the three-year limitation period in section 20164, subdivision (b). That limitation period applies to "payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, *or 20532, or otherwise.....*" (§ 20164, subd. (b) (emphasis added.) Section 20532 is expressly referenced in, and section 20536 falls under the "or otherwise" provision of, section 20164, subdivision (b).

33. **(c) CalPERS' Contractual Authority:** CalPERS argues that it may collect the overpayments from the County based on CalPERS' authority to adjust employer contributions and collect administrative, investigation, and valuation costs from the County under the County's contract with CalPERS. However, as explained above, CalPERS' attempt to collect from the County an overpayment to members on a dollar-for-dollar basis cannot reasonably be characterized as an adjustment of employer contributions, nor as collection of mere administrative, investigation, and valuation costs. Thus, the contract does not authorize CalPERS' attempted collection here. Even if it did, the contract must comply with the PERL, including section 20164, subdivision (b)'s three-year limitation period. Consequently, the County's contract with CalPERS does not aid CalPERS.

34. **(d) CalPERS' statutory authority to determine the applicability of the limitation period:** Notwithstanding the plain language of section 20164, subdivision (b), CalPERS urges that it has absolute statutory authority to decide whether the three-year limitation period applies to the County. Specifically, it relies on section 20164, subdivision (e), which provides:

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.

35. That argument fails for two reasons:

First, the statute does not grant CalPERS authority to select any limitation period it desires, or none. Section 20164 identifies different potentially-applicable limitation periods in subdivisions (b), (c), and (d), which each start to run upon different specified events.⁵ Thus, the statute instructs the Board to initially determine which particular limitation period applies, and then when the particular limitation period began to run, based on the facts of the specific case. As such, CalPERS cannot merely dispose of a limitation period at whim.

⁵ The parties all agree that the other limitation periods in section 20164, subdivisions (c) (erroneous payment due to death of the retired member or beneficiary or because of the remarriage of the beneficiary) and (d) (fraud) do not apply to this case.

Second, courts have clarified that the language “conclusive and binding” does not mean unfettered discretion; judicial review is not precluded and no deference is owed to an arbitrary or irrational exercise of power. (*City of Oakland v. Public Employees’ Retirement System* (2002) 95 Cal.App.4th 29, 43, 45 [*City of Oakland*].) Failure to comply with the express terms of a state statute would be an arbitrary or irrational exercise of power.

36. **(e) The limitation period does not apply to administrative proceedings:** CalPERS also argues that the three-year limitation period under section 20164, subdivision (b), only applies to civil actions and not to administrative proceedings. That argument lacks merit and borders on the frivolous.

37. As an initial matter, the argument is puzzling to say the least, because CalPERS itself applies section 20164, subdivision (b), to this administrative proceeding to conclude that it can only collect the most recent three years of overpayments from the Members. Although CalPERS initially raised this argument in its written briefing on the County’s prior motion to dismiss, CalPERS’ counsel then disavowed the argument during subsequent oral argument on the motion. At that time, CalPERS’ counsel conceded that it would be “disingenuous” to apply section 20164, subdivision (b), to the Members in this administrative proceeding while simultaneously contending that it did not apply to administrative proceedings. For unknown reasons, CalPERS has now resurrected this dubious argument.

38. Setting aside its schizophrenic nature, the argument is also unpersuasive. Although it is well-established that the three-year statute of limitation for mistake in Code of Civil Procedure section 338, subdivision (d), only applies to civil actions, section 20164, subdivision (b), is not a general statute of limitation broadly governing civil actions; it appears in the PERL. It is thus part of CalPERS’ enabling legislation and

plainly binds CalPERS. Moreover, section 20164, subdivision (b), expressly limits CalPERS' "right to collect"; not just its right to file a civil action.

39. CalPERS' reliance on contrary dicta in *City of Oakland* is misplaced. *City of Oakland* held that the three-year limitation period in section 20164, subdivision (b), does not apply to an administrative reclassification proceeding. In *City of Oakland*, CalPERS retroactively reclassified certain airport employees of the City of Oakland from local miscellaneous to local safety members, making them eligible for superior retirement benefits. The appellate court noted that section 20164, subdivision (b), applies to erroneous payments into or out of the retirement fund, not to retroactive reclassifications. Although the retroactive reclassification would likely result in the need for increased employer and employee contributions to support the increased benefits, the court made clear that the issues of collection and potentially applicable limitation periods were not before it:

The ALJ's decision, which was adopted by the PERS Board, did not require anyone to pay any money; it merely reclassified the employees. That issue is not properly before this court.

(*City of Oakland*, supra, 95 Cal.App.4th at 49.) Unlike *City of Oakland*, this case does not involve an administrative reclassification proceeding; none of the Members were retroactively reclassified. And unlike *City of Oakland*, this case does involve erroneous payments out of the retirement fund.

To be sure, the *City of Oakland* decision contains a remark that section 20164's limitation periods do not apply to administrative proceedings. (*City of Oakland*, supra, 95 Cal.App.4th at 51.) However, that remark is mere dicta not essential to the court's

decision, because it was not an issue presented in *City of Oakland*. (*Chevron U.S.A., Inc. v. County of Monterey* (2021) 70 Cal.App.5th 153, 169 [“It is axiomatic that cases are not authority for propositions not considered.”].) Moreover, that dicta respectfully makes little sense given section 20164’s location in CalPERS’ enabling legislation. (See *Krolkowski v. San Diego City Employees’ Retirement System* (2018) 24 Cal.App.5th 537, 558, 560 fns. 11 & 14 [drawing distinction between general statutes of limitation governing civil actions that *do not apply* to administrative collection proceedings, and limitation periods specific to a retirement system that *apply* to administrative collection proceedings].) Moreover, other California Courts of Appeal have enforced analogous limitation periods in administrative proceedings. (See, e.g., *Baxter v. State Teachers’ Retirement System* (2017) 18 Cal.App.5th 340 [applying three-year limitation period in Education Code section 22008 to administrative proceeding by CalSTRS to collect benefits overpayments]; *Blaser v. State Teachers’ Retirement System* (2019) 37 Cal.App.5th 349 [same].)

40. Finally, even if CalPERS were correct that section 20164, subdivision (b), does not apply to administrative proceedings, it would not support CalPERS’ claim against the County. In that case all overpayments, including those beyond the most recent three years, would merely become collectible from the Members who actually received them.

41. **(f) Even if the limitation period applies, collection is allowed by the discovery rule:** CalPERS argues that, even if section 20164, subdivision (b), applies to its claim against the County, CalPERS’ collection is timely under the discovery rule. That is because CalPERS first discovered the County’s reporting errors and the corresponding overpayments in the early summer of 2018, and CalPERS invoiced the County by January 2020, well within the three-year limitation period.

42. The problem with CalPERS' argument is that it invents a discovery rule from whole cloth without any footing in the statutory text. Nothing in section 20164, subdivision (b), suggests that the running of the three-year limitation period only starts upon discovery of the error or mistake. Notably, the Legislature expressly included discovery provisions for other limitation periods outlined in section 20164, suggesting that it was intentionally omitted from subdivision (b). (*See* § 20164, subds. (c) [10-year limitation period for erroneous payments based on death or remarriage "shall commence with the discovery of the erroneous payment"] & (d) [10-year limitation period for erroneous payments based on fraudulent reports "shall commence either from the date of payment or upon discovery of the fraudulent reporting, whichever date is later."].)

43. Finally, even if a discovery rule applied to section 20164, subdivision (b), it would not support CalPERS' claim against the County. Collection would then be from the Members who actually received the overpayments.

44. **(g) The limitation period is superseded by operation of IRS Guidelines:** CalPERS also avers that its claim against the County is mandated by IRS Guidelines; specifically, Revenue Procedure 2021-30.⁶ Revenue Procedure 2021-30 generally requires that overpayments of a defined benefit plan's benefits be corrected

⁶ CalPERS' invoices to the County initially referenced Revenue Procedure 2015-27, whereas CalPERS now requests official notice of the updated 2021 IRS Guidelines, including Revenue Procedure 2021-30, pursuant to section 11515 and California Evidence Code section 452. The court grants CalPERS' request. As the County acknowledges, "the substance remains the same." Thus, the court relies on the more recent Revenue Procedure 2021-30 cited by CalPERS.

in accordance with section 6.06(3) and Appendix B, section 2.05, of that procedure. (Revenue Procedure 2021-30, §§ 5.01(3)(c); 6.06(3).) It provides several correction methods, including the following provision relied upon by CalPERS:

Depending on the nature of the Overpayment, other appropriate correction methods may be used. An appropriate correction method may include using rules similar to the correction methods described in Appendix B, section 2.05, but having the Plan Sponsor or another person contribute the amount of the Overpayment (with appropriate interest) to the plan instead of seeking recoupment from an Overpayment recipient. Any other correction method used must satisfy the correction principles of section 6.02 and any other applicable rules in this revenue procedure.

(Revenue Procedure 2021-30, § 6.06(3)(e).)

45. CalPERS does not contend that Revenue Procedure 2021-30 preempts section 20164, subdivision (b). Indeed, Revenue Procedure 2021-30 is neither a federal statute nor a federal regulation. Moreover, CalPERS limits its collection against the Members to three years pursuant to section 20164, subdivision (b), which would be inconsistent with a federal preemption argument.

46. However, CalPERS argues that Revenue Procedure 2021-30 nonetheless requires pursuing CalPERS' claim against the County, because failure to do so would jeopardize the CalPERS defined benefit plan's tax-favored status under the Internal

Revenue Code. Although there is no dispute that CalPERS must comply with the Internal Revenue Code, CalPERS' argument fails for three reasons.

First, Revenue Procedure 2021-30 does not *mandate* collection of overpayments from the County. It merely allows recovery from an employer as one of several *permissive* correction options. Other correction options include recoupment from the member recipient, adopting a retroactive amendment to conform the plan document to the plan's operations, and discharging the debt to be assessed to the broader CalPERS employer population. (Revenue Procedure 2021-30, § 6.06(3).) Absent federal preemption, CalPERS may not use a permissive option for correction under Revenue Procedure 2021-30 to violate a limitation period enacted by the Legislature merely because CalPERS prefers that particular correction option.

Second, CalPERS' argument is inconsistent with its past and present collection practices. Prior to 2016-2017, CalPERS generally discharged all debt beyond the three-year limitation period in section 20164, subdivision (b). After its 2016-2017 policy change, it continues to discharge debts beyond the three-year limitation period attributable to staff or member errors. CalPERS discharges such debts without apparent fear of jeopardizing its plan's tax-favored status because, as Mr. Suine explained, discharge is a permissible correction option under the IRS Guidelines. Indeed, as Mr. Suine also acknowledged, the IRS Guidelines were not even an impetus for the 2016-2017 policy change. Thus, CalPERS' present reliance on the IRS Guidelines is but an attempted post-hoc rationalization for a decision it actually made for other reasons.

Third, even if CalPERS were genuinely concerned about its defined benefit plan's tax-favored status, its remedy is to seek an appropriate statutory amendment by the Legislature. Absent such an amendment, or a finding of federal preemption by a

court of competent jurisdiction, CalPERS has no authority to ignore an existing, duly-enacted limitation period in a state statute.

47. In sum, Revenue Procedure 2021-30 does not mandate collection of the overpayments from the County and does not supersede section 20164, subdivision (b). Stripped of bluster, CalPERS' argument that its plan's tax-favored status is jeopardized unless it pursues collection against the County is wholly devoid of substance.

48. **(h) Public policy supports allowing CalPERS' collection claim:** CalPERS finally argues that allowing its collection claim against the County supports the public policies of holding employers accountable for their errors and incentivizing accurate reporting to CalPERS. CalPERS' concerns are understandable. But however laudable the asserted public policies may be, they do not trump the plain language of a statute. Public policy arguments for statutory amendment must be addressed to the legislative branch.

49. **Conclusion:** CalPERS correctly observes that it generally has broad authority and discretion to administer its defined benefit plan in a manner that it determines is in the best interests of the plan and its members. That includes authority to correct mistakes retroactively and collect overpayments. Additionally, as the agency charged with administering the PERL, CalPERS' interpretations of the PERL are ordinarily entitled to deference. However, neither this court nor the CalPERS Board has authority to permit CalPERS to collect overpayments in violation of a limitation period

duly enacted by the Legislature.⁷ Thus, CalPERS' claim against the County for overpayments beyond the three-year limitation period in section 20164, subdivision (b), is precluded.

The County's Remaining Arguments

50. Given the conclusion that section 20164, subdivision (b), precludes CalPERS' claim against the County, the court need not, and does not, consider the County's remaining arguments that CalPERS lacks statutory authority to collect from a party who did not receive the payments based on an assessment of fault, that CalPERS' 2016-2017 policy change constitutes an unlawful underground regulation, and that CalPERS should be held responsible for any unreasonable delay in reducing the Members' prospective retirement allowances.

LEGAL CONCLUSIONS

1. "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. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn. 5.) A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549,

⁷ And even if this court or the CalPERS Board were tempted to do so in an attempt to promote a desired public policy, the final decision would be subject to further judicial review pursuant to Government Code section 11523.

1567.) Here, the parties vigorously dispute which party bears the burden of proof as to specific issues. For purposes of deciding this matter, the court assumes, but does not decide, that: (a) CalPERS and the County bear the burden of proving that section 20164.5 does not apply to this matter; and (b) the County bears the burden of proving that CalPERS' claim against it is precluded by section 20164, subdivision (b).

2. Based on the Factual Findings as a whole, and specifically, Factual Findings 16 through 21, section 20164.5 does not apply to this matter. Thus, CalPERS is authorized to prospectively reduce the Members' retirement allowances and collect from Members overpayments for the most recent three years.

3. Based on the Factual Findings as a whole, and specifically, Factual Findings 22 through 50, CalPERS is precluded from collecting from the County the balance of any overpayments to members beyond the most recent three years, pursuant to section 20164, subdivision (b).

ORDER

1. The Members' appeals are DENIED and the County of Glenn's appeal is GRANTED.

2. CalPERS correctly determined that the County had erroneously reported employee compensation to CalPERS during the relevant period.

3. Government Code section 20164.5 does not apply to this matter. Thus, CalPERS is authorized to prospectively reduce the Members' retirement allowances and collect from Members overpayments for the most recent three years.

4. CalPERS is precluded from collecting from the County the balance of any overpayments to members beyond the most recent three years, pursuant to Government Code section 20164, subdivision (b).

DATE: June 28, 2022

Wim vanRooyen

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings