

**ATTACHMENT A**

**THE PROPOSED DECISION**

**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. 2020120099.1**

**PROPOSED DECISION**

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard oral argument on the County of Glenn's motion to dismiss by videoconference on April 23, 2021, from Sacramento, California.

Charles H. Glauberman, Senior Staff Attorney, represented the California Public Employees Retirement System (CalPERS).

Michael D. Youril, Liebert Cassidy Whitmore, represented respondent County of Glenn (County).

On April 23, 2021, the motion was submitted for decision.

## MOTION TO DISMISS

### The Record

1. No evidentiary hearing was conducted. Thus, no factual findings are made beyond the undisputed background and procedural facts necessary to put the motion in context.

2. Before turning to analysis of the County's motion to dismiss, the court clarifies the documents considered, as well as the purposes for which they were considered. The following documents were considered as argument:

(a) County of Glenn's Motion to Dismiss, marked for identification as Exhibit 1.

(b) County of Glenn's Request for Official Notice, marked for identification as Exhibit 2, but only to the extent discussed below with respect to its attachments (Exhibits 2-A through 2-E).

(c) CalPERS' Opposition to Motion to Dismiss, marked for identification as Exhibit 3.

(d) CalPERS' Request for Official Notice, marked for identification as Exhibit 4, but only to the extent discussed below with respect to its attachments (Exhibits 4-1 through 4-5).

(e) County of Glenn's Reply to CalPERS' Opposition to Motion to Dismiss, marked for identification as Exhibit 5.

## REQUESTS FOR OFFICIAL NOTICE

3. Any fact which may be judicially noticed by California state courts may be the subject of official notice in an administrative proceeding. (Gov. Code, § 11515.)<sup>1</sup> Courts may take judicial notice of records, reports, and orders of administrative agencies of the United States or any state of the United States. (Evid. Code, § 452, subd. (c); *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.) Additionally, courts may take judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code, § 452, subd. (h).)

4. The County requests official notice of the following documents: Exhibits 2-A (a January 21, 2021 invoice from CalPERS to the County); 2-B (a May 21, 2020 letter from the County Counsel’s Office to CalPERS); 2-C (CalPERS’ Discharge from Accountability Policy); 2-D (CalPERS’ September 17, 2019 agenda item concerning discharged debts); and 2-E (Internal Revenue Service [IRS] Revenue Procedure 2015-27). The request is granted as to Attachments 2-A and 2-E, because they constitute government agency records and are not reasonably subject to dispute. However, even assuming, without deciding, that Attachments 2-B through 2-D are properly subject to official notice, they are unnecessary to resolution of the motion, as discussed below. Thus, the request is denied as to Attachments 2-B through 2-D.

5. CalPERS requests official notice of the following documents: Exhibits 4-1 (*In the Matter of the Application to Contract with CalPERS by the Galt Services*

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<sup>1</sup> All further statutory references are to the Government Code, unless otherwise specified.

*Authority, Respondent, and the City of Galt, Respondent*, Precedential Decision 08-01, October 22, 2008); 4-2 through 4-4 (selections from IRS Revenue Procedure 2019-19); and 4-5 (the County's contract with CalPERS). The request is granted as to Exhibits 4-1 through 4-4, because they constitute government agency records and are not reasonably subject to dispute. However, even assuming, without deciding, that Exhibit 4-5 is properly subject to official notice, it is unnecessary to resolution of the motion, as discussed below. Thus, the request is denied as to Exhibit 4-5.

## **Background**

6. CalPERS conducted an audit of the County's payroll reporting for the period of July 1, 2012, through June 30, 2017, to determine compliance with the California Public Employees' Retirement Law (PERL) and the California Public Employees' Pension Reform Act of 2013 (PEPRA). On December 6, 2018, CalPERS issued a final public agency review audit report, which determined that the County had overreported payrates to CalPERS by: (1) including items of special compensation in payrates; and (2) reporting pay increases during the incorrect reporting periods. According to CalPERS, the reporting errors caused the overpayment of retirement benefits to 56 County retirees.<sup>2</sup>

7. Based on its findings, CalPERS then sought collection of the overpayments from the individual retired members for the most recent three years of retirement benefits. In January 2020, CalPERS invoiced the County for the remainder of

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<sup>2</sup> For purposes of the instant motion only, the court assumes the truth of CalPERS' allegation that the County made errors resulting in overpayment of retirement benefits to County retirees.

the overpayments. More specifically, CalPERS issued an invoice to the County for each individual 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)).

8. Eighteen individual retired members and the County appealed CalPERS' determinations. On November 20, 2020, CalPERS filed a Statement of Issues for purposes of the appeals.

**Motion**

9. On February 4, 2021, the County filed a motion to dismiss. The motion seeks to dismiss CalPERS' claim to collect from the County the balance of any overpayments to all 56 members, arguing it would violate section 20164, subdivision (b)(1). On March 15, 2021, CalPERS filed an opposition to the motion, and on March 24, 2021, the County filed a reply. On May 10, 2021, the court bifurcated the County's motion to dismiss.

**CALPERS' OBJECTIONS**

10. CalPERS opposes consideration of the County's motion prior to an evidentiary hearing on several grounds. Each is addressed below.

11. First, CalPERS argues that there is no express statutory authority for entertaining a motion to dismiss prior to hearing. However, the Third District Court of

Appeal (Third District) held that an administrative agency has implied authority to dismiss a claim where the undisputed facts, without the need to weigh evidence, demonstrate good cause for dismissal as a matter of law, provided that the parties were provided an opportunity to be heard consistent with due process requirements. The Third District observed that such dismissal promotes the goal of administrative efficiency. (*Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626, 634-641 [*Duarte*].) Although *Duarte* involved the New Motor Vehicle Board, the Third District did not expressly limit its rationale to that board, and it applies with equal force to other administrative agencies, including CalPERS. Here, the parties submitted written briefing and was allowed over an hour of oral argument on the County's motion to dismiss, which raises a pure question of law. Thus, due process requirements were satisfied, and the motion may be considered under the CalPERS Board's implied authority.

12. Second, CalPERS contends that the County's motion to dismiss is improper, because CalPERS, as the prosecuting agency, has not acquiesced to a motion to dismiss before hearing. However, *Duarte's* rationale did not limit consideration of a motion to dismiss to administrative proceedings where the complainant or prosecuting agency acquiesces. Moreover, because any resolution of the County's motion to dismiss is submitted to the CalPERS Board as a Proposed Decision, the CalPERS Board retains final authority to review the Proposed Decision and determine whether to adopt it.

13. Third, CalPERS suggests that the County's motion is an improper attempt at an informal hearing, to which CalPERS has not acquiesced. (*See* § 11445.30.) That argument lacks merit, because resolution of the County's motion is not an informal

proceeding; it involves issuance of a formal Proposed Decision for consideration by the CalPERS Board pursuant to the implied authority discussed above.

14. Fourth, CalPERS characterizes the County's motion as an improper request for a declaratory determination. CalPERS is mistaken. "A person may apply to an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency." (§ 11465.20, subd. (a).) "The agency in its discretion may issue a declaratory decision in response to the application." (*Id.*, subd. (b).) However, the agency shall not issue a declaratory decision if it "involves a matter that is the subject of pending administrative or judicial proceedings." (*Id.*, subd. (b)(3).) Here, the County is not seeking a declaratory decision that CalPERS may issue in its discretion. Instead, this is a formal administrative proceeding in which there is an actual controversy between CalPERS and the County, and the County is moving for a final decision on the merits.

15. Fifth, CalPERS argues that the County's motion requests consideration of CalPERS policies, procedures, and practices, evidence which CalPERS should be afforded an opportunity to explain and/or rebut through other documents and witness testimony in an evidentiary hearing. To be sure, the County's motion includes references to CalPERS policies, procedures, and past practices to bolster its statutory interpretation arguments. However, the court need not, and does not, consider such CalPERS policies, procedures, and past practices to decide the motion. The motion can be resolved on statutory interpretation grounds alone. No witness testimony or evidence is required to construe the plain meaning of a statute.

16. Admittedly, in most administrative matters, there can be no factual basis for a proposed decision without the taking of evidence. However, the County's instant motion involves a pure question of law – whether CalPERS' claim to collect from the



County the balance of any overpayments to members is precluded by the plain language of section 20164, subdivision (b)(1)). The issue is one of statutory interpretation and can be decided on the undisputed background and procedural facts. It does not require weighing evidence, making credibility determinations, or resolving disputed facts. Moreover, if the County's motion has merit, it would be unnecessary, unduly burdensome, and a waste of public resources to require the County to defend against CalPERS' claim in a full evidentiary hearing.

17. In sum, consideration of the County's motion prior to an evidentiary hearing is both authorized and appropriate. Thus, the court proceeds to the merits of the motion.

### **THE PLAIN LANGUAGE**

18. The County argues that CalPERS' claim to collect from the County the balance of any overpayments to members is precluded by the plain language of section 20164, subdivision (b)(1)).

Section 20164, subdivision (b)(1), 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.

19. The statute's plain language creates a three-year statute of limitation for collection of an erroneous overpayment. CalPERS acknowledges that section 20164, subdivision (b)(1), 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 limit application of the statute of limitation to collection from members or 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."].)

20. CalPERS nonetheless contends that its collection claim against the County is authorized on the following grounds: (1) CalPERS' authority to determine applicability of the statute of limitation; (2) CalPERS' fiduciary duties to administer the defined benefit plan and correct errors; (3) CalPERS' authority to perform periodic valuations and adjust employer contributions; and (4) the operation of IRS Guidelines. CalPERS' opposition brief also initially raised two additional arguments, which it then disavowed at oral argument. Each argument is addressed below and found unavailing.

### **CALPERS' AUTHORITY TO DETERMINE APPLICABILITY OF STATUTE OF LIMITATION**

21. CalPERS urges deference to its interpretation that the three-year statute of limitation does not apply to CalPERS' collection against the County pursuant to 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.

However, 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. Therefore, no deference is owed to CalPERS’ interpretation pursuant to section 20164, subdivision (e).

## **CALPERS’ FIDUCIARY DUTIES**

22. CalPERS argues that it has a fiduciary duty to administer its defined benefit plan so as to optimize benefits to members who are legitimately entitled to receive them under the terms of the plan. As such, it also has a duty to correct errors, including overpayments pursuant to sections 20160, 20163, and 20532.

23. Although CalPERS’ general fiduciary duties are undisputed, they may not be exercised in contravention of a statute of limitation 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 statute of limitation outlined in section 20164, subdivision (b)(1), 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.....*" (emphasis added). Thus, CalPERS' general fiduciary duties as well as sections 20160, 20163, and 20532 cannot salvage CalPERS' claim against the County.

### **CALPERS' AUTHORITY TO PERFORM PERIODIC VALUATIONS AND ADJUST EMPLOYER CONTRIBUTIONS**

24. CalPERS also relies on section 20532 and *City of Oakland* to suggest that its claim against the County is cognizable under CalPERS' authority to perform periodic valuations and adjust employer contributions.

25. 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.

26. *City of Oakland* held that the three-year statute of limitation in section 20164, subdivision (b)(1), 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)(1), did not bar CalPERS from seeking retroactive increased employer contributions from the City of Oakland to account for the reclassification, because the statute applies to erroneous payments into or out of the retirement fund, not to retroactive reclassifications.

27. CalPERS' reliance on section 20532 and *City of Oakland* is misplaced. This case does not involve an administrative reclassification proceeding; none of the members at issue were retroactively reclassified. Therefore, the exception to the statute of limitation created by *City of Oakland* does not apply.

Nor does this case involve a period 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 an overpayment to members on a dollar-for-dollar basis. The fact that it is seeking to collect a portion of the overpayment from their former employer does not transmute it into an employer contribution for purposes of section 20532.

## IRS GUIDELINES

28. CalPERS also avers that its claim against the County is authorized by certain IRS Guidelines; more specifically, Revenue Procedure 2019-19,<sup>3</sup> which provides, in part:

*(3) Correction of Overpayment (defined benefit plans). An Overpayment from a defined benefit plan is corrected in accordance with rules similar to the Return of Overpayment and Adjustment of Future Payments correction methods described in section 2.04(1) of Appendix B or any other appropriate correction method. Depending on the nature of the Overpayment, an appropriate correction method may include using rules similar to the correction method described in section 2.04(1) of Appendix B but having the employer or another person contribute the amount of the Overpayment (with appropriate interest) to the plan instead of seeking recoupment from a plan participant or beneficiary. Another example of an appropriate correction method includes a Plan Sponsor adopting a retroactive amendment to conform the plan document to the plan's operations (subject to the requirements of section 4.05).*

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<sup>3</sup> CalPERS' invoices to the County initially referenced Revenue Procedure 2015-27, whereas CalPERS' brief references the more recent Revenue Procedure 2019-19. As the County's brief acknowledges, "the substance is very similar." Thus, the court relies on the more recent Revenue Procedure 2019-19 cited by CalPERS.

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 2019-19, § 6.06(3).)

29. At oral argument, CalPERS clarified that it does not contend that Revenue Procedure 2019-19 preempts section 20164, subdivision (b)(1). Indeed, Revenue Procedure 2019-19 is neither a federal statute nor a federal regulation. Moreover, CalPERS expressly limits its collection against the individual members to three years pursuant to section 20164, subdivision (b)(1), which would be inconsistent with a preemption argument.

30. However, CalPERS argues that it is “correct in deciding to apply the IRS guidelines not as regulation, but to mitigate risk,” because failure to do so could jeopardize the CalPERS defined benefit plan’s tax qualified status under the Internal Revenue Code. That argument fails for three reasons.

First, Revenue Procedure 2019-19 does not mandate collection of overpayments from an employer. It merely provides that recovery from an employer is one of several permissive options for correction.

Second, Revenue Procedure 2019-19 provides that a plan sponsor can make up the difference for any overpayment. (*See* Revenue Procedure 2019-19, § 2.04(1)(a) [“To the extent the amount returned by the recipient is less than the Overpayment, adjusted for Earnings at the plan’s earnings rate, then the Plan Sponsor or another person contributes the difference to the plan.”].)

Third, absent federal preemption, CalPERS may not use a permissive option for correction under Revenue Procedure 2019-19 to violate a statute of limitation enacted by the state Legislature. If CalPERS is concerned with its defined benefit plan's tax qualified status, its remedy is to seek an appropriate statutory amendment by the Legislature. However, it has no authority to ignore an existing, duly-enacted statute of limitation.

### **DISAVOWED ARGUMENTS**

31. As noted above, CalPERS' opposition brief initially raised two additional arguments, which it then disavowed at oral argument. Each is discussed briefly.

32. CalPERS' brief argued that the three-year statute of limitation in section 20164, subdivision (b)(1), only applies to civil actions and not administrative proceedings. At oral argument, CalPERS abandoned that argument given that CalPERS is applying the statute of limitation to the individual members in this administrative proceeding. CalPERS conceded that it would be "disingenuous" to apply it to the individual members while simultaneously contending that it did not apply to administrative proceedings.

Even absent CalPERS' disavowal, the argument is 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)(1), is not a general statute of limitation broadly governing civil actions; it appears in the PERL and specifically applies to CalPERS. Moreover, it limits CalPERS' "right to collect"; not just its right to file a civil action.

33. CalPERS' brief also argued that, even if section 20164, subdivision (b)(1), applies to its claim against the County, CalPERS acted within the applicable time limit.



That is because CalPERS first learned of the County's reporting errors and corresponding overpayments through its December 6, 2018 audit, and CalPERS invoiced the County by January 2020, well within the three-year limitation period. At oral argument, CalPERS abandoned that argument.

Even absent CalPERS' disavowal, the argument lacks any footing in the statutory text. Nothing in section 20164, subdivision (b)(1), 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 statutes of limitation outlined in section 20164, suggesting that it was intentionally omitted from subdivision (b)(1). (*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."].)

## **CONCLUSION**

34. 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 and collect overpayments. However, neither this court nor the CalPERS Board has authority to permit CalPERS to collect overpayments in violation of a statute of limitation duly enacted by the Legislature. Thus, the County's motion to dismiss must be granted.

## ORDER

1. The County of Glenn's motion to dismiss is GRANTED.
2. CalPERS' claim to collect from the County of Glenn the balance of any overpayments to members beyond the three-year statute of limitation in Government Code section 21064, subdivision (b)(1), is DISMISSED.

DATE: May 14, 2021

*Wim vanRooyen*

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings