BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Retroactive Reclassification to State Industrial Membership from State Safety Member of WILLIAM R. SMITH Respondent, and CALIFORNIA YOUTH AUTHORITY (YOUTH TRAINING SCHOOL), Respondent.	CASE NO. 1731 OAH NO. L-19988070086 PRECEDENTIAL BOARD DECISION No. 99-01 Effective: March 31, 1999

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated November 12, 1998, concerning the application of William R. Smith; RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, hereby designates as precedential its decision concerning the application of William R. Smith; RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

* * * *

I hereby certify that on February 18, 1999, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the administrative law judge's Proposed Decision is a true copy of the decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
JAMES E. BURTON, CHIEF EXECUTIVE OFFICER

Dated: BY_____
BARBARA HEGDAL
ASSISTANT EXECUTIVE OFFICER

BEFORE THE BOARD OF ADMINISTRATION
CALIFORNIIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Retroactive Reclassification to State Industrial Membership from State Safety Membership	)	Case No. 1731
	)	OAH No. L-1998070086
WILLIAM R. SMITH,	)	
Respondent,	)	
and	)	
CALIFORNIA YOUTH AUTHORITY,	)	
Respondent.	)	

PROPOSED DECISION

On October i5, 1998, in San Bernardino, California, Timothy S. Thomas, Administrative Law Judge, Office of Administrative Hearings, heard this matter.

Richard B. Maness, Senior Staff Counsel, represented Petitioner James E. Burton, Chief Executive officer of the California Public Employees' Retirement System (hereinafter CalPERS).

Richard I. Rydstrom, Attorney at Law, represented William R. Smith (hereinafter Smith, or Respondent), who was present throughout the hearing.

Jurisdictional documents and exhibits were introduced, oral testimony was heard and oral arguments made and considered. Objections by Petitioner to the introduction of Exhibits 6 and 9 were taken under submission. Exhibit 6 is an internal CalPERS memorandum which discusses Smith's request leading up to Petitioner's decision to deny the request. The author testified at the hearing and was questioned about the document. The objection is overruled and Exhibit 6 is received for the purpose of explaining the witness' testimony concerning the manner of investigation conducted by the witness. Exhibit 9 is a letter from CalPERS approving the request of someone other than Respondent to revert to industrial status. The objection on relevance grounds is sustained because there is no foundation to show that the circumstances of this other case were in any way similar to Respondent's circumstances.

The matter was submitted on October 15, 1998.

FACTUAL FINDINGS

1. On July 21, 1998, Barbara Hegdal, Assistant Executive Officer, Board of Administration, CalPERS, signed the Statement of Issues on behalf of Petitioner James E. Burton, Chief Executive Officer of CalPERS, in her official capacity.

2. Respondent became employed by the California Youth Authority (hereinafter CYA) in January of 1960, as a counselor. For many years thereafter, he taught U.S. History, Government and other subjects to delinquent children in California's juvenile justice system. In the 1980's, Respondent became a supervisor of teachers, a position which he continues to hold to this day. As a CYA employee, Respondent became a member of CalPERS in 1960.

3. As a teacher for CYA, Respondent was classified by CalPERS as a "miscellaneous" member for purposes of calculating benefits. Effective July 1, 1972, his position became classified as "industrial." With the passage of SB699 (originally Government Code section 20017.79, now Government Code section 202405), effective July 1, 1918, Respondent's employment position was reclassified again, this time to "safety" service. This change was intended to benefit employees within the CYA system who did not hold positions traditionally thought of as safety-related (such as prison guards) but who nevertheless worked in prison-like conditions and had direct contact with juvenile offenders, SB699 specifically provided, however, that any affected employee "may elect by a writing filed with the board prior to 90 days after such operative date, to be restored to his previous status as a state industrial member," Thus, to opt out of the new classification, Respondent needed to file his election by October 1, 1978,

4. As a result of the passage of SB699, CalPERS prepared materials, including election forms, to be provided to all affected employees, including Respondent. Approximately 2300 employees fell within the many categories of employment addressed by SB699.) The materials were distributed to the employers of the affected CalPERS members, and CYA was one of the employers which was sent the explanatory and election materials, complete with copies for each employee and labeled with each affected employee's name. The materials included an election form, which if signed by the member would restore the member to industrial status, a "Benefits Comparison," which provided the member with exemplary comparisons of benefits in the safety and industrial classifications, and a letter of explanation of the history of the legislation and the effects of it on members in general. (See Exhibit 3-E.)

The election form itself cites the applicable Government Code section (20017,79) and states: "I hereby file written notice that I elect to be restored to my previous status as a state industrial member in the Public Employees' Retirement System. I

understand that upon filing this election I will cease to be a state safety member and that my rights and obligations will be adjusted prospectively and retroactively to what they were on the day prior to the operative date of this section, July 3, 1978." The form later states, in capital letters, underlined: "THIS ELECTION MUST BE RECEIVED IN THE OFFICE OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM BEFORE OCTOBER 1, 1978, TO BE EFFECTIVE."

The Benefits Comparison part of the materials stated that it "is provided to assist persons employed by the Department ... of Youth Authority and affected by Government Code Section 200079.79, as amended. It is obviously not intended to be a comprehensive discussion of membership categories, retirement formulas, benefits, or options. It simply illustrates the similarities and differences between the two membership categories. Persons who do not understand any of the items listed or who have questions regarding them should consult the appropriate PERS member booklets or direct an inquiry to one of the offices of the Public Employees' Retirement System." The benefits comparison table unambiguously demonstrates that a state safety member who retires at age 55 receives more favorable benefits than a state industrial member who retires at the same age, and that the benefits of a state industrial member are more generous if one doesn't retire until after age 63.

PERS benefits member booklets were available to Respondent to explain in much greater detail both the benefits for "miscellaneous" members (Exhibit 3-A) and safety members (Exhibit 3-B). Comparison of the charts in these two booklets yields the fact that the two classifications, in Respondents case, are equal in benefits if Respondent's retirement age were 60; any earlier and he would have been better off as a safety member; any later and the miscellaneous, or industrial classification is more favorable.

5. CYA employee Patricia Lobua, who testified at the hearing, was responsible for distributing the materials to affected employees in July of 1978, and authored the memorandum which served as a cover letter conveying the materials. (See Exhibit 3-H.). Ms. Lobua's memorandum clearly instructs the employee to return the form to her before September 22, 1978, or, if the employee chooses to remain a safety member, to sign the memorandum and return it to her. She distributed the materials to the approximately 870 CYA affected members utilizing the pre-labeled packets provided by CalPERS, and her office made a record of the process of sending out the materials and receipt of election forms in significant detail. A computer printout of the names of all affected employees was utilized, and indicates that the package was sent to Respondent on July 24, 1978, and that the election form was not returned. (See Exhibit 3-M.)

Respondent claims to have been unaware of the classification change which took place in 1978, and that he learned about it sometime between 1989 and 1991. However, it was not until April 17, 1995, that he first formally addressed the issue. His letter of that date to CalPERS (see Exhibit 8) states that at the time of the classification change in 1978 "I did not fully understand the ramifications of the appointment to the safety formula, nor was I advised of what this entailed." Respondent agrees that the language of his own letter indicates that he had received the election materials in 1978, but replies that he merely copied verbatim a letter written earlier by another employee who had allegedly successfully reversed his classification back to industrial. However, once his request was denied by CalPERS on May 11, 1995 (see Exhibit 4-D) Respondent wrote again, on May 17, 1995, that he misunderstood and made a "wrong interpretation of the choices and I had been in error when making a decision for my membership category. Therefore I did not respond to the

category change requesting the state industrial (miscellaneous) formula over the other." He went on to admit to "an error in judgment."
(Exhibit4-E.)

7. The upshot of the instant dispute is that classification as a safety member would have been more advantageous had Smith retired before age 60, as many in that classification do due to the inherent risks in the types of occupations so classified. But Respondent is now 63 years of age and has no definite plans to retire. He formed the opinion sometime between 1989 and 1995 that his benefits would be more generous if classified industrial should he remain employed until age 65.

LEGAL CONCLUSIONS

1. It has been held that the administrator of a pension is a fiduciary in its relationship with its pensioner. Hittle v. Santa Barbara County Employees Retirement Assn., 39 Cal.3d 374 (1995). CalPERS had a duty, in 1978 and since that time, to deal with Smith fairly and in good faith. Included within the fiduciary obligation is the duty to fully inform its members of their options in obtaining retirement benefits. In this matter, CalPERS met that duty. The legislative mandate of SB699 gave each affected employee 90 days after the effective date of the legislation to opt to revert to industrial status; it was the responsibility of CalPERS to provide the education and means by which Smith and others similarly affected could intelligently comply. Smith may not recall receiving the materials, but substantial evidence supports the finding that they were sent to him. Indeed, given the magnitude of the task, it is difficult to conceive of a method which would have better accomplished the duty to inform. CalPERS went so far as to individually label the information packets with employees' names, forward the packets to the many employers involved, provide a computerized list of employees affected as well as hypothetical benefit comparisons and explanations for forwarding to the affected employees. CYA documented the fact that one such package was sent to Respondent.

2. The duty to inform and deal fairly with members also requires that the information it conveyed be complete and unambiguous. In this matter, the summary chart itself, by its own terms not intended to be a complete comparison of plans, answers the basic question member Smith eventually asked himself: which plan best suits him if he retires at age 63 or later? For more complete detail, the notice referred the member to "the appropriate member booklets," which Respondent could have obtained by asking if he didn't already have access to them. "Ordinarily when an employee becomes a member of a pension plan he is provided with a booklet or other materials describing the plan in some detail. If the booklet fully and fairly describes the plan and its various options and procedures, and copies are made available, the obligation of the trustees...may be satisfied by appropriate reference to the booklet itself, supplement by a provision of forms pertaining to all available choices." See Hittle, supra, at 394.

3. If we ignore that Respondent has based his chief argument on the supposition that the election materials were never provided him, we are left with the question of whether he made a "mistake" in 1978 by not electing to revert to industrial status, and whether it is appropriate to correct the error more than twenty years after the fact. Government Code section 20160 provides that in order for errors or omissions of members to be corrected three tests must be applied. First, the request for correction must be made within a reasonable time after discovery of

the right to make a correction; second, the error or omission must be the result of mistake, inadvertence, surprise or excusable neglect as those terms are used in Code of Civil Procedure section 473; and third, the correction will not provide the member with a status or right not otherwise available to the member.

Only the third test is passed by Respondent. As to the first, Respondent knew as early as 1989 to 1991 that others similarly situated had determined that industrial status might be more beneficial than safety and that those others were requesting relief. Moreover, 20160 states that in no case shall "reasonable time" exceed 6 months. Respondent waited four to six years to seek redress. As to the second requirement, given the clarity of the materials provided and the obvious intelligence and education of Respondent, it is more likely than not that Respondent consciously chose not to exercise the election available to him. The conclusion is inescapable that the "error or omission" is no more than a mistake in judgment (indeed, Respondent admitted as much), but only when looked at retrospectively, i.e., only after Respondent made the decision to retire later rather than earlier. It is doubtful that Respondent had found a definite intent concerning his exact retirement age in 1978, when he was 44 years of age.

4. The cases, including Hittle, which grant relief to members on any ground where wrong retirement elections have been made, do so in situations where it is obvious to any objective observer that the member in fact made a wrong choice at the time it was made. Because he was so ill-informed by his retirement association, Mr. Hittle accepted a one-time total payment of $187.49 in lieu of lifetime disability benefits. In Rodie v. Board of Administration, 115 Cal.App.3d 559 (1981), Mr. Rodie took disability instead of service retirement and later discovered that his social security benefits were reduced by the amount of the disability benefits, whereas they would not have been reduced by service retirement benefits. In both cases, moreover, timely claims were made once the member was on notice that he had made the wrong choice.

ORDER

Respondent's appeal of the Chief Executive officer's determination of classification of membership is denied.

DATED: November 12,1998

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TIMOTHY S. THOMAS
Administrative Law Judge
Office of Administrative Hearings