ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal of Downward Adjustment of Retirement Benefit and Collection of Overpayment of:

BEATRIZ A. URIOSTIGUE, Respondent

Agency Case No. 2022-0443

OAH No. 2022090225

PROPOSED DECISION

Marion J. Vomhof, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on February 9, 2023.

Cristina Andrade, Senior Attorney, represented complainant, Kimberlee Pulido, Chief, Retirement Benefit Services Division, California Public Employees' Retirement System (CalPERS), State of California.

Steven C. Sayler, Law Offices of Steven C. Sayler and Associates, represented respondent, Beatriz A. Uriostigue.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on February 9, 2023.

ISSUE

The appeal is limited to the following issues: (1) Whether CalPERS, in accordance with Government Code sections 20160-20164, is correct to make proper adjustment to respondent's retirement benefit due to the City's payroll corrections for the period of July 2017, through May 2019, from 60 hours to 40 hours; and (2) Whether respondent owes CalPERS overpayment of retirement benefits totaling $13,914.84 attributable to the downward adjustment in her retirement benefit.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent was employed with the City of Poway (City). By virtue of her employment, respondent is a local miscellaneous member of CalPERS.

2. City is a public agency contracting with CalPERS for retirement benefits for its eligible employees. The provisions of City's contract with CalPERS are contained in the California Public Employees' Retirement Law (PERL). (Gov. Code § 20000 et seq.)

3. CalPERS is a retirement system created by statute for the purpose of administering retirement, disability, and death benefits to California state employees in accordance with the provisions of the PERL. (Gov. Code, §§ 20000 et seq.) It also provides the same services to employees of other governmental entities that choose to participate in the CalPERS pension system by contract. (Gov. Code, § 20460.)

4. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions and by interest and other earnings on those

contributions. 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 contribution rate to the payroll of the agency. Using certain actuarial assumptions specified by law, the CalPERS Board of Administration sets the employer contribution rate on an annual basis.

5. The amount of a member's service retirement allowance is calculated by applying a percentage figure based upon the member's age on the date of retirement to the member's years of service, and the member's "final compensation." In computing a member's retirement allowance, CalPERS staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member's "final compensation" for purposes of calculating the retirement allowance.

6. On March 6, 2019, respondent submitted an application for service retirement. She retired on July 1, 2019, and received her first retirement allowance on August 1, 2019.

Reporting Error Discovered by CalPERS

7. In January 2020, CalPERS Actuarial Office discovered a reporting error by City. City incorrectly reported respondent’s work schedule for the period of July 17, 2017, through May 5, 2019, as 60 hours per week rather than 40 hours per week, resulting in an overstatement of her pay for this period. CalPERS initially notified City in January 2020. On September 2, 2021, City corrected respondent’s reported work hours from 60 to 40 hours per week.

Notice and Correspondence with Respondent

8. In a September 28, 2021, letter, CalPERS notified respondent of the error. In summary, CalPERS wrote that in January 2020 it discovered an error in City's reporting of respondent's work schedule and requested that City correct the error. For the period July 17, 2017, through May 5, 2019, City calculated respondent's monthly pay rates using a 60 hour per week schedule rather than a 40 hour per week schedule. As a result, respondent's average final compensation required a downward adjustment from $6,497.21 to $4,348.93, resulting in a decrease to her current monthly allowance of $520.28 and a total overpayment of $13,914.84. CalPERS stated that it is required by Government Code sections 20160 through 20164 to make proper adjustments when discrepancies or errors are found in benefit payments.

9. On October 19, 2021, respondent wrote to CalPERS, requesting that it withdraw the proposed adjustment to her retirement account. Respondent stated that because CalPERS discovered the error in January 2020, and she was not notified until September 2021, CalPERS's claim was made beyond the six-month limitation provided in Government Code Section 20160, subdivision (a)(1).

10. On December 14, 2021, CalPERS responded that Government Code 20160 does not allow a member to receive a benefit they are not entitled to receive under the PERL. The adjustment was made as required by Government Code section 20163, resulting in an overpayment of $13,914.84.

11. On December 27, 2021, January 25, 2022, and February 24, 2022, CalPERS sent past due notices to respondent for the overpayment of retirement benefit of $13,914.84.

12. On January 25, 2022, respondent appealed CalPERS's decision.

13. On September 8, 2022, Kimberlee Pulido, Chief, Retirement Benefit Services Division, CalPERS, signed and thereafter filed the Statement of Issues, in her official capacity. This hearing followed.

Testimony of Robin Owens

14. Robin Owens is an Associate Governmental Program Analyst in CalPERS's Retirement Administration and Support section. Her duties include calculating retirement benefits and making adjustments as needed. Ms. Owens testified at hearing regarding her review and CalPERS's determinations relating to respondent's retirement benefit.

15. CalPERS discovered City's reporting error through an audit in January 2020. CalPERS calculates and pays benefits based on the payroll information submitted by employers.

16. The calculations and adjustments were as follows: For the period of July 17, 2017, through May 5, 2019, City erroneously reported respondent's work schedule as 60 hours rather than 40 hours. Respondent's work schedule was used to convert her hourly pay rates of $24.60 and $25.09 into monthly pay rates. CalPERS uses monthly pay rates to calculate final compensation.

On September 2, 2021, City corrected respondent's reported work schedule for the period of April 2018 through May 2019 from 60 hours to 40 hours. Respondent's converted monthly pay rates with the 60-hour work schedule were $6,396.00 and $6,523.40. Her converted monthly pay rates for April 2018 through June 2018 were corrected to $4,264.00 and for July 2018 through June 2019 were corrected to $4,348.93 with a 40-hour work schedule.

As a result, respondent's highest final compensation period was changed to July 1, 2018, through June 30, 2019, with an average final compensation of $4,348.93. An adjustment was processed to correct respondent's final compensation from $6,497.21 to $4,348.93. This resulted in a decrease of $520.28 to her then current monthly allowance and an overpayment of $13,914.84. Her corrected monthly allowance was $1,053.26.

17. Respondent asserted that CalPERS is barred from seeking reimbursement of the overpayment because Government Code section 2160, subdivision (a)(1) requires that the claim be made within six months of the discovery of the right to recover. Ms. Owens stated that Section 2160, subdivision (a)(1) applies where a member makes an error, and that Section 20164, subdivision (b)(1) is controlling here, as it applies "where system makes erroneous payment to member," and the time to collect expires three years from the date of the payment. The first payment was made to respondent on August 1, 2019, and CalPERS notified respondent on September 28, 2021.

Testimony of Respondent

18. Respondent worked for City at the Poway Center for the Performing Arts as Box Office Supervisor from 2008 through June 30, 2019. In January 2019, she anticipated retiring on July 1, 2019, and asked CalPERS to calculate the amount of her retirement benefit. She was informed the amount was $1,554.42 per month. Based on the information she received, she notified City and retired on July 1, 2019. She received her first payment on August 1, 2019. It was not until many months later that she was notified by CalPERS that there had been an error in City's calculations, resulting in an overpayment of benefits. She would never have retired if she had known that the

calculations she received were incorrect. She understands the error was in City's reporting to CalPERS but this was not her error.

LEGAL CONCLUSIONS

General Principles Relating to CalPERS's Functions

1. The Constitution imposes on CalPERS a duty to "ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland v. Public Employees' Retirement System* (2002*)*, 95 Cal.App.4th 29, 46.) But, "[CalPERS's] fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. [CalPERS] has a duty to follow the law." (*City of Pleasanton v. Bd. of Administration* (2012) 211 Cal.App.4th 522, 544.)

2. Pension legislation should be liberally construed and all ambiguities should be resolved in favor of the pensioner. (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 473.) "However, this rule of liberal construction is applied for the purpose of effectuating obvious legislative intent and should not blindly be followed so as to eradicate the clear language and purpose of the statute." (*Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1603.)

Burden and Standard of Proof

3. While the party against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476), the fact that CalPERS filed a statement of issues is not dispositive as to the burden of proof. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, the court considered the

issue of burden of proof in an administrative hearing concerning retirement benefits and found “the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence." (*Id.* at p. 1051, fn. 5.) Here, CalPERS is the party asserting the affirmative, in that it is seeking to change the level of retirement benefits it has been paying to respondent since she retired in July 2021 and to recoup overpayments. Where a change in the status quo is sought, the party seeking the change has the burden of proving that the change is necessary. (Evid. Code, § 500.) Moreover, CalPERS is seeking to correct an error in reporting pursuant to Section 20160. Under this provision, CalPERS, as the party seeking correction of an error, has “the burden of presenting documentation or other evidence to the board establishing the right to correction.” (Gov. Code, § 20160, subd. (d).) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Relevant Statutory and Regulatory Authority

4. CalPERS is a “prefunded, defined benefit” retirement plan. (*Oden v. Bd. of Administration* (1994) 23 Cal.App.4th 194, 198.) The formula for determining a member’s retirement benefit considers: the years of service, a percentage figure based on the age on the date of retirement; and “final compensation.” (Gov. Code, §§ 20037, 21350, 21352 and 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.)

5. “Compensation” means the remuneration paid out of funds controlled by the employer in payment for the member’s services performed during normal working hours or for time during which the member is excused from work for specified reasons. (Gov. Code, § 20630, subd (a).)

6. “Final Compensation” means the highest annual average compensation earnable by a member during any consecutive 36-month period of employment preceding the effective date of his or her retirement. (Gov. Code, § 20037.)

7. 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 20161 provides:

Notwithstanding any other provision of this part or of Section 12438 or 16302.1 to the contrary, the following shall apply:

(a) When there has been a payment of death benefits, a return of accumulated contributions, a contribution adjustment, or a deposit of contributions, this system may refrain from collecting an underpayment of accumulated contributions if the amount to be collected is two hundred fifty dollars ($250) or less.

(b) When there has been a payment of death benefits, a return of accumulated contributions, a contribution adjustment, or a deposit of contributions, and there is a balance of fifty dollars ($50) or less remaining posted to a member's individual account, or an overpayment of fifty dollars ($50) or less was received, this system may dispense with a return of accumulated contributions.

(c) When there is a positive or negative balance of two hundred fifty dollars ($250) or less remaining posted to a member's individual account, or the balance exceeds two hundred fifty dollars ($250) but the difference to the monthly allowance unmodified by any optional settlement is less than five dollars ($5), this system may dispense with any recalculation of, or other adjustment to, benefit payments.

(d) The dollar amounts specified in subdivisions (a) and (c) shall be adjusted in accordance with any changes in the dollar amounts specified in Section 12438.

9. Government Code Section 20163 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.

10. Government Code Section 20164 provides:

(a) The obligations of this system to its members continue throughout their respective memberships, and the obligations of this system to and in respect to retired members continue throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged. The obligations of the state and contracting agencies to this system in respect to members employed by them, respectively, continue throughout the memberships of the respective members, and 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. The obligations of any member to this system continue throughout his or her membership, and thereafter until all of the obligations of this system to or in respect to him or her have been discharged.

(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.

(2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

(c) Notwithstanding subdivision (b), in cases where payment is erroneous because of the death of the retired member or beneficiary or because of the remarriage of the beneficiary, the period of limitation shall be 10 years and shall commence with the discovery of the erroneous payment.

(d) Notwithstanding subdivision (b), where any payment has been made as a result of fraudulent reports for compensation made, or caused to be made, by a member for his or her own benefit, the period of limitation shall be 10 years and that period shall commence either from the date of payment or upon discovery of the fraudulent reporting, whichever date is later.

(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.

Evaluation

11. This appeal is limited to the following two issues:

12. Issue (1). Whether CalPERS, in accordance with Government Code sections 20160-20164, is correct to make proper adjustment to respondent's retirement benefit due to City's payroll corrections for the period of July 2017, through May 2019, from 60 hours to 40 hours.

CalPERS discovered the reporting error in January 2020. Under Government Code section 20160, subdivision (e), once the error in reporting was discovered, CalPERS had a duty to correct the error. CalPERS was required to make a correction that returned the parties to the status they would have occupied but for the error.

Government Code Section 20164, subdivision (b)(1), provides that where CalPERS makes an erroneous payment to a member, CalPERS's time frame to collect expires three years from the date of the payment. The first payment was made on

August 1, 2019, and therefore CalPERS had until August 1, 2022, to claim the overpayment.

Respondent argued that CalPERS is barred from seeking reimbursement of the overpayment because Government Code section 2160, subdivision (a)(1) requires that the claim be made within six months of the discovery of the right to recover. However, section 2160, subdivision (a)(1) applies where an error is made by a member. The overpayment was not the result of an error by respondent. Section 20164, subdivision (b)(1) is controlling here, as it applies "where system makes erroneous payment to member," and the time to collect expires three years from the date of the payment. The first payment was made to respondent on August 1, 2019, and CalPERS notification to respondent was dated September 28, 2021.

13. Issue (2). Whether respondent owes CalPERS overpayment of retirement benefits totaling $13,914.84 attributable to the downward adjustment in her retirement benefit.

CalPERS is governed by PERL and Government Code Section 20160 does not allow a member to receive a benefit they are not entitled to receive under the PERL. CalPERS is required to collect the overpayment from respondent.

ORDER

The appeal by respondent Beatriz A. Uriostigue is denied. CalPERS's decision to make proper adjustment to respondent Beatriz A. Uriostigue's retirement benefit due to City's payroll corrections for the period of July 2017, through May 2019, from 60 hours to 40 hours is affirmed. Respondent Beatriz A. Uriostigue owes CalPERS the amount of the overpayment of retirement benefits totaling $13,914.84 attributable to the downward adjustment in her retirement benefit.

DATE: March 15, 2023

Marion J.Vomhof

MARION J. VOMHOF

Administrative Law Judge

Office of Administrative Hearings