

ATTACHMENT C

RESPONDENT'S ARGUMENT

(Submitted)

Respondent's Argument
Ref. No. 2020-0583

August 23, 2021

CalPERS Board of Administration
Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O Box 942701
Sacramento, CA 94229-2701

I am writing this letter to request that you adopt the decision of Administrative Law Judge Holly M. Baldwin regarding the hearing of June 24, 2021, OAH No. 2020100952, Agency Case No. 2020-0583.

I have been addressing membership questions with CalPERS since 2012. I became a member of CalPERS upon my hiring as a Classified employee in 1999. In 2003, I became a part-time faculty member and requested that my retirement contributions for both Classified and Certificated work be made to CalPERS. My right to membership in CalPERS for both Classified and Certificated work was not questioned until 2012 when a routine audit in the Community College system and CalPERS was conducted. As a result, I was forced to move my Certificated contributions to CalSTRS going forward. However, my contributions in CalPERS from the beginning of my part-time Certificated work until the change to CalSTRS in 2012 were allowed to remain in CalPERS while a determination was made regarding my right to have my retirement funds for both Classified and Certificated work remain with CalPERS.

With the passage of SB 525 in 2017 (codified in Government Code section 20309.7), the question of membership in CalPERS for both my Classified and Certificated work was resolved. This legislation allowed a one time opportunity for people in my situation to be grandfathered into CalPERS for Certificated work. SB 525 took effect on January 1, 2018, but CalPERS was not able to determine how to include my Certificated compensation into my retirement calculations. This also affected CalPERS' ability to consider correction of the cost of Additional Retirement Service Credit (ARSC). In his email dated September 12, 2019, Charles Miller identified Government Code 20636.1(b) as laying out the process that would be used to incorporate my Classified and Certificated earnings into the retirement benefit calculation process. My research indicates that this Government Code and calculation method have been in effect since at least 1995. It was not until September 12, 2019 that I learned that CalPERS would use this for my classified and certificated salaries. I was unable to get any explanation as to why it took CalPERS staff so long to find this Government Code on how to do the calculation.

When I initially received ARSC information, I felt that an error had been made because the cost seemed excessive. I requested that CalPERS provide me with the calculations for the Additional Retirement Service Credit (ARSC). Participant Notes dated 5/13/2013 are the result of a

meeting with Kimberly Jacobs in the San Jose CalPERS office. Ms. Jacobs forwarded my concerns to CalPERS, Sacramento. She wrote: "Mbr received the Confirmation Letter of Intent to Purchase ARSC. Mbr received an SPM Election Package which quoted her pay rate: \$8,884.09. The base pay rate used to calculate the ARSC is \$9,350.28 not including the Special Comp. Mbr would like to know why the ARSC pay rate is higher than the SPM pay rate? Mbr would like to speak to a Supervisor or Manager "ASAP" regarding this issue and ask if a new document can be mailed if a mistake in the calculation has occurred."

CalPERS refused to investigate my questions / concerns any further. In Participant Notes for 5/17/2013, Susan Smith's notation reads "Validated that the calculation for ARSC is correct according to the requirements for ARSC. Explained that for SPM, CalPERS uses the pay rate at the time of membership." With that said, there was no more ability or willingness on the part of CalPERS to work with me regarding my concerns that too high a salary value had been used in the calculation of ARSC.

I had no choice but to select the number of years and amount for ARSC that I felt that I could afford. I selected 4.000 years of ARSC for a total of \$122,122.02. I paid this amount in a single full payment.

Much has happened in the years since I tried to get CalPERS to work with me on my questions about how ARSC was calculated. In 2019 CalPERS was at last able to determine how they would recognize the retirement contributions for my Certificated and Classified work. Once the retirement benefit process was completed and corrections were made to the CalPERS system, the matter of my Additional Retirement Service Credit (ARSC) was finally revisited and reviewed.

I submitted an appeal letter to Donald R. Martinez, Chief, Member Account Management Division, dated January 28, 2020, stating the following:

- The ARSC purchase information was sent to me, dated November 15, 2019:
The Corrected Lump Sum for 4.00 years was \$90,050.58
The Lump Sum cost of 5 years was \$112,562.60
The additional cost to purchase 1.000 year of ARSC is \$35,808.71 which includes interest through December 31, 2019.
- Then, in an email dated December 13, 2019, the ARSC information had changed again due to payroll corrections due to reporting format requirements of CalPERS:
- The Corrected Lump sum cost for 4.000 years has been recalculated to \$86,459.60
The Revised Lump sum cost to purchase 5.000 years is \$108,074.50
The additional cost to purchase 1.000 year of ARSC is \$35,635.45 which includes interest through December 31, 2019.

I had sent an appeal previously to Marcie Frost, Chief Executive Officer for CalPERS, requesting assistance to have my situation reconsidered and resolved. My appeal letter was referred back to the department handling ARSC. Nothing would be done to change the decision of ARSC staff.

Ms. Hobbs stated in her letter for Ms. Frost: "I understand you would like to appeal CalPERS' determination that interest cannot be waived. You may appeal CalPERS' determination that you were required to submit your election by the due date of December 31, 2019, **AND** pay the interest owed through the election due date with respect to your request to purchase one additional year of ARSC by filing a written appeal with CalPERS in Sacramento, within thirty days of the date of the mailing of this letter, in accordance with GC Section 20134 and sections 555-555.4 Title 2, California Code of Regulations." Thus I appealed **both** the assessment of interest for the 5th year of ARSC as well as that I was required to submit my election of the 5th year of ARSC by the due date of December 31, 2019.

An email from Christine Mercado, Associate Governmental Program Analyst, dated November 22, 2019, states:

"Your signed Election to Purchase Service Credit is for 4.000 years of ARSC not 5.000 years. **An incorrect pay rate was used** in your original calculation and per Public Employees' Retirement Law (PERL) Government Code (GC) Section 20160 (b) which states in part: "The board shall correct all actions taken as a result of errors and omissions."

Government Code Section 21052 states: "A member or retired former employee who elects to receive service credit subject to this section shall contribute, in accordance with Section 21050, an amount equal to the increase in employer liability, using the payrate and other factors affecting liability on the date of the request for costing of the service credit..."

The date of my election was May 2013. The recalculated ARSC cost for 4.000 years was \$86,459.60. No interest has been assessed to me as a result of this recalculation.

The recalculated ARSC cost for 5.000 years is \$108,074.50. In the same manner, no interest should be assessed to me as a result of this recalculation. The correction is made as Ms. Mercado states per Government Code (GC) Section 20160 (b). And additionally, following Government Code Section 21052, the payrate and other factors affecting liability that were used were from the date of the initial calculation in May 2013.

As CalPERS records show, I was overcharged for 4.000 years of ARSC as I paid \$122,122.02 in a single lump sum for what should have cost \$86,459.60. CalPERS had the use of my funds from 2013 forward until May 2020 when the amount in excess of \$86,459.60 was returned to me.

I asked Fidelity Investments to provide me with an estimate of my loss in investment value as a result of the overcharged amount for 4.000 and 5.000 years of ARSC:

Corrected ARSC Cost for 4.000 years: \$86,459.60

Overpayment: \$35,662.42

Estimated loss in Fidelity investment interest: \$55,356.77

However, CalPERS earned investment interest every year over the period of time from 2013 through 2019. This public information is available in CalPERS document "Investment & Pension Funding, Facts at a Glance for Fiscal Year 2018-19".

Using Government Code 20160, I feel that CalPERS should make the correction to show that I had paid sufficient funds to accommodate the purchase price of the corrected calculation for 5.000 years of ARSC as \$108,074.50 at the time of my initial full payment of \$122,122.02.

CalPERS has only returned to me the difference between the \$122,122.02 and \$86,459.60 minus a deduction of \$2,750.93 that CalPERS determined was due to their error in the final recalculation of my retirement benefit. The CalPERS error in the retirement benefit calculation was discovered during a conference call in April 2019 when CalPERS explained their calculation process to several Foothill DeAnza CCD staff and me. As the CalPERS staff talked us through an example of the calculation, one of the CalPERS staff realized that an error had been made in how my Classified and Certificated payrates were used in their formula. April 2019 was the first time that CalPERS advised my district and me of the CalPERS formula to determine Payrate and Overtime. Overtime is excluded from compensation calculations. The Government Code that Charles Miller referenced has been in effect since at least 1995, as I have previously mentioned. I was not able to get an explanation of why it took so long for CalPERS to find this procedure for how to incorporate my Classified and Certificated compensation.

The point that I want to make is that during the conference call, CalPERS realized that they had made an error and admitted it to me.

In the Public Agency & Schools Reference Guide, dated January 2020, and published by the California Public Employees' Retirement System it is written that: "With the implementation of myCalPERS, all positions should be reported to CalPERS. This means you should enroll the employee into myCalPERS and submit payroll with contributions for all CalPERS covered employment. CalPERS will determine what employment is considered overtime, meaning which positions will be contributory (where employer and employee contributions are submitted to CalPERS) and which positions are non-contributory (where no contributions are submitted)."

In summary:

- In April 2019 CalPERS finally told my district and me what formula would be used in calculating the amount of my Certificated work that would be used in the calculation of my retirement benefit. In his email of September 12, 2019, Charles Miller provided written responses to my questions regarding incorporating my Classified and Certificated contributions into the retirement benefit calculation.
- On May 13, 2013, I tried to escalate my concerns about the validity of the calculation for ARSC. I felt that the compensation information was much inflated over what I knew to be my earnings at the time.

- On May 17, 2013, per CalPERS' Participant Notes, Susan Smith notified me that CalPERS had "Validated that the calculation for ARSC is correct according to the requirements for ARSC." No further exploration would be made by CalPERS of my questions and concerns.
- I elected 4 years of ARSC in the amount of \$122,122.02 and paid this amount in full.
- CalPERS corrected their retirement benefit calculation in 2019. This resulted in the determination of an overpayment to me as a result of CalPERS' prior recalculation of my retirement benefit.
- On November 15, 2019, I was notified of a Corrected Lump Sum cost for ARSC:
 - The cost of 4 years corrected was \$90,050.68
 - The corrected Lump Sum cost of 5 years was \$112,562.60
 - The additional cost to purchase 1.000 year of ARSC is \$35,808.71 which includes interest through December 31, 2019
- On December 13, 2019, I was notified of an additional correction:
 - The Corrected Lump sum cost for 4.000 years has been recalculated to \$86,459.60
 - The Revised Lump Sum cost to purchase 5.000 years is \$108,074.50
 - The additional cost to purchase 1.000 year of ARSC is \$35,635.45 which includes interest through December 31, 2019.
- I wrote an appeal to CalPERS CEO, Marcie Frost. That letter was referred back to ARSC staff member, Ms. Hobbs, for reply and there was no change in the consideration of my concerns.
- Christine Mercado, Associate Governmental Program Analyst, in an email dated November 22, 2019, stated that "An incorrect pay rate was used in your original calculation and per Public Employees' Retirement Law (PERL) Government Code (GC) Section 20160(b) which states in part: "The board shall correct all actions taken as a result of errors and omissions."
- However, Government Code Section 21052 states: "A member or retired former employee who elects to receive service credit subject to this section shall contribute, in accordance with Section 21050, an amount equal to the increase in employer liability, using the payrate and other factors affecting liability on the date of the request for costing of the service credit..."
- The date of my election was **May 2013**. The recalculated ARSC cost of \$86,459.60 had **no** additional interest assessed to me.
- Thus, the recalculated ARSC cost for 5.000 years at the cost of \$108,074.50 likewise should not have additional interest assessed to me.
- CalPERS had the inflated cost of 4 years of ARSC of \$122,122.02 from 2013 to 2020. This meant that due to the error in the original calculation, I lost the potential for earnings on the overpaid amount in my personal retirement account. I asked Fidelity Investments to calculate the estimated loss of earnings had the amount overpaid been retained in my retirement portfolio.
 - The overpayment for 4 years of ARSC was \$35,662.42
 - The estimated earnings on that amount would have been: \$55,358.77

- CalPERS document, "Investment & Pension Funding, Facts at a Glance for Fiscal Year 2018-19" shows that CalPERS made investments of their funds and earned interest each year. The document shows Total Fund Market Value and Total Net Investment Return 10-year Review from 2010 through 2019 with interest earned for each year.
- I feel that Government Code 20160 provides the mechanism for CalPERS to make the correction to show that I had paid sufficient funds to accommodate the full purchase price of the corrected calculation for 5.000 years of ARSC as \$108,074.50 at the time of my initial full payment of \$122,122.02

Therefore, I am requesting:

- Per Government Code 20160 (b) the correction be made to the cost of 5.000 years of ARSC.
- I feel that the assertion by CalPERS that I would owe additional interest for that 5th year is not valid.
- Following Government Code Section 21052, there should be no interest assessed because the calculation used the corrected pay rate and included factors affecting liability from the date of the initial calculation in May 2013. Thus all factors are included in the amount of \$108,074.50.
- And that I be permitted to purchase the 5th year of ARSC based on the recalculated cost and without assessing interest from 2013 forward.

I hope that the CalPERS Board of Administration will therefore adopt the decision of Administrative Law Judge Holly M. Baldwin regarding this case.

Respectfully,


Patricia Cornely