ATTACHMENT A

PROPOSED DECISION

Attachment A

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

In the Matter of the Application to Purchase Additional Retirement Service Credit By: ARNOLD B. CARSON, Respondent.	Case No. 2011-0730 OAH Case No. 2012040017

PROPOSED DECISION

This matter was heard before Marilyn A. Woollard, Administrative Law Judge for the Office of Administrative Hearings (OAH), State of California, on October 11, 2012, in Sacramento, California.

Senior Staff Counsel Carol A. McConnell represented complainant California Public Employees' Retirement System (CalPERS).

Respondent Arnold B. Carson appeared and represented himself.

Oral and documentary evidence was received, and the parties offered oral closing arguments. The record was closed, and the matter was submitted for decision on October 11, 2012.

ISSUES AND SUMMARY

1. Did CalPERS correctly determine that Government Code section 20909 limits respondent to a single election to purchase Additional Retirement Service Credit (ARSC)?[1] YES.

[1] Unless otherwise indicated, all undesignated statutory references are to the California Government Code.

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2. Did CalPERS act appropriately when it corrected respondent's second ARSC purchase, or should it be equitably estopped from doing so? YES. Equitable estoppel was not established.

FACTUAL FINDINGS

1. Respondent has been employed by the California Department of Corrections and Rehabilitation (CDCR), at the California Medical Facility for over 20 years. By virtue of his employment, respondent is a member of CalPERS.

2. *First ARSC Purchase*: On August 30, 2004, respondent signed an election form to purchase 1.00 year of ARSC. To do so, respondent paid $11,867.76, which was the lump sum value of the service credit. The additional 1.00 year of ARSC was credited to respondent's CalPERS retirement account.

3. *Second ARSC Purchase*: On July 31, 2009, respondent signed a second election form to purchase an additional 1.00 year of ARSC. Respondent paid the lump sum value of the service credit ($17,831.65) by rolling over funds from his 457 plan (State Savings Account). The additional 1.00 year of ARSC was then credited to his CalPERS retirement account.

4. *Third Attempted Purchase of ARSC*: On March 28, 2010, respondent signed an application to purchase a third 1.00 year of ARSC.

5. *CalPERS Denial*: On July 26, 2010, CalPERS notified respondent in writing that "under current law, you may only make one election for the purchase of ARSC" under section 20909. Respondent was also informed that his second election to purchase 1.00 year of ARSC in 2009 was "invalid," that "1.000 year of service credit will be removed from your retirement account," and that he would be issued a refund to his 457 account for the lump sum amount used to purchase this credit. Respondent's appeal rights were explained.

6. On August 2, 2010, CalPERS advised respondent that a review of his account revealed that "ineligible purchase/receivable for an Additional Retirement Service Credit purchase has occurred." Respondent was informed that a refund warrant, in the amount of $17,831.65, would be made payable to Nationwide Retirement Solutions to deposit into respondent's 457 account.

Thereafter, on August 25, 2010, the State of California issued a check in that amount to Nationwide Retirement Solutions for the benefit of respondent.

7. On August 14, 2010, respondent filed an appeal and request for hearing. Respondent noted that CalPERS had the use of the money from his 457 account for one year. This resulted in respondent's loss of "interest and share market

loss for a period of twelve months." Respondent requested that he be made whole, and that he receive "fair and equitable compensation" for this hardship.

8. On September 12, 2012, Renee Ostrander, Assistant Division Chief, Retirement Account Services, in her official capacity, signed the Statement of Issues regarding respondent's third application to purchase ARSC, and its correction of respondent's second purchase of ARSC. Complainant requests a determination that it acted appropriately when it determined that respondent could not elect to purchase ARSC more than once and that it appropriately corrected respondent's second ARSC purchase.

Respondent's First Election to Purchase ARSC

9. In his January 7, 2004 Request for Service Credit Cost Information, Additional Retirement Service Credit, respondent indicated that he intended to purchase two years of ARSC credit. Respondent attached a document entitled "Service Credit Cost Estimator" from CalPERS, which itemized the cost for respondent to purchase one, two, three, four, or five years of service credit.

10. On August 4, 2004, after receiving this request, CalPERS Member Services Division provided respondent with an ARSC Cost Packet for 1.000 year of service credit.[2] This detailed document provided the lump sum cost to purchase 1.0 credit ($11,867.76), methods of payment, and alerted respondent that only a single election to purchase ARSC was permitted. Specifically, this document provided: "Under current law, you may only make one election for the purchase of ARSC. Ensure that this packet contains information on the amount of ARSC you would like to purchase." Respondent was also advised that, once made, the election to purchase was irrevocable.

On August 30, 2004, respondent signed his "Election to Purchase ARSC," using the Lump Sum Payment Option, by an indirect rollover from his 457 account.

Respondent's Second Election to Purchase ARSC

11. On March 25, 2009, respondent submitted a second Request for Service Credit Cost Information, Additional Retirement Service Credit, requesting an estimate of the cost to purchase one year of ARSC. Respondent answered "yes" to the question "have you requested this cost information before" and gave the date of January 17, 2004. Respondent attached a "Service Credit Cost Estimate Results"

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[2] As indicated in CalPERS's Customer Touch Point (CTP) Report, on February 3, 2004, respondent telephoned and asked to have his "ARSC time changed to 1 year from 2 for calculations." This was again clarified by CTP on April 9, 2004, ("member requesting 1 year not 2 years").

printout from CalPERS website, which itemized the cost for him to purchase from one to five years of service credit.

12. On June 16, 2009, after receiving this request, CalPERS Member Services Division provided respondent with an ARSC Confirmation Letter regarding his request to purchase one year service credit, with a blank Confirmation of Intent to Purchase ARSC form (Confirmation form) attached. The Confirmation form further provided:

> Under current law, you may only make one election for the purchase of ARSC while an active CalPERS member. Carefully select the number of years you wish to purchase (1, 2, 3, 4 or 5 years) as the service credit purchase packet will provide an election to purchase this amount of service.

13. On June 23, 2009, respondent completed, signed and returned the Confirmation form, checking the box immediately below the above-quoted language for one year ARSC for the amount of $17,831.65.

14. On July 6, 2009, after receiving this request, CalPERS Member Services Division provided respondent with an ARSC Cost Packet for 1.000 year of service credit. This detailed document advised respondent that "CalPERS has determined that you are eligible to purchase" ARSC. The packet provided explanation about ARSC and again alerted respondent that: "Under current law, you may only make one election for the purchase of ARSC. Ensure that this packet contains information on the amount of ARSC you would like to purchase."

15. On July 31, 2009, respondent signed his "Election to Purchase ARSC," using the Lump Sum Payment Option, by an indirect rollover from his 457 account.

16. On August 5, 2009, CalPERS Member Services Division sent respondent a written "confirmation that CalPERS receive a check on August 3, 2009, in the amount of $17,831.65, which has been accepted as an In-Service, Plan-to-Plan Transfer of tax deferred funds from your Savings Plus Program governmental 457 plan account. This amount will be credited as payment toward your Additional Retirement Service Credit purchase with CalPERS." The funds were rolled over from respondent's Nationwide Retirement Solutions, Inc. account on July 23, 2009.

Respondent's Application for Third Election to Purchase ARSC

17. On March 28, 2010, respondent submitted a third Request for Service Credit Cost Information, Additional Retirement Service Credit, requesting an estimate of the cost to purchase one year of ARSC. Respondent answered "no" to the question "have you requested this cost information before." Respondent attached a "Service

Credit Cost Estimate Results" printout from the CalPERS website, which itemized the cost for him to purchase from one to five years of service credit.

18. As indicated in its July 26, 2010 letter to respondent, after receiving this third request, CalPERS "discovered, on July 19, 2010, that you had been allowed to purchase ARSC in 2004 and again in 2009. Under current law, you may only make one election for the purchase of ARSC... Therefore your election in 2009 is invalid..."

19. *Testimony of Matthew Alan Eubanks*: Mr. Eubanks is a Staff Service Manager II with CalPERS. His responsibilities include overseeing the Service Credit Costing Unit, which encompasses requests to purchase ARSC. Mr. Eubanks's testimony at hearing is paraphrased in relevant part below.

The ARSC service credit purchase option for members became effective on January 1, 2004. Mr. Eubanks discussed CalPERS's efforts made to notify and explain ARSC's requirements and limitations to members in both written and electronic format. Before respondent's initial purchase of ARSC credit in 2004, CalPERS had a page on its website designed to educate members about this new benefit. Entitled "New Service Credit (Air Time) Frequently Asked Questions (FAQs) (October 23, 2003), it provided:

> **How much time can be purchased?**
> You can buy from one to five years of additional service credit. Credit must be purchased in whole year increments and only one election can be made (even if you choose to purchase less than five years of credit).
>
> [¶]. . . [¶]
>
> **If I buy two years now, can I buy the remaining three years later?**
> No. Only one election is permitted under the new law. (Bolding in original.)

Similar language was contained in CalPERS's March 26, 2006 FAQs page for ARSC purchase, and in the publication, "A Guide to Your CalPERS, Service Credit Purchase Options (Publication 12)" (Guide) with publication dates of September 2006, September 2007, and January 2009. Each of these publications was in effect and available to members prior to respondent's second purchase of ARSC. This information was available in written format and on the website. CalPERS records show that the Guide was mailed to respondent on August 1, 2007.

20. It was undisputed that CalPERS made an error by allowing respondent to purchase a second year of ARSC credit, and it was required by section 20160,

subdivision (b), to correct this error. CalPERS returned the lump sum of $17,831.65 to respondent's 457 account. During the time that CalPERS erroneously held this money, respondent earned approximately six percent annual interest on these funds. Mr. Eubanks explained why the interest earned on that account could not be returned directly to respondent or to his 457 account. Pursuant to rulings by the Internal Revenue Service, CalPERS is prohibited from returning interest to the member, or to the member's 457 account, before retirement. Under relevant IRS Revenue Rulings, such action would constitute a "distribution" and be a violation of CalPERS plan. As a result, the accrued interest will remain in respondent's account and be paid out to him or to his beneficiary upon retirement or death.

21. *Respondent's Testimony*: Respondent's testimony at hearing is paraphrased in relevant part below.

Respondent did not dispute the basic facts of his two purchases of ARSC credit. Much of his testimony was essentially argument about why his appeal should be granted. Respondent strongly believes that section 20909 is confusing in that its subdivision (a) –which allows up to five years of service credit to be purchased in one-year increments—"conflicts" with its subdivision (b)—which allows only a single election to purchase. He also strongly believes that CalPERS made a mistake by allowing his second ARSC purchase. Even assuming that he also made a mistake, respondent would like CalPERS to accept some responsibility for its actions. Specifically, respondent feels very strongly that his 457 account should be reimbursed in some way for lost interest or market share during the time these funds were placed in CalPERS account for his second ARSC purchase.

Discussion

22. Section 29090 allows only a single election to purchase ARSC credits. Its subdivisions (a) and (b) must be read as a whole. It is clear that, as in this case, a member who elects to purchase one year of ARSC may not at any later time purchase additional years of ARSC time. CalPERS provided clear information to its members about this limitation, and respondent received this information prior to his second purchase of ARSC credit. Respondent was also notified of this fact in 2007. As indicated in Mr. Eubanks' testimony, the CTP Report for August 1, 2007, prior to respondent's second ARSC purchase indicates: "Mbr wanted to purchase addl ARSC but hes [sic] already elected to purchase one year. I sent him sc pub to see if he can buy anything else." Yet two years later respondent made another purchase. CalPERS acted appropriately by correcting its undisputed error and it took all action legally allowed to return to respondent the funds he used to pay for the additional year of ARSC. Respondent's money earned interest during this period and this money will ultimately be distributed to him or to his beneficiaries. No more is required.

LEGAL CONCLUSIONS

1. The purpose of the Public Employees' Retirement Law (PERL) is "to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits." (§ 20001.)

2. The PERL provides an opportunity for CalPERS members (members) to elect to purchase additional retirement service credit that will affect their ultimate retirement compensation. This option is delineated in section 20909, subdivisions (a) and (b), as follows:

> (a) A member who has at least five years of credited state service, may elect, by written notice filed with the board, to make contributions pursuant to this section and receive not less than one year, nor more than five years, in one-year increments, of additional retirement service credit in the retirement system."
>
> (b) A member may elect to receive this additional retirement service credit at any time prior to retirement by making the contributions as specified in Sections 21050 and 21052. *A member may not elect additional retirement service credit under this section more than once*." (Italics supplied.)

3. *Burden of Proof:* "As in ordinary civil actions, 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...." (*McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044; Evid. Code 500.) In this matter, respondent bears the burden of establishing that CalPERS erroneously interpreted section 20909, that all required elements for his claim of equitable estoppel are established, and/or that he had a right to correction of an error or an omission. (§ 20160, subd. (d).)

4. The principles of statutory construction are well established. As articulated by the California Supreme Court in *Bonnell v. Medical Board of California (Bonnell)* (2003) 31 Cal. 4th 1255, at 1261:

> We begin our discussion with the oft-repeated rule that when interpreting a statute we must discover the intent of the Legislature to give effect to its purpose, being careful to give the statute's words their plain, commonsense

> meaning." [Citation.] In undertaking this task, we adhere to the guideline that "[i]f the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Ibid.*) When the statutory language is unambiguous, " 'we presume the Legislature meant what it said and the plain meaning of the statute governs.' " [Citation.] Statutory language is not considered in isolation. Rather, we "instead interpret the statute as a whole, so as to make sense of the entire statutory scheme." [Citation.]

5. Reading section 20909 as a whole, its language plainly dictates that a member may only elect to purchase ARSC credits on a single occasion, regardless of the number of years s/he purchases. The election to purchase one out of five possible years of ARSC credit under section 20909, subdivision (a), does not expand the plain meaning of section 20909, subdivision (b), to allow further elections to purchase any or all of the remaining four years. Respondent used all of his ARSC rights by electing to purchase one year of credit in 2004.

As set forth in the Factual Findings and Legal Conclusions as a whole, CalPERS appropriately denied respondent's application for a third purchase of ARSC credit and appropriately determined that respondent's second ARSC credit purchase had to be rescinded based upon the plain meaning of section 20909, and the mandate of section 20160, subdivision (b).

6. Section 20160 addresses the correction of errors and omissions and provides, in pertinent part, as follows.

> (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.

7. Pursuant to section 20909, subdivision (b), the CalPERS Board was statutorily required to correct its error of allowing respondent to make a second election to purchase ARSC credit in 2009. To the extent that respondent is seeking to correct his own error of not completing two years of ARSC credit purchase at the time of his initial election to purchase in 2004, or of making the second election to purchase in 2009, he has failed to meet his burden of proof. Respondent was on notice of the limitations of section 20909 and, to the extent that he failed to read or understand that information, respondent failed to make reasonable inquiry within the meaning of 20909, subdivision (a)(3).

8. *Equitable Estoppel*: In *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, the California Supreme Court established the relevant factors to be considered when estoppel is asserted against a public agency. Generally speaking, four elements must be present: (1) the party to be estopped must be apprised of the facts; (2) the party must intend that its conduct shall be acted upon, or must so act that the party asserting estoppel had a right to believe it was so intended; (3) the party asserting estoppel must have been ignorant of the true state of facts; and (4) that party must have relied upon the conduct to his injury. (*Driscoll,* supra at 305.) Although estoppel is generally a question of fact, when the evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an estoppel is a question of law. (*Id.* at 305; *Crumpler v. Board of Administration, PERS* (1973) 32 Cal.App. 3d 567, 581 (citing *Driscoll*).) Although equitable estoppel may be applied against the government, this principle has its limits. It is well-established that estoppel will not be applied if to do so would nullify a strong rule of policy enacted for public benefit, or if to do so would result in expanding an agency's powers. (*Fleice v. Chualar Union Elementary School District* (1988) 206 Cal. App.3d 886, 893.)

9. As set forth in the Factual Findings and Legal Conclusions as a whole, CalPERS acted appropriately when it corrected its error of allowing respondent to make a second purchase of ARSC. Respondent did not establish that CalPERS should be equitably estopped from correcting this acknowledged error. To the contrary, at the time of his second ARSC purchase, respondent was aware that he had already exhausted his single election to purchase authorized by section 20909. (Factual Findings 19, 22.) Further, any such "correction" would provide respondent with a benefit that is expressly excluded by statute (§ 20160, subd. (a)(3)), and would be contrary to public policy.

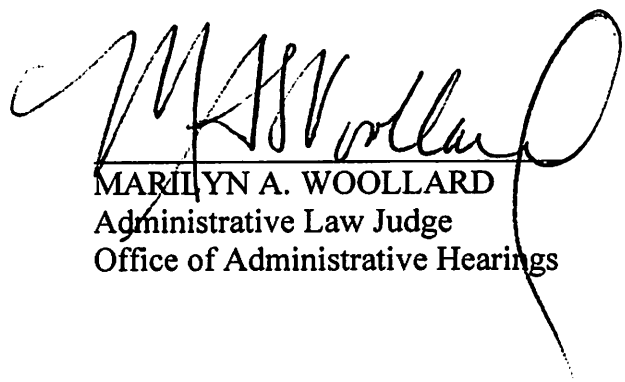
As part of its correction, CalPERS properly reimbursed respondent's 457 account for the funds utilized to make that purchase. Respondent's assertion that he

lost market share during the time CalPERS held these funds is entirely speculative. As indicated in Factual Finding 20, respondent actually earned six percent annual interest on these funds. Respondent has cited no authority that requires CalPERS to distribute this interest in violation of its plan and IRS rulings. This accrued interest remains in respondent's retirement account and will ultimately be paid out to respondent or to his beneficiaries.

ORDER

Respondent's appeal is DENIED.

DATED: November 6, 2012



MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings