

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Statement of Issues
Against:

MICHAEL T. CAMPBELL,
Respondent,
and
CITY OF LANCASTER,
Respondent.

Case No. 2011-1262

OAH No. 2012030114

PROPOSED DECISION

This matter was heard by David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings (OAH), on September 12, 2012, in Glendale, California.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS). Michael T. Campbell (Respondent) represented himself. City of Lancaster (City) was represented by Beverly Glode, Human Resources and Risk Management Director.

Oral and documentary evidence was received, and argument was heard. The record was closed and the matter was submitted for decision on September 12, 2012.

ISSUES

(1) Whether CalPERS is required to restore 3.025 years of service credit to Respondent's retirement account, which was removed as a result of an inadvertent double posting for his Community Property Redeposit of Withdrawn Contributions election dated July 23, 2008.

(2) Whether CalPERS is required to restore 0.736 years of prior service credit to Respondent's retirement account, which was removed because Respondent was incorrectly afforded the opportunity to elect prior service credit for employment previously credited to his account on December 17, 1979.

FACTUAL FINDINGS

1. Karen DeFrank made and filed the Statement of Issues in her official capacity as the Chief of the Customer Account Services Division of CalPERS.
2. Respondent was employed by the City of Lancaster. By virtue of this employment, he is a member of CalPERS.
3. On April 28, 2010, CalPERS notified Respondent of its determination to deduct 3.025 years of service credit from his retirement account. On September 29, 2010, Respondent submitted a written request to appeal “the decision to deny my claim of three plus years removed from my years of service credit.” (Exhibit 6.) The Statement of Issues was filed on March 2, 2012.
4. Respondent had been employed by the City for many years and, at first, was not interested when the City notified employees of an early retirement incentive program on March 23, 2009 (Exhibit A). The City’s incentive program included increased health benefits and an extra monthly retirement allowance based on years of service to the City. As discussed in more detail below, Respondent learned that CalPERS had credited him with more years of service credit than he anticipated—over 39 years of credit—and he obtained further estimates and information from CalPERS that confirmed the increased amount of service credit. Respondent decided to retire early and accepted the City’s incentive program. Errors made by CalPERS improperly increased Respondent’s service credit, which errors were not discovered until it was too late for Respondent to rescind his retirement.
5. In 2006, Respondent submitted a request to CalPERS for 0.733 years of service credit based on time he worked for the City before the City contracted with CalPERS. A City spreadsheet (Exhibit 12) indicates that this related to time worked in the fiscal year 1978 – 1979. CalPERS had already included this period in Respondent’s account. However, in error, CalPERS added, or posted, 0.736 years of prior service credit to Respondent’s account as of May 5, 2006.¹
6. CalPERS sent an annual statement to Respondent in 2007 indicating that, as of June 30, 2007, his account showed he had 29.519 years of service credit based on employment with the City. This amount included the “double posting” of service credit from the 1978 – 1979 fiscal year that gave Respondent credit for 0.736 years to which he was not entitled.
7. On January 2, 2008, Respondent purchased five years of service credit, referred to as ARSC or Additional Retirement Service Credit, also known as airtime. In April 2008, 3.025 years of service credit was deducted from Respondent’s account and

¹ This information is found in Exhibit 17 and in the testimony of Justin Garrett, a retirement program specialist for CalPERS. Mr. Garrett explained that 0.736 years service credit was added, not 0.733, based on information provided by the City to CalPERS in 2006.

placed in the non-member account of Respondent's ex-wife as a result of their divorce and resolution of community property rights. By letter dated May 2, 2008, CalPERS informed Respondent that the transfer of service credit was complete and that, as of June 30, 2007, the balance of service credit in his account was 30.761 years. (Exhibit T.) This amount is apparently in error; however, no evidence was submitted to explain why or how.

8. CalPERS sent an annual statement to Respondent in 2008 indicating that, as of June 30, 2008, his account showed he had 32.494 years of service credit based on employment with the City. The changes from the 2007 annual statement were based on (1) one more year of work for the City; (2) five years of added airtime; and (3) 3.025 years deducted based on the ex-wife's community property rights. The "double posting" amounting to an extra 0.736 years of credit (see Factual Findings 5 and 6) was still included.

9. On September 10, 2008, CalPERS began processing Respondent's Election to Purchase 3.025 years of service credit for community property redeposit along with a lump sum check. By virtue of this paperwork and check, Respondent was able to purchase the amount of service credit deducted due to his ex-wife's community property rights and have it added back to his account.

10. On October 7, 2008, CalPERS staff inadvertently double posted 3.025 years of service credit to Respondent's account. Respondent was entitled to only one of the two postings.

11. On June 2, 2009, CalPERS staff discovered that 6.050 years of service credit was added to Respondent's account in error, and the overstated 3.025 years of service credit was deducted from Respondent's account pursuant to Government Code section 20160.

12. Soon after the City offered its early retirement incentive program in March 2009, a City employee in its human resources department obtained information from CalPERS, including that Respondent had 39.247 years of service credit. (Phone notes dated 4/22/09; Exhibit 19, p. 13.) When Respondent learned of this, he thought it was not correct. The employee again contacted CalPERS and was told that Respondent had 39.474 years of service credit. (Phone notes dated 4/28/09; Exhibit 19, p. 13.) Again, Respondent thought it was not correct. Respondent also contacted CalPERS on April 28, 2009, and was told his service credit was 39.474 years. A letter followed, dated April 30, 2009, in which CalPERS stated Respondent had 39.107 years of service credit. Respondent received the letter May 7, and, relying on the information, applied for the City's early retirement incentive and submitted his resignation the next day, May 8, which was accepted by the City.

13. CalPERS sent a letter to Respondent dated June 12, 2009 (Exhibit 14), which he received June 17, estimating that, for a retirement date of June 30, Respondent would have 36.519 years of service credit. This reduction was due to the discovery and correction of the double posted 3.025 years of service credit (see Factual Findings 7 – 11). Respondent had based his decision to retire on having 39+ years of service credit. He sought to rescind

his retirement. Unfortunately, in the interim, the City had passed a budget that did not include funds for his position.

14. There were numerous contacts between Respondent and CalPERS, the details of which are not necessary to a determination of the issues in this matter, other than that Respondent wanted 3.025 years added to his service credit and CalPERS denied his request. Respondent sent a letter, dated September 29, 2010, appealing the denial by CalPERS (Exhibit 6).

15. CalPERS employee Linda Cox made a file note dated July 6, 2009 (Exhibit 19, p. 9) that the posting of credit for 0.736 years of service from 1978 – 1979 (see Factual Findings 5 and 6) was in error because it had already been posted to the account. Also on July 6, Ms. Cox wrote a letter to notify Respondent that his correct service credit amount was 35.783 years (Exhibit 16). Ms. Cox informed Respondent on October 29, 2009, that the reason for the error was the double posting. However, the error was not actually corrected for more than two years when CalPERS performed an administrative review of Respondent's account. CalPERS corrected the account on August 2, 2011, by deducting 0.736 years of service credit, which resulted in a final service credit for Respondent of 35.783 years. CalPERS notified Respondent of this correction/deduction orally on August 3, 2011, and subsequently in writing on September 12, 2011 (Exhibit 18). Respondent has also appealed this decision.

16. On December 7, 2011, CalPERS sent a letter to Respondent (Exhibit M) indicating that his retirement allowance had been based upon 36.519 years when it should have been based on 35.783 years. As a result, he received an over payment of \$4,103.72 and his future monthly allowance would be reduced by \$143.26. Respondent was given three options for repayment: (1) send a check for the full amount; (2) withhold monthly retirement checks in full until \$4,103.72 was repaid; or (3) deduct monthly payments of \$683.95 for 12 months. Under the third option, total deductions would amount to \$8,207.40. There was no indication to Respondent in the letter, and no evidence offered, to explain why, under the last option, Respondent was required to pay overpayment \$8, 207.40 due to an overpayment of \$4,103.72.

17. Respondent contends, among other things, that because he relied to his detriment on CalPERS calculations of his service credit in deciding to retire sooner than he had planned, CalPERS is estopped from reducing that service credit after his retirement, particularly where the reductions are based on errors made by CalPERS that, in some instances, were not corrected for extended periods of time.

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LEGAL CONCLUSIONS

1. This case is governed by various sections of the Government Code, some of which are summarized or quoted below.²

2. Respondent's pension is referred to in the applicable statutes as a service retirement allowance. Under sections 21350, 21352, 21353 and 21354, some components of Respondent's service retirement allowance are the amount of his contributions, his final salary, and a multiplier comprised of a "retirement fraction" depending on the retiree's age at the time of retirement and the number of years of prior service. The present case refers to the number of years of prior service expressed above as years of service credit.

3. Claimant contends that the deductions of 3.025 and 0.736 years of service credit are errors that should be corrected. Under section 20160, corrections can be made to a member's account under various conditions. Of significance, subdivision (a)(3) provides:

"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."

Under subdivision (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)."

Subdivision (e) provides in pertinent part: "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."

4. Corrections are also governed by section 20163 which provides, in relevant part: "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."

5. A statute of limitations exists for adjustment of errors which, as related to this matter is found in section 20164, subdivision (b)(1), which provides:

"(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:

² Statutory references are to the Government Code unless otherwise indicated.

“(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.”

6. The adjustment to Respondent’s account related to his purchase of the 3.025 years credit previously attributed to his ex-wife is governed by section 20751.5, which refers to this action as a redeposit of contributions, and limits the member to “the same amount that the nonmember was entitled to redeposit.” Therefore, section 20751.5 would operate to limit Respondent to a single redeposit of 3.025 years of service credit.

7. The governing law, particularly sections 20160 and 20751.5, dictates that Respondent is only entitled to the benefits and status to which the law allows. Although CalPERS made numerous errors and there were unexplained delays in finding those errors, correcting them, and notifying Respondent, nevertheless he is only entitled to the benefits that he is allowed under law and not any overage due to CalPERS errors.

8. Respondent contends that he relied on CalPERS’ errors and retired before he would have based on those errors, and that CalPERS is therefore required to pay a pension based on those errors. The legal theory behind these contentions is called estoppel. As noted below, estoppel will not be applied to the circumstances of this case.

9. The Public Employees’ Retirement System is a creation of statutes, codified in the Government Code, which grant it certain powers. CalPERS has no authority other than that granted by those statutes. It has the authority to pay benefits to a member only when the statutes authorize it and then only in the amount authorized. (See, *Hudson v. Posey* (1967) 255 Cal.App.2d 89.)

10. It is well settled that estoppel cannot be used to enlarge the powers of the Public Employees’ Retirement System (*Page v. City of Montebello* (1981) 112 Cal.App.3d 658 at 667; *Board of Administration, State Employees’ Retirement System v. Ames* (1963) 215 Cal.App.2d 215 at 230; and *Boren v. State Personnel Board* (1951) 37 Cal.App.2d 634) or to provide a benefit to a retiree which is not otherwise statutorily authorized because public employee benefits are wholly statutory. (*Hudson v. Posey, supra.*)

11. Estoppel is an equitable doctrine that is centuries old. It seeks to prevent a person or entity from profiting from their own wrongdoing. As the Court of Appeal noted in *California School Employees Association v. Jefferson Elementary School District* (1975) 45 Cal.App.3d 683 at page 692: “The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted” (Internal quotations and emphasis omitted.) In determining whether or not estoppel shall be applied to a given situation, the burden of establishing that all of the requirements have been met is upon the party asserting the estoppel. The California Supreme Court in the case of *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 (*Mansell*), stated that the claiming party must establish the following four elements for estoppel to apply:

- “(1) the party to be estopped must be apprised of the facts;
- “(2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;
- “(3) the other party must be ignorant of the true state of facts; and
- “(4) he must rely upon the conduct to his injury.”

12. In this administrative hearing, Respondent has established the four requisite elements of estoppel. However, for the doctrine of equitable estoppel to be applied to a governmental entity, there must be a further showing.

The California Supreme Court in *Mansell* noted that estoppel should only be applied to a governmental agency in rare circumstances and discussed the limitations of applying estoppel to governmental agencies as follows: “The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.”

13. The Court of Appeal in *Crumpler v. Board of Administration, Public Employees' Retirement System* (1973) 32 Cal.App.3d 567 at 584, held that estoppel will not be applied to preclude a proper reclassification prospectively, that is from the time of the proper reclassification forward.

“We will not, however, extend estoppel to preclude the board from reclassifying petitioners prospectively from the date of the board’s decision. Public interest and policy would be adversely affected if petitioners, despite the discovery of the mistaken classification, were required to be continued to be carried as local safety members when all other contract members of the retirement system throughout the state performing like duties and functions are classified as miscellaneous members. Manifestly, it would have a disruptive effect on the administration of the retirement system. The conclusion we have reached respecting the extent to which the board should be estopped is in keeping with, if not compelled, by the provisions of section 20160 pertaining to the duty of the board to correct errors.”

Estoppel will not be applied against the government if doing so effectively nullifies a strong rule of policy adopted for the benefit of the public. (*Lentz v. McMahon* (1989) 49 Cal.3d 393; *County of San Diego v. Cal. Water* (1947) 30 Cal.2d 817.)

14. Similar logic applies to this case regarding the correction of the amount of Respondent’s retirement allowance. Despite the fact that there is a foundational showing of the four factors referenced in *Mansell*, Respondent is unable to overcome the sound public policy argument raised by the board. To do as Respondent requests would enlarge the authority of the Public Employees’ Retirement System regarding the granting of a beneficiary’s allowance in amounts in excess of the amount authorized by statute. It would

be detrimental to the public policy behind the creation of the Public Employees' Retirement System. CalPERS is not estopped from paying Respondent only that which it is statutorily authorized to pay. It is not estopped from reducing his retirement allowance from an incorrect amount to a correct amount. Respondent has established the traditional elements of estoppel. However, judging the facts against the statutory and decisional law, estoppel is not established against CalPERS because to do so would violate a strong public policy.

15. The Board owes a fiduciary duty of trustee to a trust and its beneficiaries. It cannot ignore a mistake that benefits one person any more than it can refuse to correct one that inures to its benefit.

To find an estoppel in this case would be sufficiently adverse to public interest or policy. Here, the board has a primary obligation to protect the retirement fund for the benefit of all its beneficiaries and to minimize the employers' costs of providing benefits. To allow Respondent to have a lifetime retirement allowance higher than permitted by the statutory formula would result in an unfunded liability, and would also have a direct impact on his former employer, the City, against whose reserves his lifetime allowance will be drawn. The unfunded liability would pass to the employer in the form of increased contributions and higher future contribution rates to fund its miscellaneous members' account. This would be a windfall to Respondent or in equivalent legal terms unjust enrichment.

To find an estoppel here would, in essence, grant to CalPERS powers that were not ceded to it by the Legislature. The grant of power was to administer a plan based upon a specific statutory retirement benefit formula. To find an estoppel here would be to allow CalPERS to unilaterally alter the statutory retirement benefit formula without benefit of enabling statutory authorization. That is the task of the Legislature, not the board.

16. If this were a matter solely driven by the equities of the situation then Respondent wins. He did not make the mistakes, CalPERS did. However, there are public policy considerations that inform and condition the decision making process in this administrative hearing. The arguments raised by the board are sound ones. They broaden the scope of inquiry so that the consequences of a particular decision can be assessed against the backdrop of its impact on the retirement system.

The key issue is whether Respondent's benefit is higher or lower than that of other retirees whose statutory retirement formula is exactly the same. For those retirees who retired exactly at Respondent's age, with his length of service and his final salary, the statutory retirement allowance is determined by that formula. It is that amount and no other. To allow Respondent to have a higher allowance would be to treat him unequally in violation of the mandate given to CalPERS by the Legislature. This, in and of itself, is against public policy. Those retirees who are similarly situated require identical treatment when implementing a statutory retirement allowance.

17. The analytical approach taken above is similar to the approach taken in Precedential Board Decision 98-02 (*In the Matter of Harvey Henderson*, CalPERS Case No.

1558. OAH No. I.-1997120250; Exhibit 23). A precedential decision may be so designated under section 11425.60 if it contains a significant legal or policy determination. The CalPERS board's interpretation and application of the statutes it administers is given great weight. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.) Particularly applicable here, the "contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight" unless it is clearly erroneous or unauthorized. (*Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921.) Under section 20125, the board "is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system."³ Further, under Evidence Code section 664, there is a general presumption that a public agency has performed its official duty. CalPERS' adoption of Precedential Decision 98-02, and the manner in which CalPERS made corrections to Respondent's account, are administrative constructions consistent with the statutory language governing implementation of retirement allowances.

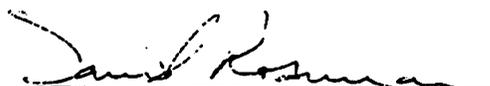
18. Notwithstanding the above, there was no evidence supporting one of the repayment options that CalPERS presented to Respondent – the 12 monthly deduction option (monthly deductions of \$683.95 for 12 months for a total of \$8,207.40, when the amount of overpayment was only \$4,103.72; see Factual Finding 16). Respondent should be given the option of 12 monthly deductions, the total of which would allow CalPERS to recoup the amount of the overage only.

ORDER

1. The appeal of Respondent Michael Campbell of the Board of Administration, California Public Employees' Retirement System decision decreasing his level of retirement allowance is denied.

2. Among the repayment options given to Respondent shall be the option of 12 monthly deductions for a total of \$4,103.72.

Dated: October 29, 2012



DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

³ In this context, "system" is a reference to the Public Employees' Retirement System; see section 20002.