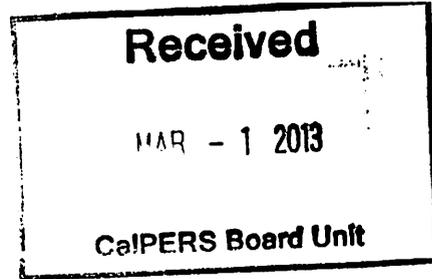


ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

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Respondent's Argument

In the Matter of the Application to Purchase Additional Retirement Service Credit

Melinda A. Tackitt, Respondent

I am submitting this letter to the CalPERS Board as written argument regarding the Proposed Decision of February 12th, 2013, by Coren D. Wong, Administrative Law Judge. Judge Wong stated in the Proposed Decision that I did not provide "clear and convincing" evidence for estopping the CalPERS decision to deny my application to purchase ARSC (additional retirement service credit), and that specifically the "intent" and "detrimental reliance" elements were "missing".

I will begin by first providing a very brief introduction. I am a Registered Nurse, and Public Health Nurse, having had a long and emotionally rewarding career in this field. I worked with many people I admire greatly and miss deeply. I was, by no means ready to leave my position, or my career.

Before retiring (due to acquiring a chronic illness) I worked in communicable disease management, interfacing with other professionals, government and private agencies, and the public on a daily basis. I was relied upon to provide guidance and accurate information, and to make certain to refer clients to the right source if I was unable to answer their questions. This is what I expected from CalPERS when I turned to SRO for assistance and guidance. This entire situation could have been completely avoided if I had been provided that.

In August 2010, at the age of 58, it became necessary for me to look at the option of "retirement", much earlier than I had planned. Due to the chronic illness that I have, I will not be able to return to work. The detrimental effect of losing the opportunity

to purchase ARSC may not seem significant, but for me it is very much so. The prospect of living on a limited income at this early point in my life has created incredible stress. The ARSC purchase would be fully funded by the transfer of funds from my deferred compensation plan, and would allow me a more secure lifetime benefit.

Arguments addressing “intent” and “detrimental reliance”:

In regard to the element of “intent”, the doctrine of equitable estoppel states that “the party (to be estopped) must intend or reasonably believe that his or her conduct will be acted upon”. The information I presented at the hearing included several references to my having been misguided and incorrectly advised regarding how to proceed with the application process for the purchase of ARSC (Additional Retirement Service Credit). I first began my search for guidance by referring to the CalPERS website (where there was no definition or explanation of “compensated employment”). I then spoke by phone with CalPERS representatives regarding the application for ARSC and my retirement plans, but finally took both applications to Sacramento (SRO) to meet with a representative in person to ensure that I was proceeding correctly.

When I originally called CalPERS to schedule an appointment with a representative regarding retirement and purchase of ARSC, I was informed it would take several months for an appointment, but that I could come to the Sacramento Regional Office early in the day and meet with a representative there on a first-come first-served basis. I was never told these representatives were “generalists” or that they were not qualified or appropriate to provide assistance in this process. This information wasn’t provided to me until I received the letter dated January 12th, 2011 (five months later) from the Service Credit Section, stating they did not find evidence that I was misguided by SRO staff and that they were only there to provide “general information”. This statement was greatly disturbing to read so far after the fact.

Because of the omissions of critical information and the misguidance provided by SRO my retirement resulted in a lose/lose situation. I could have dated my retirement back to the last day on payroll, and acquired an additional 5 months of back retirement (according to our CalPERS representative), but it was determined, during the face to face encounter with Ms. Kirkpatrick, that since I was also

submitting my application for ARSC I would need to keep my retirement date as it was. Ultimately, I lost both of these options. This entire situation could have been rectified if I had been provided with clear and appropriate guidance by SRO at the time of my visit at their office. Ms. Kirkpatrick, the CalPERS representative, was fully informed that my husband and I had come to obtain information and guidance regarding how to proceed with the applications for ARSC, as well as retirement from CalPERS. But unfortunately, it appears the particular law regarding "compensated" employment and its true meaning is not only not clearly defined on the CalPERS website, but is also not understood by the staff employed to provide us guidance. In addition to consulting the CalPERS website, I had at least two phone interactions with SRO staff prior to my meeting face to face with Ms. Kirkpatrick on August 18th, 2010. I honestly believed I was in compensated employment as I still held my position and was still receiving insurance benefits compensation. Each of the representatives that I spoke with was provided with my "last day on payroll" and need for guidance regarding ARSC and retirement. In fact, the "last day on payroll" was a specific point of attention and discussion during our meeting with Ms. Kirkpatrick. It was never stated that date would be viewed as the last day of what the law defines as compensation, nor did Ms. Kirkpatrick ever state or inform us that she was not qualified to assist us in this matter, or refer me to another representative.

Judge Wong states in item 13 of the Proposed Decision that I "chose" my retirement date before meeting with Ms. Kirkpatrick (CalPERS representative), but the truth is the retirement date was still arbitrary and changeable at the point that we met with her. In fact, Ms. Kirkpatrick actually did change the retirement date twice (shown next to the "last day on payroll" date) using whiteout on the application two times during our interaction (refer to page 6 of the Service Retirement Election Application). No applications had yet been submitted. I want to reiterate, that was the purpose of making the drive to Sacramento that day; to ensure we were receiving the guidance and advise needed to proceed correctly before submitting either application (for ARSC and retirement). At that moment in time I was still employed with my position being held for my return. I was receiving a statement every two weeks showing payment by the county for my insurances. I maintained my permanent status and rate of pay. I had also refused additional donations of

time from fellow employees, not knowing at that time it would have made a difference to this decision by producing a payroll check during that particular pay period. (Mathew Eubanks, Section Manager for Staff Services Unit of CalPERS, stated during the January 24th, 2013 hearing that any amount on payroll, no matter how small, would be considered compensation.)

Judge Wong also states in item #13 of the Proposed Decision “However, Ms. Tackitt admitted that she did not believe any of the CalPERS representatives intentionally tried to mislead her”. This is true, I do not believe I was *intentionally misled*, but I was misled, misguided, and misinformed nonetheless. The doctrine of equitable estoppel states that “the party (to be stopped) must intend or reasonably believe that his or her conduct will be acted upon”, not that they must intend to mislead. The representative did reasonably believe and intend that the guidance and advice (conduct) she was providing to me was accurate, and thus would be acted upon, and that is where there is “intent”. We trusted that she was there to provide the needed advice, guidance, or referrals appropriately, and she *did intend* to provide us with the same. Because of this reliance and trust upon her voiced advice and assurances, I submitted my applications that day.

In the case of *Crumpler v. Board of Administration, PERS (1973)* involving equitable estoppel, these phrases were used from a previous case to illustrate the concept of intent and misleading advice;

“The fact that the advice may have been given in good faith does not preclude the application of estoppel. Good faith conduct of a public officer or employee does not excuse inaccurate information negligently given”. (Driscoll v. City of Los Angeles, supra, 67 Cal. 2d 297, 307-308; Orinda-County Fire Protection Dist. v. Frederickson and Watson Co., 174 Cal. App. 2d 589, 593 [344 P.2d 873].) It is also stated that “in a matter as important to the welfare of a public employee as his pension rights, the employing public agency bears a more stringent duty to desist from giving misleading advice”, and “that good faith conduct of a public officer or employee does not excuse inaccurate information negligently given”. (Driscoll v. City of Los Angeles, supra, 67 cal. 2d 297, 307-308)

In regard to the element of “detrimental reliance”, Judge Wong states “Mr. Tackitt testified that Ms. Kirkpatrick (CalPERS representative) did not say that his wife’s application to purchase ARSC would be approved because she doesn’t make that decision.” This is true, but not the point. She did provide us the assurance that our

application appeared to be in order, and that we had proceeded appropriately, despite her being fully aware of, and completely informed regarding, my last day on payroll and ARSC application. We were there for that crucial guidance and information I needed, that she felt she was giving, and that we believed we were getting. We now know it was lacking and inaccurate. Yes, of course we knew someone else provided the final approval, but we believed (relied upon) the erroneous guidance provided by the CalPERS representatives to our detriment. If we had not “relied” upon her conduct (advice/guidance and information), and had been referred appropriately, I would not be faced with this situation today. Consequently, I lost both options that I still had at the time of my meeting with Ms. Kirkpatrick; I lost the option of purchasing the four years of ARSC, and I also lost the option of an additional five months of retirement benefit (over \$8,000). I ended up with the worst outcome, the lose/lose option, the one I could have rectified if I had been given the facts I needed and had sought from CalPERS when I was there.

Conclusion:

I argue that all elements of estoppel are clearly met, including “intent” and “detrimental reliance”, as detailed above.

Additionally, I have been informed by CalPERS that “equitable estoppel may only be applied against a government agency ‘where justice and right require it’, and it will not be applied against the government where it would effectively nullify a rule of public policy”. In my particular appeal circumstance the effect upon public interest or policy is of no impact. The request is fully funded by the transfer of my private deferred compensation funds. I am not requesting a change to policy, only a correction of error and omission that has taken place at my expense.

It is CalPERS, the same agency I originally attempted to receive most critical guidance from, the same agency that then denied the very application they had advised me in completing, that I am again turning to for help today.

In the case of *Crumpler v. Board of Administration*, 32 Cal. App. 3d 567, it is stated that:

In the provisions of section 20180 (Now California Government Code Section 20160-20164) pertaining to the duty of the board to correct errors, it states that when the board finds that through "inadvertence, oversight, mistake of fact, mistake of law, or other cause" any act required by law to be taken by the system was not taken or performed when it should have been taken or performed, the board "shall cause the books, accounts and records of this system to be corrected accordingly, so as to make the status, rights, and obligations of the employee or member, his public employer and this system the same in every respect that they would be if the action had been duly taken or performed at the proper time."

The action that should have been performed in this circumstance is the action of providing timely, accurate, and complete guidance and advice that is needed and sought for by a member in order to ensure all critical paperwork is completed correctly. This should have been done at the time of the face to face encounter on August 18th, 2010, rather than *after* the application was submitted. This misguidance was inadvertent and a mistake of fact by the representative, who fully intended that she was providing the accurate advice and guidance that I could rely upon, but ultimately was instead an error and omission of critical information. The Information and facts provided to me retrospectively by CalPERS are easily understood, just as they would have been if they had been provided at the time that I sought them. But, unfortunately, that is not what happened.

I went to CalPERS for assistance before finalizing and submitting both applications, and now I come to you again, hoping that you can, that you will, make a difference to my life and future and rectify this error, and that you will each look at my case in terms of what is just and right.

In summation, I am requesting, and hoping for, your fair assessment and determination of my appeal. I am asking for CalPERS to honor my application for ARSC, funded by my deferred compensation. Beyond the aspects of "estoppel", I am requesting your honest and compassionate consideration of this fully funded and desperately needed request.


Melinda A. Tackitt