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 of: JAMES D. GATES, and KATHLEEN J. GATES, and EASTERN MUNICIPAL WATER DISTRICT, Respondents.	CalPERS Case No. 2012-0518 OAH No. 2012080197

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on February 13, 2013, in the presence of CHP security.

Wesley Kennedy, Senior Staff Counsel, represented petitioner Karen DeFrank, Chief, Customer Account Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Respondent James D. Gates (Mr. Gates) appeared and represented himself.

No appearances were made by or on behalf of respondents Kathleen J. Gates (Ms. Gates) or Eastern Municipal Water District (Water District), although Ms. Gates testified in this matter.

Oral and documentary evidence was received and the matter was submitted on February 13, 2013.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED 3-14 2013
Barbara Moseman

ISSUE

Is CalPERS allowed to correct the error it made when it mistakenly allowed respondent James D. Gates to redeposit his contributions, plus interest, and to restore service credit to his retirement account?

FACTUAL FINDINGS

Preliminary Matters

1. Mr. Gates is employed by Eastern Municipal Water District. He is a member of CalPERS by virtue of his employment. Ms. Gates, Mr. Gates' former wife, is employed by the Hemet Unified School District. She is a miscellaneous member of CalPERS by virtue of her employment. On March 18, 2009, during their divorce proceedings, the Riverside County Superior Court, in case number HED008789, awarded Ms. Gates 50 percent of the accumulated retirement contributions and service credit in Mr. Gates' CalPERS retirement account.

2. On April 21, 2009, CalPERS advised Mr. Gates that it completed the separation of his account in accordance with the court's order, crediting Ms. Gates with 13.244 years of service credit and $84,000 and $820.39 in contributions and interest. The balance remaining in Mr. Gates' account was 18.806 years of service credit and $105,926.75 in contributions and interest. CalPERS further advised that if Ms. Gates received a lump sum distribution by either a refund (or rollover) of the contributions and interest credited to her account, Mr. Gates would have the right to redeposit those contributions, plus interest, and restore the service credit to his account. CalPERS stated, "You will be sent written notification should Kathleen Gates elect to receive a refund (or rollover) from their [sic] nonmember account with instructions how to purchase the service credit that was transferred to this non-member account."

3. Effective August 1, 2009, Ms. Gates retired using the service credit awarded to her and her nonmember account with CalPERS.

4. On January 26, 2010,[1] CalPERS received Mr. Gates' Request for Service Credit Cost Information-Redeposit of Withdrawn Contributions. On that form, Mr. Gates checked the box indicating the "Funds transferred due to a community property settlement agreement, and these funds had since been withdrawn by my former spouse or domestic partner." Mr. Gates certified that the information was true and correct.

5. On May 12, 2010 CalPERS advised Mr. Gates that he could repurchase his 13.244 years of service credit at a lump sum costs of and $95,300.66.

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[1] The statement of issues alleges the date as being January 27, 2010, but the date stamp on the document is January 26, 2010.

6. On June 22, 2010, CalPERS notified Mr. Gates that it had received his three checks on June 16, 2010,[2] all of which were credited as payments towards his redeposit of withdrawn contributions.

7. On November 30, 2011, CalPERS notified Mr. Gates that while CalPERS was conducting an administrative review of his account, it determined that CalPERS had offered him the opportunity to redeposit of withdrawn contributions in error because his former spouse had retired on the service credit awarded to her from his retirement account thereby making him ineligible to purchase that service credit. Accordingly, CalPERS stated that it would be removing 13.244 years of service credit from his retirement account and that it would refund him the lump sum amount he paid to purchase that service credit.

8. In response thereto, Mr. Gates advised CalPERS that he would "not allow you to retract on your acceptance of my purchase of 'Redeposit of Withdrawn Contributions' total of 13.244 years [sic]. You approved and accepted my request and payment of such. You had my money since before June 22, 2010. You cashed and deposited into my account." Mr. Gates further stated that he was "holding CalPERS and their representatives 100% responsible for your misleading, and this error. I believe that an administrative review my account should have been done before they the purchase was awarded [sic]."

9. Thereafter, CalPERS notified Mr. Gates of its decision to void his purchase of the service credit and to return to him the funds he provided to purchase that service credit, and of his right to appeal. This hearing ensued.

Witness Testimony

10. Teri Parker, who has assisted Mr. Gates with preparing his taxes and financial documents, discussed the factual history surrounding the repurchase of service credit. She pointed to the various CalPERS documents which advised Mr. Gates on several occasions that his repurchase of service credit was accepted and thereafter was included in his retirement calculations.

11. Ms. Gates testified that she never received a lump sum distribution by refund or rollover of the contributions and interest awarded to her in the divorce and that she has been receiving retirement funds from that CalPERS account.

12. Matthew Eubanks, Staff Services Manager II of the Service Credits, Costing and Elections Department, testified that CalPERS erred when it allowed Mr. Gates to redeposit his contributions that had been awarded to Ms. Gates during the divorce because she never received a lump sum distribution from that account. Mr. Eubanks explained that the rationale behind the CalPERS policy is to prevent CalPERS from having an unfunded liability. Mr. Eubanks acknowledged that the analyst who reviewed Mr. Gates' request to

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[2] The statement of issues alleges the checks were received on June 15, 2010, but the CalPERS letter indicated they were received June 16, 2010.

repurchase his contributions had done a less than thorough job and should have performed some additional analysis; if that additional analysis had been performed, CalPERS would have discovered that Ms. Gates had not received a distribution and CalPERS would have denied Mr. Gates' request, thereby preventing this error from occurring.

13. Mr. Gates testified that he had consulted several financial planners and accountants in an effort to ensure that he complies with all financial requirements. His human resources (H.R.) manager informed him that he was able to repurchase the contributions awarded to his ex-wife. He completed the paperwork with H.R.'s assistance, it was approved by CalPERS, he deposited the lump sum required, he has been receiving statements indicating his service credits include his repurchase of those contributions, and he wants CalPERS to abide by that decision. Mr. Gates introduced several CalPERS documents in which he was advised of his retirement account balances and service credit. Those documents indicated that on several occasions his retirement information included the service credit he repurchased in 2010. Based upon his testimony, it became evident that Mr. Gates wanted CalPERS to continue to abide by those mistaken and erroneous calculations for purposes of his retirement; essentially he put forth a collateral estoppel argument.

Mr. Gates admitted that he had never received a letter from CalPERS notifying him that Ms. Gates had received a refund or rollover from her account. Mr. Gates offered no testimony to explain why he checked off the box to indicate that his ex-wife had received a lump sum distribution of the distribution when, in fact, she had not. Although as noted below, it did not appear he intended to mislead CalPERS, more that he misunderstood the definition as used by CalPERS for the word "distribution."

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54).

2. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Applicable Statutes

3. Government Code section 20160 authorizes CalPERS to correct errors.

4. Government Code section 21251.15 instructs CalPERS how member accounts are to be handled when they have been divided by a court order in a divorce proceeding.

5. Government Code section 21290 provides in part that during a divorce proceeding the court shall order that the contributions and service credits accumulated during the marriage be divided into two separate and distinct accounts.

6. Government Code section 21296 defines when the nonmember's retirement shall be effective and when the retirement allowance begins to accrue.

7. Government Code section 21297 defines nonmember final compensation.

8. Government Code section 21298 provides when a nonmember is entitled to receive retirement allowances.

Equitable Estoppel

9. With regard to the well-established doctrine of equitable estoppel, "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. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." (*Seymour v. Oelrichs* (1909) 156 Cal. 782, 795, quoted in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488.)

10. "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (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 .... The doctrine of equitable estoppel may be applied against the government where justice and right require it." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305-306.) The party asserting the estoppel bears the burden of proof. (*Killian v. City and County of San Francisco* (1978) 77 Cal. App. 3d 1, 16.)

11. "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 an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*City of Long Beach v. Mansell, supra,* 3 Cal.3d at 496-497.)

However, it is generally "held that the power of a public officer cannot be expanded by application of this doctrine." (*Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 667.) In other words, the doctrine may not be applied when doing so "would have the effect of granting to the state's agents the power to bind the state merely by representing that they have the power to do so." (*Ibid.*)

Evaluation

12. Mr. Gates erroneously advised CalPERS that Ms. Gates had withdrawn funds, when she had not. Apparently, CalPERS relied on that false statement and allowed him to repurchase those contributions. No explanation for that false statement was offered although it appeared from Mr. Gates' testimony that the interpreted the word "distributed" as used on that form to mean that the funds had been taken out of his account. It did not appear as though Mr. Gates ever intended to mislead CalPERS. In that regard, CalPERS is strongly encouraged to change the wording on that form to prevent similar mistakes from occurring in the future. In any event, allowing Mr. Gates to repurchase his contributions awarded to Ms. Gates was an error and CalPERS is entitled to correct that mistake.

On another note, while Mr. Eubanks did admit in response to the court's questioning that the CalPERS employee had not been thorough in her review of Mr. Gates request, CalPERS is reminded that its decisions directly affect its members' retirement planning and decision making, and it is essential that CalPERS employees perform their jobs with the utmost due diligence. This case perfectly illustrates what happens when analysts do not perform their jobs duties, thereby undermining the entire CalPERS system. CalPERS should take steps to insure that this type of error does not reoccur.

Finally, CalPERS asserted that it would keep the interest obtained from the lump sum purchase and apply it towards Mr. Gates' retirement account. However, had CalPERS performed its due diligence, Mr. Gates would have had those funds available to him to invest elsewhere in 2010. As such, he is entitled to his lump sum plus interest if he so desires - the choice is his. Alternatively, he may elect to have the interest earned on that lump sum remain in his CalPERS retirement account. The choice is entirely up to Mr. Gates.

ORDER

CalPERS may remove 13.244 years of service credit and refund to Mr. Gates his lump sum contribution.

Mr. Gates may elect to have the interest earned on that lump sum remain in his account or be returned to him.

DATED: March 13, 2013

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings