

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding
Retirement Benefit Formula and
Overpayment by:

JOSEFINA LIMOS,

Respondent.

Agency Case No. 2012-0580

OAH No. 2013030417

PROPOSED DECISION

Administrative Law Judge Steven C. Owyang, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on June 20, 2013.

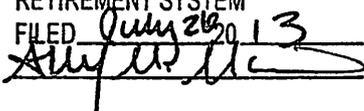
Elizabeth Yelland, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Josefina Limos was present. She was not represented by legal counsel.

The matter was submitted for decision on June 20, 2013.

FACTUAL FINDINGS

1. Karen DeFrank, Division Chief, Retirement Account Services Division, CalPERS, filed the Amended Statement of Issues in her official capacity.
2. CalPERS requested official notice of the Board of Administration's precedential decision *In the Matter of the Appeal of Decreased Level of Retirement Allowance of Harvey H. Henderson* (1998) Precedential Board Decision No. 98-02, and the board's final decision *In the Matter of the Statement of Issues Against Michael T. Campbell* (2012). Official notice is taken of both decisions.
3. Respondent Josefina Limos became a member of CalPERS on August 6, 1974, through her employment with the City of Oakland. She separated from her employment with Oakland in October 1999. The City of Oakland did not report respondent's separation to CalPERS, either at the time or thereafter.

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RETIREMENT SYSTEM
FILED July 26, 2013


4. After leaving her employment with the City of Oakland, respondent was employed for several years with the City of Richmond. Respondent was under a "2.7% at 55" benefit formula during her employment with the City of Richmond.

5. The City of Oakland contracted with CalPERS to participate as a local public agency member pursuant to Government Code section 20460 et seq.

6. During the entire period of time respondent was employed by the City of Oakland, it had contracted for the "2% at 55" benefit formula for local miscellaneous members such as respondent.

7. On March 18, 2004, respondent sent an email message to CalPERS:

I had prior years [sic] service with Oakland, which at the time when I left was at 2% at 55. They still are, but they will be adopting 2.7% at 55 beginning July 1, 2004. When I requested for an estimate of my retirement effective Oct. 24, 2004, my service with Oakland was computed at 2% at 55 and my service with Richmond was at 2.7% @ 55. My question is, if I go back to work for Oakland in June of 2004, and still retire in October, 2004, will all my years of service with Oakland be computed at 2.7% at 55? On the other hand, if I go back to for [sic] Oakland in July 2004, how will all of my years of service with Oakland be computed?

CalPERS replied to respondent on March 22, 2004:

Thank you for contacting CalPERS.

Yes, going back to work with the City of Oakland will allow your previous service credit to be converted to the 2.7% @ 55 formula. Technically, you only have to be employed for one-day [sic] on active payroll to be eligible for this conversion.

We hope this information answers your question. Please let us know if we can be of any further assistance.

Member Services Division
CalPERS

The above messages demonstrate that CalPERS had notice that respondent had left her employment with the City of Oakland and that she was under the "2% at 55" benefit formula while she was employed there. Apparently, this information was not retained in CalPERS files or did not reach the appropriate staff members, as CalPERS later miscalculated respondent's retirement benefit.

8. On June 19, 2004, the City of Oakland amended its contract to include Government Code section 21354.5, which provided a "2.7% at 55" benefit formula for local miscellaneous members. This was more than four years after respondent had separated from her employment with Oakland. Section 21354.5 states, in part:

(c) This section shall supersede Sections 21353, 21354, 21354.1, and 21354.4 with respect to a local miscellaneous member who is employed by a contracting agency on or after the date this section becomes applicable to the contracting agency.

Respondent was not employed by the City of Oakland on or after June 19, 2004, and was not eligible for the "2.7% at 55" benefit formula.

9. On January 18 and June 7, 2005, CalPERS mailed respondent service retirement estimates at her request. Apparently because the City of Oakland had not reported respondent's separation to CalPERS, and because the information in respondent's March 2004 email exchange with CalPERS was not taken into account, CalPERS erroneously calculated her service credit with the City of Oakland using the "2.7% at 55" formula. Respondent relied on those estimates and filed for service retirement on June 30, 2005.

10. Respondent retired for service effective July 2, 2005, and thereafter received a monthly retirement payment erroneously calculated using the "2.7% at 55" formula.

11. Almost six years later, in an April 7, 2011, letter, CalPERS informed respondent that she was not entitled to the "2.7% at 55" benefit formula because her employment with the City of Oakland had ended before the effective date of that formula. CalPERS further informed respondent that her retirement benefit had been erroneously calculated and that "the error is often the result of CalPERS not receiving separation information from your former employer." CalPERS did not mention the March 2004 email exchange with respondent. CalPERS stated that its Benefit Services Division was reviewing respondent's retirement calculation and that it would send her a letter providing the specific impact to her retirement benefit. CalPERS informed respondent that she had the right to appeal its decision.

12. In an April 25, 2011, letter, respondent informed CalPERS of her intent to appeal.

In a June 16, 2011, letter, CalPERS informed respondent that her retirement benefit had been corrected, using the "2% at 55" formula. CalPERS also acknowledged receiving respondent's letter stating her intent to appeal. CalPERS wrote:

Your allowance has been corrected using the 2% at 55 formula[.] This change decreases your monthly allowance by

\$948[.]80 and results in an overpayment of \$65,165[.]66 effective from your retirement date through July 31, 2011[.] The gross overpayment of \$65, 165[.]66 was reduced to \$33,052[.]76 in accordance with Government Code section 20164, which limits the collectible overpayment period to three years from the date that your retirement benefit is reduced[.]¹

13. In a June 29, 2011, letter, respondent formally appealed. She wrote:

I waited for the letter from CALPERS Benefit Division regarding the specific dollar impact on my retirement benefits before sending my formal appeal. I received the letter on June 25, 2011. The reduction of \$948.80 in my monthly allowance, as stated on the letter has a significant impact on my finances. To add \$33,052.76, as the amount I owe, which can be payable in the amount of \$600.96 in 55 months just added to my financial hardship. As much as I would like to avail myself of the services of an attorney, the reality is I cannot afford to have such services.

I did not retire on impulse. I had been going to CALPERS for calculations to see if I can afford to retire. Listed below is a chronology of correspondences from CALPERS for retirement estimates and other letters I received from CALPERS. Also attached are copies of the letters.

Respondent provided a detailed chronology of her communications to and from CalPERS from January 27, 2004, through June 25, 2011. She further wrote:

Had I known that the retirement computations provided to me on Dec. 9, 2004, Jan. 18, 2005 and June 7, 2005 were incorrect, I would not have retired, knowing that I cannot afford to retire. I would have stayed employed in Richmond and work [*sic*] for 4 plus more years. Had I stayed with Richmond for that period, I would have qualified for the health premium benefit given to employees who had 10 years of service when they retired. Right now, I pay for my own health premium, which I don't know if I can afford, given that I am still paying my mortgage and home equity loan.

¹ For some unknown reason no periods (the punctuation mark) appeared in the CalPERS letter.

Respondent wrote further:

I am not a lawyer, and cannot afford to pay for the services of a lawyer and therefore I am not familiar with the appeals process. I understand that you have the right to correct your mistakes and a duty to protect taxpayers' dollars, although the bottom line is I am being punished for a mistake made by somebody else. As difficult as it is on my part, I am trying to grasp the outcome and resulting financial burden on me. As I stated on the first page of this letter, reducing my retirement allowance by \$948.80 is already a huge financial burden, with my mortgage and equity line of credit taking a huge chunk of my retirement allowance. Adding the \$33,052 [sic] to pay, although CALPERS offered for me to do it in installments of \$601 [sic] in 55 months, made it a catastrophic financial burden. I just cannot afford a reduction of \$1,550.00 a month. This is not what I anticipated when I retired. If other retirees can afford to go on cruises, I can't and have not been, and with this coming up, maybe never will. I had always lived within my means.

Despite the financial hardship caused by the \$948.80 reduction in her monthly benefit, respondent did not seek its reversal. Instead, respondent asked that the \$33,052.76 overpayment be waived and that she be released from that liability.

14. Due to the miscalculation of respondent's retirement benefit, CalPERS overpaid her \$65,165.66 from her retirement date through July 31, 2011. CalPERS seeks to recover \$33,052.76 of that overpayment.

15. The miscalculation and subsequent reduction of respondent's retirement benefit by \$948.80 caused respondent great financial distress. Had she known the CalPERS retirement estimates were incorrect she would not have retired in July 2005. She would have continued working for the City of Richmond where she would have qualified for a health premium benefit after about four additional years of service.

16. Almost half of respondent's retirement benefit is spent on her mortgage. She has sought to reduce her expenses in any way she can. She stopped buying groceries at Safeway and now shops at dollar stores and at the Grocery Outlet. She has reduced her monthly grocery budget from \$500 to \$200, and eats mainly chicken parts on sale. She adjusted her car insurance to lower the premium.

17. To save money, respondent in August 2011 opted out of the CalPERS medical plan and enrolled in Kaiser Senior Advantage. Unfortunately, respondent was scheduled for unforeseen surgery on June 25, 2013 (just five days after the hearing in this matter). Under her current health plan, respondent must pay for all lab work, an increased charge for

doctor's office visits, prescription costs, and the cost of surgery; all of these would have been covered under the CalPERS health plan.

18. At hearing, respondent reiterated her request that CalPERS forgive the \$33,052.76 overpayment. In paragraphs 39 through 44 of her statement to the board, respondent wrote:

39. Having unloaded what is in my heart, and so I can focus on my surgery this Tuesday and move forward without the additional hardship on my side, I am respectfully requesting that the amount of \$33,052.76 that CALPERS is seeking to recuperate from me be forgiven based on several facts which include the following:

40. CALPERS forgave the overpayment amount to Mr. Harvey H. Henderson, as stated on page 3 in the Precedential Decision 98-02, In the matter of the Appeal of Decreased Level of Retirement Allowance of Harvey H. Henderson, Exh U. Why would I be treated differently from Mr. Henderson? Why would I be given disparate treatment? Both of our allowances have been reduced, and I agree with that. I cannot do anything about that. All I am asking is that the same treatment accorded to Mr. Henderson be accorded to me in terms of forgiving the amount CALPERS said I owe them.

41. Mr. Henderson's monthly benefit was reduced by approximately 11.85% and went unnoticed for almost 4 years. My monthly benefit was reduced approximately 13.56% and went unnoticed for almost 6 years. The comparison in an EXCEL spreadsheet is on Exh. V. The percentage reduction is very close with a difference of only 1.71%.

42. I am asking for this consideration in that the additional reduction of \$600.96 in addition to \$948.80 already in effect for a total of \$1,549.76 would make me unable to meet my monthly financial obligations and suffer severe financial hardship through no fault of my own. CALPERS had already made my life miserable, the additional reduction would just destroy the remainder of the years left in my life. I made my retirement decision in good faith based on the calculations provided to me by CALPERS.

43. The amount CALPERS is claiming due is not a result of any wrongdoing on my behalf. The responsibility lies with the City of Oakland who failed to notify CALPERS of my leaving their employ and subsequent calculations were based on erroneous and/or incomplete information provided by the City of Oakland to CALPERS.

44. That is all I can say on my behalf.

LEGAL CONCLUSIONS

1. At hearing, respondent did not contest the application of the “2% at 55” benefit formula for her years of service with the City of Oakland. That is the correct formula. Nor did respondent contest the \$948.80 reduction in her monthly benefit.

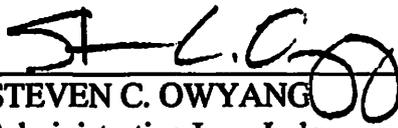
2. Respondent is not represented by an attorney. She cannot afford legal representation. She did not invoke the doctrine of equitable estoppel. As was the case in the board’s 1998 precedential decision, *In the Matter of the Appeal of Decreased Level of Retirement Allowance of Harvey H. Henderson, respondent*, this is a dispute over who should pay for a mistake CalPERS made when respondent’s employer (City of Oakland) failed to report the proper retirement benefit formula. Additionally in this case, however, both CalPERS and respondent knew, as evidenced by their March 2004 email exchange, that respondent had left her employment with the City of Oakland, and that her retirement benefit should properly have been calculated using the “2% at 55” formula. Nevertheless, CalPERS provided respondent January 18 and June 7, 2005, retirement estimates using the “2.7% at 55” benefit formula. Respondent relied on these erroneous estimates when she filed for service retirement on June 30, 2005.

3. As in *Henderson*, equitable estoppel would not have been successfully invoked in the present case. Nevertheless, as CalPERS recognized at hearing and stated in its hearing brief, “If this were a matter driven solely by the equities of the situation, then respondent wins. She did not make the mistake, Oakland and CalPERS did.” The \$948.80 monthly reduction alone has placed respondent in a very difficult financial situation. Having planned her retirement and lived her life for the past several years based on the erroneous calculation, respondent now is faced not only by the \$948.80 reduction in her monthly benefit, but also with the prospect of having to repay \$33,052.76 of the amount overpaid to her. She cannot afford to do so. As respondent notes, however, the board in *Henderson* agreed to waive or forgive the overpayment amount. That is the appropriate resolution of the present case. The \$948.80 reduction in respondent’s monthly benefit shall be upheld, but her appeal regarding the \$33,052.76 overpayment amount will be granted.

ORDER

1. The CalPERS decision decreasing respondent's level of retirement benefit by \$948.80 per month is affirmed.
2. Respondent's appeal of the CalPERS decision to recover \$33,052.76 overpaid to her is granted. Respondent will not be required to repay that amount.

DATED: July 19, 2013



STEVEN C. OWYANG
Administrative Law Judge
Office of Administrative Hearings