

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Concerning:

MICHAEL FITZGERALD,

Respondent.

CalPERS Case No. 2013-0437

OAH No. 2013060796

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Orange, California, on May 15, 2014.

Cynthia Rodriguez, Senior Attorney, represented petitioner Karen DeFrank, Chief, Customer Account Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Respondent Michael Fitzgerald (Mr. Fitzgerald) appeared and represented himself.

The matter was submitted on May 15, 2014.

ISSUE

Should CalPERS be required to honor the \$122,574.04 cost it quoted Mr. Fitzgerald to purchase Additional Retirement Service Credit (ARSC)?

FACTUAL FINDINGS

Preliminary Matters

1. Mr. Fitzgerald was employed by the City of Anaheim as a firefighter/paramedic. By virtue of his employment he is a member of CalPERS.
2. On October 7, 2011, Mr. Fitzgerald submitted a Request for Service Credit Cost Information (Request) for ARSC.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED June 20, 2014

C. Bodily

3. On April 26, 2012, CalPERS completed the Request and mailed a Confirmation of Intent to Purchase (Confirmation) to Mr. Fitzgerald. CalPERS advised Mr. Fitzgerald that the lump sum amount to purchase three (3) years of ARSC was \$122,574.04, which was due in 30 days.

4. On June 26, 2012, after the 30 days had lapsed, Mr. Fitzgerald signed and returned his Confirmation. On June 29, 2012, Mr. Fitzgerald sent a letter to CalPERS asserting that he was given incorrect information regarding his timelines and asking CalPERS to honor the costs as outlined in the Confirmation.

5. CalPERS declined to honor the Confirmation as untimely, notified Mr. Fitzgerald of his right to appeal, and this hearing ensued.

Documents Introduced at Hearing

6. Mr. Fitzgerald sent CalPERS a letter (Exhibit 4) outlining his many conversations with CalPERS employees. He noted that he had been told about delays because of the "billion dollar computer" that was causing problems. Mr. Fitzgerald wrote that during his last conversation before receiving his application, he was advised that applications would not be processed until at least the Fall, if not later, but that CalPERS could resend him "the documents by mail to look over." Mr. Fitzgerald noted that two days after that phone call he received "what looked like duplicate documentation." Having been advised that his application would not be processed and until much later, Mr. Fitzgerald filed those documents with his other CalPERS paperwork and prepared "for the long, long wait ahead for the computer fix to begin processing again." When Mr. Fitzgerald called in June 2012 to "check on the status of the computer," he was advised that he had "lost his place in line" and would have to refile his request for ARSC. He was also told that it would now cost him in excess of an additional \$4,000 to purchase his service credit. Mr. Fitzgerald wrote that had he known the documentation he received in April was his application, he would have immediately completed and returned it.

7. Mr. Fitzgerald sent CalPERS a letter (Exhibit 6) in which he claimed that he was given "many confusing statements...during several phone conversations" with CalPERS personnel. Mr. Fitzgerald claimed he was told there were computer problems which led to a delay in his application being processed; later, in April of 2012, he was told that his application would not be processed until the Fall or possibly the end of the year. Mr. Fitzgerald claimed he asked whether applications were being hand-processed and was told they were not. Mr. Fitzgerald stated he was reassured by the CalPERS employees that he would not lose his place in line and that "duplicate paperwork" would be sent to him for his records. Mr. Fitzgerald acknowledged that when he received an envelope from CalPERS he thought it was this "duplicate paperwork;" he did not think it would be his application based upon his telephone conversations with CalPERS.

8. CalPERS introduced a Customer Touch Point Report (Report) which documented contact between CalPERS and Mr. Fitzgerald. The document indicated that on

October 21, 2011, there was contact regarding service credit purchase. On December 28, 2011, there were two contacts with Mr. Fitzgerald in which the CalPERS staff member documented that Mr. Fitzgerald was "very upset" because he had turned in his ARSC packet in October and had been told it would only take approximately one month for him to receive the application, but two months had now elapsed. The note documented that it was explained to Mr. Fitzgerald that he could retire and then receive his application and that he was informed that because of a new computer system it would be "late spring" before he would receive his application. The staff member requested that her supervisor contact Mr. Fitzgerald.

A note on December 29, 2011, documented a conversation with Mr. Fitzgerald during which it was explained to him that requests were being processed in the order received and that CalPERS would be unable to provide Mr. Fitzgerald with an accurate timeframe for when his application would be processed due to the new computer system. Mr. Fitzgerald was informed that there would be an update to the new system in late spring 2012. Mr. Fitzgerald was upset with the uncertainty of that response, as he wanted to retire in May 2012. A note dated April 24, 2012, documented contact with Mr. Fitzgerald in which he was again advised that the ARSC applications were being processed in the order received and there was no information as to when his application would be completed. The note documented that Mr. Fitzgerald disconnected the call.

Witness Testimony

9. Mr. Fitzgerald testified about his many phone calls to CalPERS to check on the status of his application and his understandable frustration regarding the delay. Mr. Fitzgerald denied hanging up on the CalPERS employee. While he did acknowledge being frustrated, he denied ever being impolite. Although Mr. Fitzgerald claimed he received different responses, the CalPERS Report documented that he received a consistent answer throughout his contact with CalPERS. Mr. Fitzgerald testified that during his final conversation with a CalPERS employee before he received his application, he complained about the delay and the employee again explained about the new computer system. According to Mr. Fitzgerald, the CalPERS employee told Mr. Fitzgerald that he could resend him "duplicate paperwork" for his records. It was unclear what the "duplicate paperwork" would be since the only documentation that Mr. Fitzgerald was waiting for was his application. Mr. Fitzgerald testified that when he received his application, he glanced at it and set it aside because he believed it was the "duplicate paperwork" he had been told he would receive. He did not realize it was his application.

Mr. Fitzgerald requested that he be allowed to purchase his service credit at the initially quoted price because he was late submitting his application due to the misleading information he was given by CalPERS employees during his numerous telephone conversations with them.

10. Sharon Hobbs, Staff Services Manager II, CalPERS Customer Account Services Division, testified that the ARSC program is a two-step process. In the first step

members are provided with information regarding the costs to purchase between one and five years of service. In the second step the members select the number of years they wish to purchase, how they intend to pay for it, and return that application to CalPERS within a certain timeframe. Ms. Hobbs explained the factors that go into calculating cost to purchase service credit, which is why members must make their choices within a certain timeframe, because those factors change with time. Mr. Fitzgerald did not return his application within the required timeframe. Ms. Hobbs testified that allowing him now to purchase his service credit at the initially quoted price would result in an unfunded liability for CalPERS.

Ms. Hobbs explained that CalPERS employees document telephone calls with members on the Report (Exhibit 7). The Report did not corroborate Mr. Fitzgerald's testimony regarding what he was told during his telephone calls with CalPERS employees.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greator 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 subject to certain conditions. The request to correct the error must be made within six months, the error must be the result of mistake, inadvertence, surprise, or excusable neglect, as those terms are used in Code of Civil Procedure section 473, and the correction must not give the individual a status, right or obligation not otherwise available. Section 20160 provides that the one seeking the correction bears the burden of proof.

Evaluation

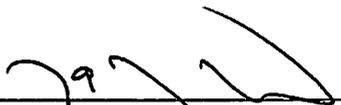
4. Mr. Fitzgerald acknowledged receipt of the application. Although he presumed that the letter from CalPERS was "duplicate documentation," it was incumbent upon him to read the correspondence he received. Moreover, since the only documentation that he was waiting to receive from CalPERS was his ARSC application, his claim that a CalPERS employee told him he would be receiving "duplicate documentation" made no sense, as there was no duplicate documentation for CalPERS to send. Even assuming Mr. Fitzgerald had been told that by a CalPERS employee, he still bore the responsibility of reading his mail from CalPERS, especially because he was anxiously awaiting his application. Although Mr. Fitzgerald made a timely request to correct his error, his failure to submit his application on time was not due to CalPERS's mistake, inadvertence, surprise, or

excusable neglect. It was because he failed to read what he had been sent. Even though he was advised that there were problems and delays caused by the new computer, he was still required to carefully read all correspondence sent to him from CalPERS. His failure to do so does not result in his being allowed to purchase his ARSC at the initially quoted cost.

ORDER

Mr. Fitzgerald's appeal of CalPERS's decision to deny his request that CalPERS honor the \$122,574.04 cost it quoted him to purchase Additional Retirement Service Credit is denied.

DATED: June 19, 2014



MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings