ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal Regarding Retirement Benefit Formula of:	Case No. 2013-0685
CORAL L. HILDER, Respondent,	OAH No. 2013100762
and	
DEPARTMENT OF INSURANCE, Respondent.	

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on July 8, 2014, in Sacramento, California.

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

Coral L. Hilder (respondent) represented herself.

There was no appearance by or on behalf of the Department of Insurance (DOI).

Evidence was received, the record was closed, and this matter was submitted for decision on July 8, 2014.

ISSUE

Respondent worked for the state of California for approximately 24 years. During that entire time, she was classified as a "state peace officer/firefighter member" of CalPERS (POFF member) as that term is defined in Government Code section 20391. From 1987 to 1997, she worked for the DOI. In 1997, she began working for what is now known as the California Department of Corrections and Rehabilitation (CDCR). She service retired in November 2011. The issue in this case is whether the enhanced retirement benefit formula

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED July 18 2014
[signature]

of 3 percent at age 50 should be applied to the approximately 10 years respondent spent at the DOI between 1987 and 1997 when determining her retirement benefits.

FACTUAL FINDINGS

Respondent's Covered Employment

1. In November 15, 1984, respondent began working for the Sacramento Police Department in a civilian position. While respondent was in this position, she was classified as a miscellaneous member of CalPERS.

2. On August 3, 1987, respondent began working for the DOI as a Special Investigator. On October 1, 1989, she became a Senior Investigator. On April 13, 1990, she became a Fraud Investigator. In these positions, she was designated as R07, and was a member of Bargaining Unit 7. She was classified as a POFF member of CalPERS.

3. On March 3, 1995, respondent promoted to Supervisor Fraud Investigator at the DOI. She was designated as S07, and was associated with Bargaining Unit 7. She remained classified as a POFF member.

4. On June 23, 1997, respondent was appointed as a Correctional Lieutenant at the CDCR. She was designated as S06, and was associated with Bargaining Unit 6. She remained classified as a POFF member.

5. On July 31, 1998, respondent was appointed as a Special Agent for the CDCR. She was designated as E97, and was associated with Bargaining Unit 6. She remained classified as a POFF member.

6. On September 3, 2008, respondent was appointed as a Senior Special Agent for the CDCR. She was designated as E98, and was associated with Bargaining Unit 6. She remained classified as a POFF member.

7. Respondent service retired effective November 14, 2011.

Changes to Respondent's Retirement Benefits Formulas Over Time

8. When respondent began working at the DOI in 1987, her retirement benefit formula was 2.5 percent at age 55.

9. Effective January 1, 2000, pursuant to SB 400, respondent's retirement formula for the almost 10 years she worked at the DOI from 1987 to 1997 was retroactively enhanced to 3 percent at age 55.

10. On June 19, 2002, SB 183 was enacted. Among other things, SB 183 added section 21363.8 to the Government Code. Government Code section 21363.8 enhanced the retirement formula for POFF members in Bargaining Unit 7 from 3 percent at age 55 to 3 percent at age 50, effective January 1, 2004. In relevant part, Government Code section 21363.8 provides:

> (a) Upon attaining the age of 50 years or more, the combined current and prior service pension for a state peace officer/firefighter member described in subdivision (c) who retires or dies on or after January 1, 2004, is a pension derived from the contributions of the employer sufficient when added to the service retirement annuity that is derived from the accumulated normal contributions of the member at the date of his or her retirement to equal 3 percent of his or her final compensation at retirement, multiplied by the number of years of state peace officer/firefighter service, as defined in subdivision (d), subject to this section with which he or she is credited at retirement.
>
> [¶] ... [¶]
>
> (c)(1) This section shall apply to state peace officer/firefighter members under this part who, on or after January 1, 2004, are employed by the state and are members of State Bargaining Unit 7.
>
> (2) This section may also apply to state peace officer/firefighter members in managerial, supervisory, or confidential positions that are related to the members described in paragraph (1) and to officers or employees of the executive branch of state government who are not members of the civil service and who are in positions that are related to the members described in paragraph (1), if the Department of Human Resources has approved their inclusion in writing to the board.

11. Government Code section 21363.4 enhanced the retirement formula for POFF members in Bargaining Unit 6 to 3 percent at age 50, effective January 1, 2006. In relevant part, Government Code section 21363.4 provides:

> (a) Upon attaining the age of 50 years or more, the combined current and prior service pension for a state peace officer/firefighter member described in subdivision (c) who retires or dies on or after January 1, 2006, is a pension derived from the contributions of the employer sufficient when added to the service retirement annuity that is derived from the

accumulated normal contributions of the member at the date of his or her retirement to equal 3 percent of his or her final compensation at retirement, multiplied by the number of years of state peace officer/firefighter service, as defined in subdivision (d), subject to this section with which he or she is credited at retirement.

[¶] ... [¶]

(c) For purposes of this section, "state peace officer/firefighter Member" means state peace officer/firefighter members under this part who, on or after January 1, 2006, are employed by the state and are members of State Bargaining Unit 6 or State Bargaining Unit 8, and may include state peace officer/firefighter members in related managerial, supervisory, or confidential positions and officers or employees of the executive branch of state government who are not members of the civil service, provided the Department of Human Resources has approved their inclusion in writing to the board.

12. In accordance with Government Code section 21363.4, CalPERS applied the enhanced retirement benefit formula of 3 percent at age 50 to all of respondent's service with the CDCR from 1997 to when she retired in November 2011. In addition, in 2006, respondent purchased four years of additional retirement service credit, which was also subject to the enhanced retirement benefit formula of 3 percent at age 50.

Respondent's Communications with CalPERS Re: Retirement Benefits

13. On January 5, 2006, respondent called CalPERS to have her account corrected. She informed the analyst to whom she spoke that her service with the DOI should be subject to the enhanced retirement benefit formula of 3 percent at age 50.

14. On January 13, 2006, Sandra May, a CalPERS Retirement Program Specialist II, contacted respondent and informed her that under Government Code section 21363.8, only active POFF members in Bargaining Unit 7 received the 3 percent at age 50 formula on January 1, 2004. Ms. May explained that, because respondent had left Bargaining Unit 7 prior to that date, her past DOI service was not eligible for the 3 percent at age 50 formula.

15. On October 9, 2007, CalPERS applied the 3 percent at age 50 enhanced retirement benefit formula to all of respondent's state service, including her approximately 10 years of service with the DOI from 1987 to 1997.

16. On May 15, 2008, respondent called CalPERS again to request that all her state employment be subject to the enhanced formula of 3 percent at age 50.

17. On May 20, 2008, a CalPERS employee in the Account Maintenance Unit, Actuarial and Employer Services Division, sent respondent a letter, which, in relevant part, stated:

> Per your request, a review of your years of service toward retirement with [CalPERS] has been completed.
>
> As of April 30, 2008, you have 24.826 years of "state" service under the 3% at age 50 formula and 2.615 years with the City of Sacramento under the 2% at age 55 formula.
>
> This correction was done on October 9, 2007 and will appear on your 2007/2008 annual statement.

18. Respondent received Annual Member Statements from CalPERS for 2008, 2009, 2010, and 2011. All four of these Annual Statements showed that all of respondent's state service, including her approximately 10 years at the DOI between 1987 and 1997, was subject to the enhanced retirement benefit formula of 3 percent at age 50. Written in italics at the bottom of the first page of each of these Annual Member Statements was the following statement:

> *While every effort has been made to ensure the accuracy of this report, it should be understood that it does not have the force and effect of law, rule, or regulation governing the payment of benefits. Should any difference or error occur, the law will take precedence.*

19. When respondent service retired effective November 14, 2011, CalPERS began paying her pension benefits calculated based upon the enhanced retirement benefit formula of 3 percent at age 50 applied to all her state service, including her approximately 10 years at the DOI between 1987 and 1997.

20. On June 14, 2012, CalPERS received a tip on its fraud alert line that indicated that respondent's retirement benefits were being calculated based upon an incorrect benefit formula. CalPERS conducted an audit in response to this tip.

21. On September 14, 2012, CalPERS sent respondent letter, which in relevant part, stated:

> A recent audit of account has revealed an error in the benefit formula used in your initial calculation, At retirement, 9.897 years of service you earned while with the Department of Insurance was incorrectly calculated at the enhanced formula of 3.0%@50. The correct formula that applies to your benefit is

> 3%@55. Unfortunately, the adjustment to correct your benefit formula changes your benefit factor and decreases your monthly allowance.
>
> The adjustment to your allowance is effective from your retirement date through August 31, 2012. It has resulted in a $399.49 decrease to your present monthly allowance and an overpayment of $3,821.79. Your allowance will be reduced on the October 1, 2012 dated warrant, and your new allowance will be $7,802.17.

22. On October 1, 2012, CalPERS sent respondent a letter that explained the error that had been made in the calculation of her retirement benefits, in relevant part, as follows:

> As previously advised, to qualify for the 3% @ age 50 retirement benefit formula, you must meet the criteria under GC Section 21363.8 (c) (1), which states in part, this section shall apply to state peace officer/firefighter members under this part who, on or after January 1, 2004, are employed by the State and are members of Collective Bargaining Unit 7.
>
> We have reviewed your employment with the DOI and found that your employment ended on June 22, 1997, which is before the effective date this enhancement took effect on January 1, 2004 for the 3% @ age 50 retirement benefit formula. Therefore, your service with the DOI is not entitled to the 3% @ age 50 retirement benefit formula.

The October 1, 2012 letter advised respondent that she could appeal from CalPERS's determination.

23. On October 29, 2012, respondent appealed from CalPERS's reduction of her retirement benefits.

24. On December 12, 2012, respondent paid CalPERS $3,821.79 to repay the overpayment she had received.

Respondent's Arguments

25. At the hearing, respondent made two arguments against CalPERS's recalculation of her retirement benefits: (1) her position as a Special Agent for CDCR should be deemed to be "related to" her position as a Fraud Investigator for the DOI as that term is used in Government Code section 21363.8, subdivision (c)(2); and (2) because she detrimentally relied upon CalPERS's statements about her retirement benefits before she retired, CalPERS should be equitably estopped from changing her benefits after she retired.

26. Respondent's "related to" argument. As set forth in Finding 10, Government Code section 21363.8, subdivision (c)(2), provides that the 3 percent at age 50 enhanced retirement benefit formula applied to POFF members in "managerial, supervisory, or confidential positions that are related to the [POFF] members" who were employed in Bargaining Unit 7 as of January 1, 2004.

Respondent argued that the position of Special Agent for the CDCR in which she was employed on January 1, 2004, should be deemed to be "related to" her position as a Fraud Investigator for the DOI as that term is used in Government Code section 21363.8, subdivision (c)(2). In both positions, she was a POFF member. She performed essentially the same functions as a Special Agent for the CDCR as she performed as a Fraud Investigator for the DOI. She was continuously employed as a peace officer for the State of California. She had no break in service between when she moved from the DOI to the CDCR. If she had stayed at the DOI instead of moving to the CDCR in 1997, she would have been eligible for the 3 percent at age 50 enhanced retirement benefit formula. Similarly, if she had been at the CDCR her entire state career, all her state service would be subject to the 3 percent at age 50 formula. It is only because she transferred from the DOI to the CDCR that CalPERS asserts that she should lose the right to the enhanced benefit formula. According to respondent, it could not have been the Legislature's intent that a peace officer would lose this benefit merely by transferring to a different state agency.

27. Respondent's equitable estoppel argument. As is clear from the Customer Touch Point Reports submitted by CalPERS, respondent expended considerable time and effort working with CalPERS to plan for her retirement. Respondent retired when she was 50½ years old. She based her retirement date on the information she received from CalPERS. She requested a review and calculation of her state years of service on more than one occasion. She met with CalPERS retirement representatives to determine the appropriate retirement date for her and her family given the retirement benefits she would receive. She has two children attending private universities. She spent many years preparing a family budget for her children's education and her retirement. If CalPERS had told her that her almost 10 years of service at the DOI did not qualify for the 3 percent at age 50 formula she could have taken steps before she retired to address this issue. She could have sought to transfer back to the DOI or she could have delayed her retirement. If she had transferred back to the DOI before she retired and worked just one day after January 1, 2004, all of her DOI service would have been eligible for the 3 percent at age 50 enhanced retirement benefit formula. Respondent argued that the loss of almost $400 a month in retirement income as a result of CalPERS's error has "put a stress on [her] budget and [her] current ability to make ends meet."

Discussion

28. "Related to." Respondent's argument with regard to the interpretation of the term "related to" in Government Code section 21363.8, subdivision (c)(2), was not persuasive. As set forth in that subdivision, individuals in related managerial, supervisory,

and confidential positions could receive enhanced retirement benefits "provided the Department of Human Resources has approved their inclusion in writing to the board."

29. The California Department of Human Resources (CalHR), formerly known as the Department of Personnel Administration (DPA), identified to CalPERS the managerial, supervisory, and confidential positions that were deemed to be "related to" POFF members in Bargaining Unit 7 as of January 1, 2004, under Government Code section 21363.8, subdivision (c)(2). The positions that CalHR deemed to be "related" were those that were associated with Bargaining Unit 7. CalHR did not deem positions associated with other bargaining units to be "related" under Government Code section 21363.8, subdivision (c)(2). When respondent was employed by the CDCR, her positions were associated with Bargaining Unit 6. CalHR did not approve the inclusion of respondent's positions at the CDCR under Government Code section 21363.8, subdivision (c)(2). Consequently, respondent's positions at the CDCR did not qualify her for the 3 percent at age 50 enhanced retirement benefit formula for her service for the DOI under that subdivision. Although the Legislature may not have anticipated when it enacted Government Code section 21363.8 that enhanced retirement benefits would be denied to peace officers who transferred from one state agency to another as respondent did in this case, CalPERS's interpretation of that statute is supported by its plain language.

30. Equitable Estoppel. Pursuant to the doctrine of equitable estoppel, CalPERS may be estopped by its own errors from taking action against a member or denying benefits to a member. In order for the doctrine to apply, a member must establish four elements: "(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." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.)

Even if all four of these elements are proven, equitable estoppel "will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public, ...'" (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.) As the court explained, "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." (*Id.* at pp. 496-497.)

31. In *In the Matter of the Appeal of Decreased Level of Retirement Allowance of Harvey H. Henderson* (November 18, 1998) Precedential Board Decision No. 98-02, OAH No. L-1998120250 (*Henderson*), the Board of Retirement found that it was against public policy for CalPERS to grant a member a retirement allowance in excess of that authorized by statute, stating:

> 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.
>
> The Board owes a fiduciary duty of trustee to a trust fund 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 of higher retirement allowance than permitted by the statutory formula would result in an unfunded liability, and would also have a direct impact on his former employer 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.

32. Respondent established the four traditional elements of equitable estoppel: (1) CalPERS was apprised of the facts relating to her; (2) CalPERS acted in a manner that caused respondent to believe that she could rely upon its representations when making her retirement plans; (3) respondent was not aware that the information she received from CalPERS was not correct; and (4) respondent relied upon CalPERS's incorrect representations to her detriment when making her retirement decisions.

33. But, as set forth in *Henderson*, it would be contrary to public policy to allow respondent to receive enhanced benefits that are not provided by Government Code section 21363.8. 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. Although the results appear to be unduly harsh to respondent, who diligently planned for her retirement in reliance upon the incorrect information provided by CalPERS, the law does not allow for the application of the 3 percent at age 50 enhanced retirement benefit formula to her service at the DOI between 1987 and 1997. Consequently, CalPERS's adjustment of respondent's retirement benefits to reflect the application of a 3 percent at age 55 formula to respondent's DOI service must be upheld. Respondent may seek to reinstate with the DOI if she wishes to receive the enhanced retirement benefits provided in Government Code section 21363.8 for all her DOI service.

LEGAL CONCLUSIONS

1. Because respondent was not a member of State Bargaining Unit 7 or in a related managerial, supervisory, or confidential position as of January 1, 2004, her service with the DOI from 1987 to 1997 does not qualify for the enhanced retirement benefit formula of 3 percent at age 50 set forth in Government Code section 21363.8.

2. Government Code section 20160, which requires CalPERS to correct the errors it makes, provides:

> (a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:
>
> (1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.
>
> (2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.
>
> (3) 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.

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(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).

(e) 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. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

3. CalPERS sought to correct the error it made regarding respondent's retirement benefits within six months after it received a tip that it had incorrectly calculated respondent's benefits. (Findings 20, 21, and 22.) CalPERS's error was the result of mistake, inadvertence, and inexcusable neglect as those terms are used in Code of Civil Procedure section 473. The correction will not provide CalPERS with a status, right, or obligation not otherwise available under the Public Employees' Retirement Law. As set forth in Findings

30 through 33, respondent did not establish that CalPERS should be equitably estopped from correcting the retirement benefit formula applicable to her DOI service.

4. In sum, when all the relevant factors set forth in Government Code section 20160 are considered, in accordance with subdivision (b), CalPERS properly corrected its error in applying the 3 percent at age 50 enhanced retirement benefit formula to respondent's service with the DOI from 1987 to 1997.

ORDER

The appeal of respondent Coral L. Hilder is DENIED. The correction made by the California Public Employees' Retirement System to apply the 3 percent at age 55 retirement benefit formula to respondent's service with the Department of Insurance from 1987 to 1997 is SUSTAINED.

DATED: July 16, 2014

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings