

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:

JOSEPH P. FURMAN,

Respondent.

Case No. 2011-1221

OAH No. 2014040644

PROPOSED DECISION

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on September 9, 2014.

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

Joseph P. Furman (Respondent) represented himself.

Petitioner denied Respondent's request to purchase Additional Retirement Service Credit (ARSC) on the grounds that Respondent was not an active member at the time he sought to purchase the credit. Respondent counters that he filed an application for the purchase of ARSC in a timely manner, while still employed for State of California, and that CalPERS failed to actually notify him of any action taken on his application.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument. On September 16, 2014, Petitioner filed a Post-Hearing Brief, which has been marked for identification as Exhibit 16. Also on September 16, 2014, Petitioner filed a Request for Official Notice and Declaration of Wesley E. Kennedy, which document has been marked for identification as Exhibit 17. On September 18, 2014, Respondent filed a Written Closing Argument and Objection to the Agency's Belated and Untimely Request for Official Notice, which has been marked for identification as Exhibit B. On September 25, 2015, Petitioner filed a Reply to Respondent's Closing Brief, which has been marked for identification as Exhibit 18. No reply closing argument was filed by Respondent by the September 25, 2014 deadline. The matter was submitted for decision on September 25, 2014.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
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Complainant seeks official notice of a document premarked as Exhibit 14 and described as "CalPERS Mail Merge Letter dated May 6, 2004" and of a document premarked as Exhibit 15 and described as "Precedential Decision OAH No. 1997120250, *In the matter of the Appeal of Harvey Henderson*." Respondent objects to receipt of the documents as untimely. Respondent's objection is sustained with respect to Exhibit 14, a document which could have been produced at the hearing and whose post-hearing production was not authorized. Respondent's objection to the receipt of Exhibit 15 is overruled, as the precedential decision is a document which constitutes an a statement of policy by the agency, which is available to all members of the public, and which is being presented as controlling authority in this matter.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. Respondent was employed by California Department of Justice (DOJ) as a Deputy Attorney General. By virtue of his employment, Respondent is a State Miscellaneous member of CalPERS.
3. Respondent started working for DOJ on October 1, 1987. On November 27, 2002, Respondent filed an "Election Document," electing the "First Tier Retirement Formula for Past and Future Service," and choosing the "Actuarial Equivalent Reduction" to pay for the added cost of First Tier contributions.
4. On January 29, 2004, Respondent filed a "Request for Service Credit Cost Information Additional Retirement Service Credit (ARSC)" (Request). He obtained the form from the CalPERS Glendale Regional Office (GRO), where he filed it. At the time, it was the custom and practice of the GRO to provide documents regarding the requirements and limitations for purchasing ARSC, including a document entitled "Frequently Asked Questions." The Frequently Asked Questions document clearly stated that ARSC was only available to active members with at least five years of earned service credit. In fact, Respondent's contact with GRO Analyst Steven S. Cohen (Cohen) was recorded in a "Customer Touch Point Report" completed by Cohen on January 29, 2004, which stated: "[Member] in GRO to complete and submit for costing of ab719, [member] also submitted calculation with request for costing. [Member] also had questions on purchasing, advised [member] must be on payroll in order to be eligible for ab719."¹
5. Respondent separated from State of California service in February 2004.

¹ This document, as well as similar ones, were received in evidence as official records of CalPERS pursuant to Evidence Code section 1280. AB 719 refers to the legislation that authorized ARSC.

6. Records regularly maintained by CalPERS, a Customer Touch Point Report dated August 19, 2004, and a cost and election packet (election packet), show that on or about August 19, 2004, CalPERS mailed the election packet to Respondent, by regular mail to his correct address, in response to the Request. The election packet contained information about the cost of ARSC and options to purchase it. The packet contained the following instructions: “[I]f you are not interested in purchasing the additional service credit at this time, no response is needed. You may request to purchase this service anytime prior to your retirement date, while still in eligible employment. [¶] If you wish to purchase the additional service credit, review the remaining information within this packet, complete, sign and return the enclosed Employment Certification and Your Payment Options worksheet along with the Election to Purchase ARSC, to the address provided. The Election to Purchase ARSC is irrevocable and must be returned within 30 days.” (Exh. 8, at p. 3; emphasis in original.) The packet contained the referenced “Election to Purchase ARSC.”

7. Respondent did not receive the election packet described in factual finding number 6.

8. Respondent made no inquiry about the status of the Request between January 29, 2004 and late 2010. Respondent explained that the issue of ARSC purchase was no longer at the forefront of his mind, as was busy with life and work.

9. At no time, while employed at DOJ or thereafter, did Respondent exercise an election to purchase ARSC.

10. In late 2010, Respondent decided that he had the resources to make lump sum payments of any contribution payments still owed, and called CalPERS to follow up on the Request and to exercise his option to convert the Actuarial Equivalent Reduction for the 2002 First Tier conversion into a lump sum payment. He had contact with staff in the GRO, whom he found helpful. On February 7, 2011, Respondent made a lump sum payment to convert his retirement to the First Tier. With respect to issues regarding ARSC, Respondent was directed to the CalPERS Call Center in Sacramento (Call Center).

11. Respondent was less satisfied with the information and service he received from the Call Center. During the period of January to May 2011, he made multiple calls and spoke to many different individuals, some who did not provide their names or full names. Respondent described his experience with the Call Center as a “nightmare.” Despite the occasional helpful staff member, he described the more common experience of being placed on hold for long periods of time, of having to explain his situation multiple times to multiple individuals, and of encountering some of the individuals with whom he dealt as less than competent. During the process of calling the Call Center, Respondent learned that CalPERS’ position was that the election packet had been mailed to him in August 2004, that no response had been received, and that he could not purchase ARSC now that he was no longer employed by DOJ.

12. On March 18, 2011, Heather Taiwo (Taiwo), SBPS, Retirement Account Services, Customer Accounts Services Division, CalPERS, wrote a letter to Respondent. Taiwo informed Respondent that he must be an active CalPERS member to be able to purchase ARSC and quoted Government Code² section 20909 in support of her statement. On May 24, 2011, Respondent formally sought review of the decision not to allow him to purchase ARSC.

13. On June 14, 2011, Taiwo wrote another letter to Respondent, stating that the Request had been received on January 28, 2004, that the Request was processed on August 19, 2004, that he was given 60 days to respond, and that no response was received before the deadline. Respondent was informed that he could not purchase ARSC because he was no longer an active member and that CalPERS could not provide relief under Government Code section 20160 because he failed to make reasonable inquiries regarding the status of the Request.

14. Despite the letters from Taiwo, Respondent continued to call the Call Center, arguing, in essence, as he does at the hearing, that he had filed an application for ARSC while still working for DOJ and that CalPERS had never actually notified him of any action taken on his application. In early summer, perhaps on June 20, 2011, a Call Center representative named "Kevin" informed Respondent that his request to purchase ARSC had been approved.

15. In reliance of the representations made by Kevin, Respondent contacted his investment advisor to sell assets and raise cash to purchase the ARSC.

16. On July 1, 2011, Respondent called the Call Center to confirm the information provided by Kevin. He spoke with another CalPERS representative named Patrick Chu (Chu). Chu could not verify the information provided to Respondent, as there was no record of the conversation between Respondent and Kevin and no cost package had been sent out. Chu transferred Respondent to another person for clarification, Kulthamani Pather, who informed Respondent he was not eligible to purchase ARSC. After his request to speak with a supervisor, Respondent was transferred to Taiwo, who again informed Respondent that he was not eligible to purchase ARSC. Respondent asked for a managerial review and Taiwo agreed to forward the matter for review.

17. On July 11, 2011, Respondent spoke with Taiwo's supervisor, Sharon Hobbs, who reiterated CalPERS' view that he was not eligible to purchase ARSC. On July 29, 2011, Respondent appealed the decision by CalPERS not to allow him to purchase ARSC.

LEGAL CONCLUSIONS

1. At all times material, section 20909 contained the following provisions: "(a) A member who has at least five years of credited state service, may elect, by written notice filed with the board, to make contributions pursuant to this section and receive not less than one year, nor more than five years, in one-year increments, of additional retirement service credit in the

² All further statutory references are to the Government Code.

retirement system. [¶] (b) A member may elect to receive this additional retirement service credit at any time prior to retirement by making the contributions as specified in Sections 21050 and 21052. . . . [¶] . . . [¶] (e) This section only applies to the following members: [¶] (1) A member while he or she is employed in state service at the time of the additional retirement service credit election. . . .” As set forth in factual finding numbers 4 through 9, Respondent did not make an election to receive ARSC at any time prior to his retirement from State service, and section 20909 precludes him from making the election at this time.

2. Respondent nevertheless argues that he may obtain relief pursuant to section 20160 because he was never actually informed about his option to make the election to purchase ARSC. In pertinent part, the provision states:

“(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.”

Respondent may not avail himself of the benefits of section 20160 because he failed to make reasonable inquiry about the status of the Request as required by subdivision (a)(3). Failure to make any inquiry about the status of the Request for almost six years is not reasonable, even if the facts that he was waiting for CalPERS to act and that he had a busy work and personal life are taken into account.

3. Respondent also argues he should be permitted to make an election to purchase ARSC pursuant to equitable estoppel and fundamental fairness. The doctrine of equitable estoppel is available in certain circumstances to those who detrimentally rely on representations made by another. In order for equitable estoppel to apply, the following requirements must be met: “(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 facts; and (4) he must rely upon the conduct to his injury.” (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Although the doctrine can be applied against the government “where justice and right require it,” it cannot be applied against the government where to do so would effectively nullify a “strong rule of policy, adopted for the benefit of the public . . .” (*City of Long Beach v. Mansell, supra*, 3 Cal.3d at p. 493.) Nor can estoppel be applied where to do so would enlarge the power of a governmental agency or expand the authority of a public official. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.)

Respondent may not avail himself of the equitable estoppel doctrine to obtain relief. While Kevin made certain representations, the representations cannot be attributed to the party to be estopped, CalPERS, because its representatives, both before and after Kevin, consistently informed Respondent that he could not purchase ARSC credit because he was no longer an active member of CalPERS. Given the written materials provided to Respondent by CalPERS and its representatives’ verbal instructions, including those at the time the Request was filed as well as in 2011, Respondent cannot be said to be ignorant of the true facts. Nor did Respondent establish that he relied on Kevin’s statements to his injury. While he did have to raise the cash needed to purchase the ARSC, Respondent did not show that he actually lost money as a result

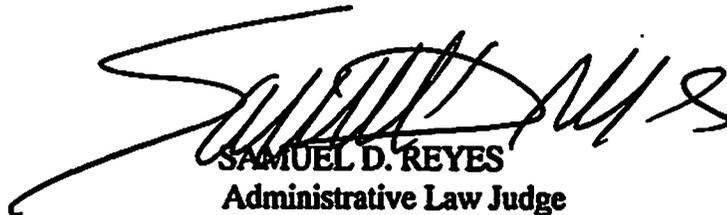
of the repositioning of his investment portfolio. Moreover, to permit estoppel where a statute expressly prohibits the purchase of ARSC by those no longer employed by the State would nullify the strong rule of policy embodied in the statute, and impermissibly enlarge CalPERS' power.

4. Accordingly, Respondent is not eligible to make an election to purchase ARSC, by reason of factual finding numbers 1 through 17 and legal conclusion numbers 1 through 3.

ORDER

Respondent's appeal is denied.

DATED: 10/20/14


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings