

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Request for Additional
Retroactive Reimbursements of Healthcare
Premiums of:

BARBARA NESS,

Respondent.

Case No. 2012-0893

OAH Case No. 2014010087

PROPOSED DECISION

This matter was heard before Marilyn A. Woollard, Administrative Law Judge for the Office of Administrative Hearings (OAH), State of California, on September 25, 2014, in Sacramento, California.

Senior Staff Counsel JeanLaurie Ainsworth represented California Public Employees' Retirement System (CalPERS).

Strowbridge Blasdel Richardson, Attorney at Law, appeared on behalf of respondent Barbara Ness, who was present.

Oral and documentary evidence was received. The parties offered oral closing arguments. The record was then closed, and the matter was submitted for decision on September 25, 2014.

ISSUE

Did respondent meet her burden of establishing an "error or omission" within the meaning of Government Code section 20160, such that she should be refunded the higher amount she paid for out-of-state health care premiums since 2004?

FACTUAL FINDINGS

1. Respondent worked as an Administrative Assistant with the Tahoe City Public Utility District (TCPUD) for approximately nine years. Based on this

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respondent became a CalPERS member. On her retirement from TCPUD effective February 8, 2004, respondent elected to enroll in PERS Choice, a Preferred Provider health care plan administered by Anthem Blue Cross.

2. At the time of her retirement, respondent lived at 487 Chipmunk Street in Kings Beach, California. Her mailing address was Post Office Box 595, Crystal Bay, Nevada 89402.

3. On November 8, 2010, respondent called CalPERS on an unrelated matter. An employee informed her that she was enrolled in an out-of-state health care plan, which carries a higher premium than the in-state plan. Respondent asked to be changed to the in-state plan based on her California address of residence, and she asked to be reimbursed the difference in the premiums she had overpaid since 2004, based on CalPERS's reliance on her Nevada mailing address.

4. CalPERS immediately corrected respondent's address. In approximately December 2010, CalPERS granted an administrative exception and gave respondent a retroactive reimbursement for six months of the premium overpayment amount, effective July 1, 2010.

5. In letters and correspondence, respondent continued to request that CalPERS reimburse her for all premium overpayment differentials since her retirement in 2004.

On November 9, 2011, respondent filed an appeal asking to be refunded \$8,800 in premium overpayments since February 2004, calculated based on an overpayment of \$122.22 a month in premium costs since that date. Respondent noted that her Nevada P.O. Box address is "right up the street" from her California residence address.

6. On January 30, 2012, CalPERS Health Account Services Manager Linda Yamanaka wrote to respondent to explain the basis for the decision not to provide any additional premium refunds. After outlining the previous reimbursement, Ms. Yamanaka noted that:

The CalPERS Health Benefit Program is governed by the Public Employees' Medical and Hospital Care Act (PEMCHA). Per PEMCHA sections 599.502(f)(2)(C) and 599.506(c)(1), CalPERS authority is limited in regard to health premiums. These two sections limit the liability of health plans for reimbursement of health premiums to members and employers to the amount of excess health premiums paid for a period of up to six months prior to the date on which the actions is processed and recorded.

In addition, respondent was informed that:

Since 2003 CalPERS mails all members an annual Health Plan Statement, which reflects the member's health plan and family members enrolled in the plan. It is your responsibility to ensure that your information is accurate and to immediately report any changes to your employer (or to CalPERS, if you are retired.) As such, a retroactive reimbursement over the six months you were already granted cannot be approved.

Respondent was advised of her right to pursue an administrative hearing.

7. On February 15, 2012, respondent requested a further review of what she contended was an error by CalPERS.

8. On November 12, 2013, Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues on the issue of whether respondent's "failure to tell CalPERS she was a California resident with a Nevada P.O. Box was a mistake which was the result of inadvertence, surprise or excusable neglect and as a result whether she would be refunded the balance [minus the six months already refunded] of the higher amount paid for out-of-state health care premiums paid since 2004, pursuant to Government Code section 20160."

9. Thereafter, the matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq. At hearing, CalPERS called its employee Richard Ramsey as a witness. Respondent testified on her own behalf. The testimony of these witnesses is paraphrased as relevant below.

Errors or Omissions Statute - Government Code section 20160

10. Pursuant to Government Code section 20160, subdivision (a), the Board has discretion to correct "the errors or omissions" of any member "upon any terms it deems just," provided that: (1) the request to correct the error or omission is made "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 used in Section 473 of the Code of Civil Procedure; and (3) the correction will not provide the party seeking correction with a status, right, or obligation not otherwise available. The failure by a member "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." (*Id.*)

CalPERS's Evidence

11. CalPERS does not dispute that, at all times relevant to this appeal, respondent was physically residing in California, and using a Nevada Post Office Box as her mailing address.¹

12. Richard Ramsey is a Staff Service Manager I for the CalPERS Enrollment Division. He reviewed CalPERS's documents relating to respondent's case. Mr. Ramsey testified that, until 2004, there was no difference between in-state and out-of-state health care premiums. Increased premiums for out-of-state plans went into effect in 2005, and CalPERS relied on the zip code and mailing address provided by the member to determine whether the member was enrolled in an in-state or an out-of-state health care plan.

13. On a yearly basis since 2005, CalPERS has mailed Health Plan Statements to its members, including respondent, which identified the health care plan in which they were enrolled and the monthly premium. CalPERS provided copies of the specific annual Health Plan Statements that were sent to respondent at her Nevada mailing address following her retirement. For example, respondent's 2005 Health Plan Statement provided in pertinent part:

This health plan statement reflects the current health enrollment information for you and your dependents. . . Carefully review the enrollment information and immediately notify your Health Benefits Officer (active employees) or CalPERS (retirees) of any incorrect information...

14. A separate page entitled "2005 Health Plan Personal Information – Barbara J. Ness," provided in pertinent part:

It is your responsibility to ensure that this information is accurate and to report any necessary changes to your employer in a timely manner. . .

Our records indicate that you are currently enrolled in: **PERS CHOICE OUT OF STATE**

Your eligibility ZIP code is: **89402** [Bolding in original.]

15. A separate page entitled Health Plan Premium Rates provided: "The chart below shows **Out-of-State Region Basic plan** premiums for 2006." [Bolding in original.]

¹ In her March 2004 Application for Disability Retirement, while noting the same physical and mailing addresses, respondent asked that California State Income Tax not be withheld, noting: "Moving to Nevada." There was no evidence that respondent had ever moved during the period in question.

The chart, entitled Out-of-State Basic Monthly Rate, provided rates for various health plans, including PERS Choice.

16. Substantially similar statements were contained in respondent's Health Plan Statements from 2006 through 2010. Each of these subsequent statements highlighted in bold respondent's out-of-state enrollment and her eligibility zip code. Mr. Ramsey noted that one of the reasons members are provided an annual health care plan statement is so they can monitor for errors.

17. Mr. Ramsey confirmed that CalPERS had refunded respondent a full six months of premium differentials after she had been converted to in-state status. He disputed the \$8,800 figure respondent asserted as the total excess premiums she had paid since her retirement due to out-of-state status. In Mr. Ramsey's estimation, after considering the two-month premium holiday given to members in 2009 and not counting employer contributions, the total respondent paid in excess health care premiums attributable to her status as an out-of-state enrollee was \$2,987.82, not \$8,800.

Respondent's Evidence

18. Ms. Ness testified that, before her retirement, TCPUD paid her health insurance and she was told that she would keep the same policy after retirement. She was never told there was a difference between in-state and out-of-state health premiums. Her premium remained the same the first year after her retirement. After that year, Ms. Ness "never had an occasion" to review her premium.

It was not until November 2010 that Ms. Ness discovered she was being charged a higher premium. She called CalPERS about something else and the person she spoke to told her she was being charged the higher out-of-state premium. Before her November 2010 discovery, Ms. Ness had never heard of an out-of-state premium.

Ms. Ness has always lived in California. She lives approximately one mile from the Nevada State line. She uses medical services in both California and Nevada. She has a post office box in Crystal Bay, Nevada that she has used continuously, both before and after her retirement. This is where she receives her mail.

Ms. Ness did not dispute that she had received a reimbursement for six months of overpaid premiums, but believes she should receive the entire amount.

Discussion

19. Respondent did not establish that she is entitled to relief based on an error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect. Under the governing statute, an "error or omission" is not correctable if the member does not make the inquiry that would be made by a reasonable person in like or similar circumstances.

In this matter, respondent received annual Health Plan Statements from CalPERS, which notified her in bold-font type that she was enrolled in an out-of-state PERS Choice plan based on her Nevada zip code, and which urged her to carefully review and promptly report any erroneous information. Respondent had an obligation to read and review these statements and to promptly notify CalPERS of any erroneous information. Respondent's failure to review her 2005 Health Plan Statement was an error which she then perpetuated by failing to review her annual statements through 2010.

Respondent either failed to read her Health Plan Statements until November 2010, or she failed to appreciate their significance until that time. Under either scenario, respondent did not alert CalPERS of her error until late 2010. It was not reasonable for respondent to simply rely on the notion that everything would remain the same after her retirement and to ignore official statements directly pertaining to her health care enrollment. Based on a review of the record as a whole, respondent failed to make the inquiry that would have been made by a reasonable person in like or similar circumstances and she thus failed to establish her entitlement to relief.

LEGAL CONCLUSIONS

1. ***Burden of Proof:*** "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence. . . ." (*McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044; Evid. Code, § 500.) In this matter, respondent bears the burden of proof. In addition, as the party seeking correction of an error or omission, respondent has the burden to establish the right to correction. (§ 20160, subd. (d).)

2. Government Code section 20160, subdivision (a), provides as follows:

(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.

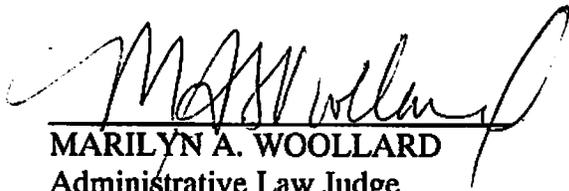
(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

3. As set forth in the Factual Findings and Legal Conclusions as a whole and particularly, in Finding 19, respondent was appropriately notified of her out-of-state enrollment status and related premium by CalPERS on an annual basis from 2005 through 2010. These annual Health Plan Statements placed respondent on notice of the details of her plan and specifically informed her of her obligation to review the enrollment information and to immediately report the need for corrections. After receiving these statements, respondent failed to make the inquiry that would have been made by a reasonable person in like or similar circumstances. Prior to November 2010, CalPERS relied in good faith on respondent's acquiescence in her out-of-state enrollment status based on the mailing address she provided. Respondent did not meet her burden of establishing her right to a correction of past premium overpayments. Accordingly, she is not entitled to relief.

ORDER

Respondent's appeal is denied.

DATED: November 6, 2014


MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings