

**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 Overpayment of:

LUCKY LORENA MEYER,

Respondent,

and

DEPARTMENT OF STATE HOSPITALS  
NAPA,

Respondent.

CalPERS Case No. 2013-0467

OAH No. 2013110337

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings (OAH), on August 5, 2014, in Sacramento, California.

Preet Kaur, Staff Counsel, represented the petitioner California Public Employees' Retirement System (CalPERS).

Lorena Lucky Meyer (respondent), was present and represented herself.<sup>1</sup>

There was no appearance on behalf of the Department of State Hospitals (DSH), Napa State Hospital.

Evidence was received and the record remained open for submission of additional evidence and written closing briefs. The record closed on September 27, 2014.

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<sup>1</sup> Respondent completed her Service Retirement Election Application using the name Lorena Lucky Meyer. She confirmed at hearing that this is her legal name.

## ISSUE

Respondent filed suit challenging her wrongful demotion on October 23, 2007, from the position of Psychiatric Technician to Custodian at DSH. Pending resolution of her wrongful demotion action before the State Personnel Board (SPB), respondent retired from state service effective April 11, 2008. Respondent ultimately prevailed, her demotion was revoked, and she was awarded back pay. The SPB ordered DSH to pay respondent the salary, interest, and all benefits that would have normally accrued from the date of her demotion through March 15, 2011. The order effectively revoked respondent's earlier retirement date.

Consequently, CalPERS reinstated respondent into state service through March 15, 2011, with a new retirement date of March 16, 2011. The question is whether the retirement benefits that respondent received between April 11, 2008 and March 15, 2011 (respondent's original period of retirement) resulted in an overpayment in retirement benefits that she must now reimburse to the retirement system?

## FACTUAL FINDINGS

1. The Statement of Issues was made and filed on November 8, 2013, by Anthony Suine, Chief of the Benefit Services Division, CalPERS, in his official capacity.

2. The DSH is an agency of the State of California. Respondent, as a DSH employee was a "state employee," and a member of CalPERS. (Gov. Code, §§ 20028, subd. (a); 20069.) The Board of Administration of the Public Employees' Retirement System (Board), oversees the administration of benefits including retirement allowances and disability retirement payments to beneficiaries including retired members, their designees, and their estates. (Gov. Code, §§ 20019; 20020.) The provisions by which the Board operates are set forth in the Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.)

3. Respondent began her employment at DSH, Napa, in 1988. On October 23, 2007, DSH medically demoted respondent from the classification of Psychiatric Technician (PT), forensic facility, to Custodian. By virtue of her employment, respondent was a miscellaneous and a state safety member of CalPERS subject to the provisions of the Government Code. (Gov. Code, § 20407.)

4. On July 20, 2008, respondent signed an application for service retirement, with an initial retirement date of April 11, 2008. Respondent's initial monthly retirement benefit was based on her years of service, benefit factor, and final compensation. Her initial monthly benefit allowance of \$1,324.84 and all future benefit payments including adjustments were reflected in her My CalPERS warrant history. Each member has a personal My CalPERS benefits page that they can access on-line. Assistance with accessing a member's personal benefit page can be obtained from CalPERS Customer Service.

5. At respondent's request, CalPERS transmitted her monthly retirement allowance by electronic funds transfer (EFT) to her checking account at Washington Mutual Bank (WAMU). Each tax year CalPERS generated a Form 1099-R reflecting gross retirement benefits received. Respondent's 1099-R forms reflected the following gross distributions by year: 1) 2008 - \$10,157.11, 2) 2009 - \$15,898.08, 3) 2010 - \$15,912.64, 4) 2011 - \$16,064.32, and 5) 2012 - \$17,170.08.

#### *Respondent's Employment History*

6. DSH clients include patients who have been determined to be mentally disordered offenders. PT duties include assistance with psychiatric care of clients; performing nursing procedures such as administering injections; charting medications and other treatments; searching clients for drugs, weapons, and contraband; escorting clients; and restraining noncompliant clients when needed.

7. Respondent was first employed as a PT at DSH, Napa, in October 1988. Other than a brief leave of absence in 1998, and another short stint as an Office Technician in 2006, respondent worked as a PT until October 23, 2007, the effective date of her medical demotion to the position of Custodian. The demotion was based on her employer's determination that respondent was unable to safely perform the essential functions of a PT for psychiatric medical reasons.

8. Respondent timely appealed her demotion before the State Personnel Board (SPB) (Case No. 07-3822). Pending resolution of the case challenging her demotion, respondent filed her Service Retirement Election Application and retired from state service effective April 11, 2008. After a hearing before the SPB on May 22, 2008, the SPB revoked respondent's medical demotion, thereby reinstating her to a PT position. Her employer, DSH, challenged the SPB's decision by writ of mandate to the Superior Court, Napa County (Case No. 26-47332). On November 17, 2009, the Court denied the writ of mandate and affirmed the judgment of the SPB, to revoke the demotion. In April 2011, the First District Court of Appeal affirmed the lower court's decision.

9. On March 17, 2011, DSH sent a letter to CalPERS explaining the legal outcome of the SPB case and DHS's obligation under the SPB Order to pay respondent her back salary, all interest, mandatory overtime, and benefits that would have normally accrued from October 23, 2007, until she returned to work. (Gov. Code, § 19584.)<sup>2</sup> This letter indicated that respondent would be returning to work as a PT for DSH. Respondent never physically returned work at DHS, Napa.

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<sup>2</sup> Whenever the board revokes or modifies an adverse action and orders that the employee be returned to his or her position, it shall direct the payment of salary and all interest accrued thereto, and the reinstatement of all benefits that otherwise would have normally accrued. (Gov. Code, § 19584.)

10. In September 2011, respondent again went before the SPB to enforce the back pay order. DSH had not yet issued back pay warrants. At issue was what dates should be used for purposes of calculating respondent's back pay award. The SPB rendered its back pay decision in January 2012. It found that respondent had successfully appealed her demotion and had not returned to work. Further, SPB found that DSH had directed respondent to return to her job on March 16, 2011, that she declined to return on that date, that other dates were agreed to, but ultimately respondent requested to postpone her return date indefinitely or until resolution of the back pay issue. On January 5, 2012, the SPB ordered:

[DSH] shall pay Appellant the difference in salary between a Custodian and Psychiatric Technician plus interest, and reinstate all benefits that otherwise would have normally accrued to Appellant during the period October 23, 2007 through March 15, 2011, had she not been medically demoted on October 23, 2007.

11. In its back pay decision signed January 5, 2012, the SPB cited the retirement law applicable to back pay awards:

[E]mployees who receive retirement payments during any period following the effective date of a back pay award issued pursuant to an administrative hearing, shall reimburse [CalPERS] for all retirement payments received during the compensable back pay period. [(Gov. Code, § 21198.)] [Respondent] may be responsible for reimbursing CalPERS for all retirement payment amounts that she received from April 12, 2008 through March 15, 2011.

Hence, respondent was on notice that she might owe CalPERS for retirement benefits received from the date of her initial retirement (April 12, 2008), through the date she was directed by DSH to return to work (March 15, 2011). The back pay decision was adopted by SPB on January 17, 2012. DSH subsequently paid respondent her PT salary for the period of October 23, 2007 (demotion date) through March 15, 2011 (the new retirement date). DSH reported this payroll to CalPERS as is required under the PERL.

12. CalPERS sent written correspondence to respondent in an effort to explain upcoming adjustments to her retirement benefits. By letter dated November 13, 2012, CalPERS informed respondent that her monthly retirement allowance had increased to \$2,214.16, and as of January 1, 2013, she was due a one-time retroactive adjustment in the amount of \$11,074.30.

13. On November 19, 2012, CalPERS mailed an Overpayment Notification letter to respondent. In this letter, CalPERS Retirement Program Specialist Julie Parra provided a detailed explanation of the reason for adjustments to respondent's retirement benefits. First,

respondent's retirement date changed from April 11, 2008, to March 16, 2011, resulting in an overpayment in retirement benefits to respondent in the amount of \$41,017.27. Second, respondent's allowance increased due to 1) the additional service credit caused by the change in her retirement date, and 2) the increase in her final compensation caused by the increase in salary from that of a custodian to a PT. The increase created a retroactive credit due respondent from March 16, 2011, forward, in the amount of \$11,074.30.

This letter explained that CalPERS had applied the one-time retroactive credit of \$11,074.30, against the overpayment balance of \$41,017.27, to arrive at a new overpayment balance due of \$29,775.53. CalPERS also included an "Overpayment Breakdown" listing for each benefit month (from the first retirement payment forward), the allowance respondent actually receive compared to the post-award adjusted allowance.

Finally, CalPERS enclosed a form for respondent to return after selecting one of four repayment methods: 1) enclose a personal check for the full balance of \$29,775.53, 2) enclose a partial payment and send additional payments on dates indicated, 3) withhold her net monthly allowance (for approximately 14 months) until the balance was satisfied, or 4) deduct monthly payments in the amount of \$620.32 for 48 months. The form stated that if CalPERS did not hear from her within 30 days, monthly deductions would begin. Respondent testified that she did not recall receiving this repayment options form. A review of respondent's MyCalPERS personal page shows that effective February 1, 2013, repayment deductions in the amount of \$637.85 began.

14. In response to an inquiry from respondent, Donna Lum, Deputy Executive Officer, CalPERS Customer Service, sent a letter to respondent on April 25, 2013, in which Ms. Lum attempted to further explain the overpayment and revised retirement allowance. Respondent's monthly retirement allowance increased from \$1,674.41 to \$2,214.16. The increase was based on the later retirement date of March 16, 2011, a higher base salary, and a higher final compensation figure.

The letter attempted to explain that in accordance with the SPB order, DSH issued back pay from October 23, 2007 through March 15, 2011. Further, DSH reported this payroll to CalPERS and respondent "accrued service credit as if you were actively employed during this period." The letter explained that respondent was not eligible to receive both *retirement benefits* from CalPERS and *back salary* during the same 35-month time period. As such, the retirement benefits she had received during this time period amounted to an "overpayment" that by law, respondent needed to reimburse to the retirement system.

CalPERS included the text of Government Code section 21198, which is applicable to this situation: "[A]mounts paid to the person during retirement for any period after the date from which salary is awarded, shall be repaid by him or her to this system,..." The letter informed respondent that CalPERS had already begun deductions from her retirement warrants to satisfy the amount of the overpayment and informed her of her appeal rights.

*CalPERS Analyst Nancy Veitenhans*

15. Nancy Veitenhans is a Staff Services Manager II with CalPERS. She has worked for CalPERS for over 13 years in benefits and retirement services. In her current position she oversees the work of staff and training. The system support team works to ensure benefits are calculated correctly. The program support team calculates overpayments and requests for forgiveness of an overpayment. Ms. Veitenhans explained that forgiveness may occur when an overpayment has been made due to erroneous employer reporting and is something the employee would not be aware of. Overpayments due to reinstatement are not considered for forgiveness because the PERL does not allow this. (Gov. Code, § 21198.)

16. Ms. Veitenhans further explained that CalPERS receives payroll reporting data directly from employers or from the State Controller's Office. Payroll and service credit data are transmitted electronically for each month during the fiscal year. Ms. Veitenhans stated that it does not matter if the employee used sick leave, vacation, or was actually physically present on the job; as long as the employee was paid for the period, he or she earns service credit for that period. In respondent's case, DHS reported to CalPERS additional payroll for respondent through March 15, 2011. Consequently, respondent's actual retirement date moved from April 11, 2008 to March 16, 2011, and she earned service credit for these 35 months.

17. After respondent filed her appeal, Ms. Veitenhans conducted a second level review of respondent's file including the revised retirement date, payroll reported, service credits, and increased final compensation. The benefit factor used to calculate respondent's allowance changed because of changes in her retirement date and physical age. Respondent's monthly benefit increased and was applied retroactively from her new retirement date of March 16, 2011, forward. The retroactive adjustment was processed in November 2012, and was used to offset her overpayment balance.

18. Ms. Veitenhans stated that CalPERS would have no way to know if respondent returned to work between April 2008 and March 2011. Further, CalPERS is not concerned with whether respondent physically returned to work or if she was just paid for that time. All CalPERS needs to know is what compensation was reported by the employer for that period. Ms. Veitenhans stated succinctly, "You can't work and be retired at the same time." Further, "forgiveness was not an issue" because the retirement change was due to the SPB decision to award back pay.

*Respondent's Testimony*

19. Respondent is currently 58 years of age. She testified that she did not want to retire and was effectively "retired against my will." She recalled receiving a letter from DSH directing her to return to work on March 15, 2011. However, she stated that friends informed her that DSH intended to "make it difficult." She stated that DSH wanted her to sign papers agreeing to work as a janitor. In 2007, she was placed in the warehouse doing office work and procurement. She feels her union also failed to properly represent her

interests. Respondent described the environment and administration at DSH Napa as bad, difficult, toxic, and hostile, amongst other things.

20. Respondent presented a letter from DSH Napa dated March 30, 2011, which listed the amounts she was to receive in back salary, mandatory overtime, and interest. The letter stated that the State Controller's Office was in the process of preparing her salary difference and overtime checks, and that her interest checks would be distributed by DSH Napa after the back pay warrants had issued. Respondent submitted copies of several State of California pay warrants in varying amounts issued in April and May 2012. Respondent testified that she received a total of 13 or 14 checks. The warrant issued May 11, 2012, listed her gross pay year-to-date as \$184,061.29. Respondent also submitted a 2011 W-2 Wage and Tax Statement (W-2) from the State Controller's Office in the amount of \$21,862.84. Respondent testified that she also received a W-2 in the amount of approximately \$170,000. She did not submit a copy of this W-2.<sup>3</sup>

21. Respondent does not believe she owes any more money to CalPERS. She recalled receiving a letter from CalPERS that informed her that they were going to deduct money from her retirement allowance to repay the overpayment. However, she does not recall receiving the repayment options form in their letter of November 19, 2012. She asserted that she never received the money she is now being required to pay back. Respondent has found the process to be "a big mess."

### *Legal Analysis*

22. Respondent appeared to conflate the issues of the back pay issued by DSH and overpaid retirement benefits issued by CalPERS. Respondent did receive retirement benefits from CalPERS prior to March 11, 2011. Respondent, with the assistance of counsel, successfully prevailed in her action against DSH before the SPB. The SPB order revoked her demotion to custodian, and awarded back pay, back benefits, and overtime in order to make her whole from the date of her demotion (October 23, 2007) to the date she was directed to return to work as a PT and DSH Napa (March 15, 2011). Respondent received the letter from DSH directing her to return to work. For personal reasons, she did not return and was unable or unwilling to establish a return date with DSH. (Factual Findings 9 & 10.) Hence, pursuant to the SPB back pay order, DSH paid respondent her PT salary through March 15, 2011, and deemed her retired as of that date.

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<sup>3</sup> The issue in this administrative hearing before CalPERS is whether respondent is required to reimburse the retirement system for overpayment of retirement benefits she received between her original retirement date of April 11, 2008, and her new retirement date of March 16, 2011. The accuracy of back pay, interest, and other benefits that accrued to respondent from the date of her demotion (October 23, 2007) through her new retirement date is not at issue in this proceeding. At all times, CalPERS relied on the payroll reported to them by DSH on behalf of respondent, in calculating her retirement benefits.

23. CalPERS was properly not concerned with grievances, negotiations and settlements as between respondent and DSH. The SPB orders directly impacted DSH, not CalPERS. CalPERS's focus was rightly on paying retirement benefits based on final compensation, service credit, and age at retirement. CalPERS had been paying respondent a retirement allowance since her original retirement date of April 11, 2008. When DSH complied with the SPB order to reinstate respondent to her PT position and pay her the PT wages through March 15, 2011, this effectively reset respondent's retirement date from the original April 11, 2008 to March 16, 2011. As plainly stated by Ms. Veitenhans, "You can't work and be retired at the same time." (Factual Finding 17.) The change in respondent's retirement date is the cause of the overpayment. Since respondent received her back salary for this period, all of the retirement checks she received during the same period constituted an overpayment. It is irrelevant that respondent was not physically on the job during this span of time. Respondent is required by law to repay these funds. (Gov. Code, § 21198.)

24. As is set forth above, respondent received a retirement allowance and her PT back salary for the same span of time ending March 15, 2011. She is obligated by law to repay the overpayment in retirement allowance. Respondent was given notice of this mandate several times, and as early as January 5, 2012. (Factual Finding 10.) Any other assertions put forth by the parties at the hearing and not addressed above are found to be without merit and are rejected.

## LEGAL CONCLUSIONS

### *Applicable Laws*

1. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198). "The PERS plan is a defined benefit plan. The formula for determining a member's retirement benefit takes into account 1) years of service, 2) a percentage figure based on age on the date of retirement, and 3) final compensation." (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470,1479.)

2. "A person who has been retired under this system for service following an involuntary termination of his or her employment, and who is subsequently reinstated to that employment pursuant to an administrative or judicial proceeding, shall be reinstated from retirement... Reinstatement shall be effective as of the date from which salary is awarded in the administrative or judicial proceedings, and his or her rights and obligations shall be as specified in this article. However, amounts paid to the person during retirement for any period after the date from which salary is awarded, shall be repaid by him or her to this system, and contributions shall be made for any period for which salary is awarded in the administrative or judicial proceedings in the amount that he or she would have contributed had his or her employment not been terminated, and he or she shall receive credit as state service for the period for which salary is awarded." (Gov. Code, § 21198.)

3. 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.

[¶]...[¶]

(Gov. Code, § 20160, subd. (a).)

4. A government agency cannot be estopped to do what it does not possess the authority to do. The “principles of estoppel are not invoked to contravene statutes and constitutional provisions that define an agency’s powers.” (*City of Pleasanton v. Board of Administration of the California Public Employees’ Retirement System* (2012) 211 Cal.App.4th 522, 542.) PERS has a duty to follow the law. (*Id.* at p. 544.) As stated in *City of Oakland*, the policy reflected in the constitutional provision is to “ensure the rights of members and retirees to their full, earned benefits.” (*Ibid.*; *City of Oakland v. Public Employee’s Retirement System* (2002) 95 Cal.App.4th 29, 46.) “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.” (*Medina v. Board of Retirement, Los Angeles* (2003) 112 Cal.App.4th 864, 869.) “No court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations.” (*Ibid.*)

#### *Legal Cause*

5. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement, absent a statutory provision to the contrary. (*Greator v. Board of Administration* (1979) 91 Cal.App.3d 54, 57.) The court is required to grant a “strong presumption of correctness” to the administrative findings, and to proceed on the basis that respondent has the burden “of convincing the court that the administrative findings are contrary to the weight of the evidence.” (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817; *City of Pleasanton v. Board of Administration of the California Public Employees’ Retirement System* (2012) 211 Cal.App.4th 522, 536.)

6. Cause does not exist to overturn CalPERS’ determination that respondent must repay the overpayment in retirement benefits. Respondent received her back salary through

March 15, 2011. She was not entitled to receive retirement benefits for the same period during which back pay was awarded. (Gov. Code, § 21198.)

7. There is direct statutory authority that applies to reimbursement of retirement benefit overpayments. “[A]mounts paid to the person during retirement for any period after the date from which salary is awarded, shall be repaid by him or her to this system,…” (Gov. Code, § 21198.) As such, estoppel does not apply in this case. To do so would contravene express statutory authority. (*Medina, supra*, 112 Cal.App.4th at p. 869.)

8. The provision of the PERL governing correction of errors or omissions does not apply in this case. Respondent’s back pay award was not an error or omission resulting from “mistake, inadvertence, surprise, or excusable neglect.” (Gov. Code, § 20160, subd. (a)(2).) Respondent affirmatively sought redress for her demotion by DSH. She prevailed and was awarded back pay to a certain date. The order for back pay was made by SPB in January 2012. The SPB order informed respondent that retirement benefits during the award period would have to be reimbursed pursuant to Government Code section 21198. There is no conflict between these two statutes. Government Code section 21198 governs cases of overpayment due to retroactive salary awards.

9. Finally, the statute of limitations does not apply in this case. In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment. (Gov. Code, § 20164, subd. (b)(1).) In January 2012, the SPB awarded back pay to respondent. Her employer, DSH, implemented the SPB order and reported the payroll to CalPERS. The issue of “overpayment” of retirement benefits did not arise until DSH transmitted the back pay in 2012. By letters in November 2012, CalPERS timely notified respondent of the resulting overpayment and the requirement that she reimburse the system. There was no unreasonable delay in CalPERS’ effort to collect overpayment in benefits to respondent. The argument that CalPERS is barred by a three-year statute of limitations is without merit. (*Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 816.)

### *Conclusion*

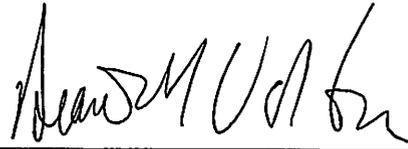
10. CalPERS correctly determined that respondent received retirement benefits during the same period that she was awarded back pay. Respondent must repay the retirement system all retirement benefits received through March 15, 2012.

### ORDER

The appeal of respondent Lucky Lorena Meyer to reverse CalPERS’ determination that she reimburse the system for overpayments in retirement benefits is DENIED.

CalPERS shall collect overpayment of retirement benefits issued to respondent through March 15, 2012.

DATED: November 4, 2014

A handwritten signature in black ink, appearing to read "Dian M. Vorters", written in a cursive style.

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DIAN M. VORTERS  
Administrative Law Judge  
Office of Administrative Hearings