ATTACHMENT A

THE PROPOSED DECISION

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BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Request to Purchase Additional Retirement Service Credit of: HARVEY CASILLAS, Respondent, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent.	Case No. 2014-0297 OAH No. 2014060519

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, on March 25, 2015, in Sacramento, California.

Wesley E. Kennedy, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Harvey Casillas appeared on his own behalf.

Evidence was received, the record was closed and the matter was submitted on March 25, 2015.

ISSUE

Should respondent Harvey Casillas be allowed to purchase three years of Additional Retirement Service Credit?

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED 4-14 20 15

FACTUAL FINDINGS

1. The Statement of Issues was made and filed on May 30, 2014, by Karen DeFrank, Chief, Customer Account Services Division, California Public Employees' Retirement System. She did so in her official capacity.

2. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198.) The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) final compensation. (Gov. Code, §§ 20037, 21350 et seq.; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.) Government Code section 20909 provides that a member, prior to January 1, 2013, may elect to purchase up to five years additional retirement service credit in the retirement system.

3. Harvey Casillas (respondent) is employed by the California Department of Corrections and Rehabilitation (CDCR) as a Senior Special Agent. By virtue of his employment, respondent is a member of CalPERS subject to the provisions of Government Code section 20909. Section 20909 provides as follows:

> (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 retirement system.
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> (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. A member may not elect additional retirement service credit under this section more than once.
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> (c) For purposes of this section, "additional retirement service credit" means time that does not qualify as public service, military service, leave of absence, or any other time recognized for service credit by the retirement system.
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> (d) Additional retirement service credit elected pursuant to this section may not be counted to meet the minimum qualifications for service or disability retirement or for health care benefits, or any other benefits based upon years of service credited to the member.

(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.

(2) A member of the system defined in Section 20324.

(f) For purposes of this section, "state service" means service as defined in Section 20069.

(g) This section shall apply only to an application to purchase additional retirement credit that was received by the system prior to January 1, 2013, that is subsequently approved by the system.

4. On December 24, 2012, respondent completed and submitted a request to CalPERS to purchase three years of Additional Retirement Service Credit (ARSC).

5. By letter to respondent dated January 31, 2013, CalPERS confirmed receipt of his request to purchase ARSC. He was advised that, effective January 1, 2013, the ARSC program was being eliminated, and that CalPERS "has received a high volume of ARSC requests" and that the mailing of ARSC cost information to respondent "will be completed in date order received." CalPERS further noted in its letter: "At this time, we are projecting ALL ARSC requests will have been responded to by the end of September 2013."

The January 31, 2013 letter detailed the following two-step process that CalPERS would be following in processing respondent's ARSC request:

- First, you will receive a Confirmation of Intent to Purchase ARSC Letter (approximately 5 pages) providing the cost for 1, 2, 3, 4, and 5 years of ARSC. It is critical that CalPERS receives your response **within 30 days** of the date on the letter to you or you will not have the right to resubmit your request.

- Second, once CalPERS has received your response on the number of year(s) you wish to purchase, an ARSC Cost Package (approximately 20 pages) will be mailed. It is critical that the completed election document and associated attachments (if appropriate) are received by a CalPERS Office **within 60 days** of date on the costing package or you will not have the right to resubmit your request.

[Bolding in original.]

6. On May 14, 2013, CalPERS sent respondent a Confirmation of Intent, which was valid for 30 days. CalPERS provided cost information for a lump sum purchase of one to five years of ARSC, as well the estimated monthly pension increase for one to five years of additional service credit. Respondent completed the form on May 23, 2013, indicating his intention to purchase three years of ARSC for a lump sum cost of $104,075.42. On May 28, 2013, respondent visited the CalPERS Sacramento Regional Office to submit his Confirmation of Intent to Purchase Service Credit. His Confirmation of Intent form was stamp received by CalPERS on that date.

7. On May 31, 2013, CalPERS mailed an ARSC Cost Package to respondent. It was again sent to the same address where it had mailed the Confirmation of Intent to respondent. The ARSC Cost Package contained a cover sheet entitled "Time Sensitive Information" which instructed the recipient that "[t]he enclosed service credit cost package is valid for only **60 calendar days** from the date on this package." [Bolding in original.] It also indicated that extensions "will not be granted under any circumstances" and that "[i]f you miss the deadline you will not be given the opportunity to reapply."

8. No completed ARSC Cost Package was ever received by CalPERS from respondent.

9. On August 27, 2013, respondent visited the CalPERS Sacramento Regional Office. He went there to make payment on an unrelated request to purchase service credit prior to membership from CalPERS.[1] Respondent also inquired about the status of the ARSC Cost Package. He was advised for the first time that CalPERS had mailed it to his address on May 31, 2013, and, because more than 60 days had passed, the time to submit the cost package had expired.

On or around August 28, 2013, respondent wrote CalPERS a letter requesting reconsideration in allowing him to submit the ARSC Cost Package.

10. By letter to respondent dated November 27, 2013, CalPERS confirmed that the ARSC cost package was valid for 60 days until July 31, 2013, and that CalPERS was not liable for correspondence that may have been lost or misrouted by the United States Postal Service (USPS). CalPERS further noted that ARSC was eliminated, effective January 1,

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[1] Government Code sections 20931 et seq. provide that members shall be granted prior service credit for previous employment with the state, university, contracting agency or a public agency that later became a contracting agency. On December 24, 2012, respondent made request for service credit cost information for service prior to membership, and on May 14, 2013, he submitted an Election to Purchase Service Credit. On August 27, 2013, respondent made a lump sum payment to CalPERS to purchase service credit for his previous employment. He did so at the Sacramento Regional Office.

2013, and that it could no longer be requested for purchase. CalPERS explained its decision to respondent as follows:

> The cost for the purchase of service credit includes interest and other actuarial factors in effect at the time the request to purchase service credit is received by CalPERS. Factors used in the calculation are time sensitive and a completed election to purchase ARSC, must be received within 60 days to ensure the accuracy of the calculations made and to avoid placing any liability for the purchase on your employer. For the above reasons, we are unable to honor your request to reconsider processing your ARSC purchase request.

11. By letter dated January 14, 2014, respondent formally appealed from CalPERS's decision.

Respondent's Testimony

12. Respondent confirmed that he never received the ARSC Cost Package from CalPERS. He received the earlier January 31, 2013 letter from CalPERS, which did reference the fact that the ARSC Cost Package must be returned within 60 days. However, the same letter also suggested to him that he might not receive the cost package until the end of September 2013. Further, the January 31, 2013 letter specifically referenced the fact that CalPERS had received a high volume of ARSC requests, was apologetic in advance for any inconvenience caused by delays, and expressed appreciation for respondent's "patience while we process the ARSC requests." The letter also advised respondent that ARSC requests would be processed by CalPERS "in date order received." Respondent indicated that when he submitted his Confirmation of Intent to Purchase ARSC in person on May 28, 2013, he was informed that the ARSC cost package would take two to three months, given the high volume of requests being processed. He noted that this was consistent with the information earlier communicated to him in the January 31, 2013 letter.

Respondent made no inquiries of CalPERS about the ARSC Cost Package until he appeared in person at its regional office on August 27, 2013. This was three months after he had submitted his Confirmation of Intent to Purchase ARSC. He understood at that time that CalPERS would be processing the ARSC requests through the end of September 2013, and was not concerned that he had not received an ARSC Cost Package by then. When advised that CalPERS had sent him a cost package on May 31, 2013, he immediately asked CalPERS for reconsideration of its 60-day rule. Respondent received no call or other communication from CalPERS advising him that it had mailed the cost package to him, or that it had not received the cost package from him.

13. Respondent maintains a CalPERS file in his home office. He noted that had he received anything from CalPERS in the mail, he would have placed it in that file. He noted that from time to time he has received neighbors' mail in his mailbox, suggesting that

the USPS may have mistakenly sent the ARSC Cost Package to a wrong address. Respondent is also aware of incidents of mail being found on the ground in his neighborhood. He cannot say for certain what occurred. He is sure that he did not receive the cost package.

14. Respondent anticipated receiving the ARSC Cost Package sometime prior and up to the end of September 2013. He was aware that the ARSC or "airtime" program was ending. He wished to take advantage of the opportunity to purchase three years additional service credit and retiring sooner, noting that as a CDCR Senior Special Agent he is involved in dangerous activities, including apprehending fugitives.

CalPERS's Position

15. CalPERS mailed the ARSC Cost Package to respondent's residence address on May 31, 2013. CalPERS staff member Adam Saefong documented the following note text on that date in CalPERS's Customer Touch Point Report system: "ARSC Election packet sent to participant for 3 years, per intent to purchase ARSC form. Lump sum cost is $104,075.42. Valid for 60 days."

16. Jennifer Innocenti is employed as a Retirement Program Specialist II with CalPERS. She testified at hearing. Ms. Innocenti confirmed that the ARSC program was a one-time offer to members, and that there was strict adherence to the 60-day period for returning the cost package, no exceptions. All related documentation was required by that time. CalPERS members have access to a website – "my/CalPERS." By accessing this website, a member would have been able to confirm when his or her ARSC Cost Package was sent. CalPERS believes respondent failed to be more proactive in contacting CalPERS or accessing its website to determine whether or when the cost package was sent to him.

17. The ARSC program was discontinued after it was determined that assumptions used to determine the cost of ARSC resulted in underfunding of the program.[2]

Discussion

18. Respondent is appealing CalPERS's decision not to except him from the requirement that he return the cost package within 60 days from mailing on May 31, 2013. The mistake in this case is respondent's failure to return the cost package within 60 days. Where mistakes are made the CalPERS Board of Administration has discretion to correct the errors or omissions of an active member. In this regard, Government Code section 20160 provides as follows:

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[2] Official notice was taken of a CalPERS report entitled "Review of Additional Retirement Service Credit Purchases," dated September 2010. Changes to the actuarial assumptions and method for the calculation of ARSC were anticipated to increase costs significantly. For example, the average increase in the cost of purchasing ARSC for State Safety members was 23 percent, and for Public Agency Safety members was 24 percent.

(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.
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> (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.

19. Here, respondent discovered the mistake on August 27, 2013, when he made inquiry about the status of the ARSC Cost Package. When advised that it was mailed to him on May 31, 2013, and that the 60-day period had expired, he immediately requested reconsideration by CalPERS. He made written request to CalPERS seeking correction the very next day. Accordingly, respondent did so well within a reasonable time after discovery of the right to make the correction.

The error or omission in this case 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. Respondent never received the ARSC Cost Package. Neither CalPERS nor respondent were at fault. One can only speculate why the cost package was never delivered to respondent.

20. Government Code section 20160, subdivision (a)(3) provides that the "[f]ailure 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." CalPERS agrees that there was probably a mistake related to the mail service, but contends that because respondent failed to make the reasonable inquiry expected of a member in like or similar circumstances, it does not arise to an error or omission correctable under section 20160. CalPERS contends that respondent's past issues regarding his mail service should have placed him on inquiry notice to determine whether the cost package had been sent to him. He could have done so by merely checking online on the CalPERS website, by telephone or in person. He was not proactive in making such inquiry over the three-month period prior to August 27, 2013. CalPERS suggests that respondent made no effort to secure financing to purchase the ARSC prior to August 27, 2013, and that

he thereby was taking advantage of the delay. It believes that a reasonable member would have done more, and not waited three months before making inquiry about the cost packet.

21. Respondent did not act unreasonably in waiting until August 27, 2013, to make inquiry. The January 31, 2013 letter invited his "patience," and explained that CalPERS had received "a high volume of ARSC requests" and that all such requests would be "responded to by the end of September 2013." The letter apologized in advance "for any inconvenience this delay may cause you." Having then submitted his Confirmation of Intent to Purchase on May 28, 2013, it was not unreasonable for respondent to expect that he would receive the cost package in a matter of months, and not days. He averred that he was told as much at the time he submitted his Confirmation of Intent materials.

Such period was also consistent with his experience with CalPERS. For example, respondent had earlier submitted a Request for Service Credit Cost Information – Service Prior to Membership on December 24, 2012. He received CalPERS's response on March 16, 2013, nearly three months after he had submitted his request.

22. Given the above circumstances, although respondent could have earlier made inquiry, it was not unreasonable for him to wait as he did until August 27, 2013, to make such inquiry. A reasonable member, having received the January 31, 2013 letter and understanding that CalPERS was processing a high volume of ARSC requests, would have expected a response sometime up to the end of September 2013. CalPERS suggested as much. For all these reasons it was established that respondent had good reason to expect that CalPERS would send him the service credit cost package two or three months after he submitted the Confirmation of Intent to Purchase Service Credit on May 28, 2013. Respondent reasonably inquired with CalPERS regarding his ARSC application on August 27, 2013, as would any other reasonable person under similar circumstances.

23. Accordingly, respondent has the right pursuant to Government Code section 20160, subdivision (a) to have CalPERS correct his error or omission in failing to file the Election to Purchase Service Credit mailed to him on May 31, 2013.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54). Government Code section 20160, subdivision (d), provides: "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)."

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. As set forth in Findings 3 and 18, the applicable statutes relating to purchase of ARSC, and the CalPERS Board of Administration's discretion to correct the errors or omissions of an active member, are set forth respectively in Government Code sections 20909 and 20160.

4. Government Code section 20160, subdivision (a)(3) provides: "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."

Legal Conclusions

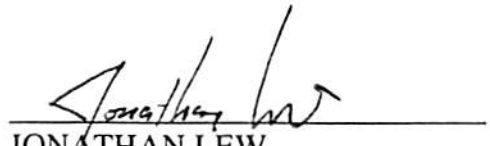
5. The matters set forth in Findings 18 through 23 have been considered. Respondent met his burden of establishing that he made a request to correct the error within a reasonable time after discovery, and that the error was the result of mistake, inadvertence, surprise or excusable neglect. Respondent also made the reasonable inquiry contemplated under Government Code section 20160, subdivision (a)(3), regarding the status of his application to purchase ARSC. He reasonably inquired with CalPERS regarding his ARSC application on August 27, 2013, as would any reasonable person in like or similar circumstances as described in Findings 21 and 22. (Gov. Code, § 20160, subd. (a)(3).)

6. For these reasons, and based on the Factual Findings and Legal Conclusions as a whole, respondent has the right pursuant to Government Code section 20160, subdivision (a) to have CalPERS correct his error or omission in failing to file the Election to Purchase Service Credit mailed to him on May 31, 2013.

ORDER

CalPERS shall correct respondent's error or omission in failing to timely file the Election to Purchase Service Credit, in a manner consistent with Government Code section 20160, subdivision (e).

DATED: April 9, 2015



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings