

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Statement of Issues  
Against:

STEVE RUBALCAVA,

Respondent.

Case No. 2012-0570

OAH No. 2014080677

**PROPOSED DECISION**

This matter was heard by David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, on February 26, 2015, in Los Angeles, California.

Cynthia A. Rodriguez, Senior Attorney, represented the California Public Employees' Retirement System (PERS). Steve Rubalcava (respondent) was present and was represented by Adam L. Marangell and Gerald S. Barton, Attorneys at Law.

The Amended Statement of Issues (exhibit 1) was amended at the hearing to state the following issues in this matter:

1. The denial by PERS of respondent's request to receive military leave of absence credit at no cost;
2. The related issue of whether respondent is entitled to purchase military leave of absence credit; and
3. Whether PERS may seek repayment of benefits already paid to respondent.

Oral and documentary evidence was received. The record remained open for the parties to file closing briefs, received on April 9, 2015 and marked as follows: PERS' Closing Argument, exhibit 12, and Respondent's Closing Brief, exhibit BB. The record was closed and the matter was submitted for decision on April 9, 2015.

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## FACTUAL FINDINGS

1. Renee Ostrander made and filed the Statement of Issues in her official capacity as the Assistant Division Chief, Customer Account Services Division of PERS.

2. Respondent was employed by the County of Riverside from February 13, 1996 through March 28, 2005, as a Deputy Sheriff. In that employment he was a local safety member of PERS.

3. Respondent was called to active duty military service and began military service on January 27, 2002. He was honorably discharged from active duty on January 4, 2005. Although he was technically still employed by the Sheriff, he did not report for work shifts, separated from the Sheriff's office, and several years later he officially retired, as described in more detail below.

4. Before and after his discharge from the military, respondent worked occasionally as a helicopter pilot for a private air ambulance company. He still carried his Deputy badge and identification but was not assigned to any work shifts by the Sheriff. In March 2005, the Sheriff required respondent to report for duty. Instead, respondent decided to turn in his badge and identification and he separated from the Sheriff's office on March 28, 2005. He continued to work for the private air ambulance company. He considered himself "retired" from the Sheriff's office but not eligible for retirement benefits until he turned age 50. He was age 46 and turned age 47 in February 2005.

5. On November 24, 2010, respondent signed an application for service retirement. He retired for service effective November 1, 2010, and has been receiving his retirement allowance from that date.

6. Later in 2010 (the letter is undated), respondent asked if PERS could credit his three years and two months of military duty to his PERS service credit. PERS responded that respondent was not eligible for the credit, described as military leave of absence service credit, citing Government Code<sup>1</sup> section 20896, which states that a member receiving military retirement pay based on 20 or more years of active military duty cannot have military service credited by PERS. Respondent's attorney, Gerald Barton, responded on December 29, 2010, noting that respondent did not have 20 years of active military service and was not receiving military retirement pay at that time. Mr. Barton stated section 20896 did not apply, and cited federal law supporting the request that military service be included as covered service under PERS.

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<sup>1</sup> All statutory references are to the Government Code unless otherwise noted.

7. On March 9, 2011, PERS mailed to respondent an election package to purchase service credit for his military leave of absence for the period of January 27, 2002, through January 4, 2005 (period of military leave). PERS now contends that respondent is not eligible to purchase service credit for his military leave of absence and that it made an error in mailing the package to respondent.

8. Although PERS alleges and argues that respondent requested on March 31, 2011, to receive service credits at no cost for his period of military leave, there was no evidence submitted in support of this allegation. See Factual Finding 11 for the details of respondent's later election to pay for service credits.

9. There was extensive correspondence between Mr. Barton and PERS, only some of which is referenced here. On April 13, 2011, PERS wrote that respondent qualifies to receive military leave of absence credit under section 20997, but that respondent must pay for the credit. The letter acknowledges PERS' (correct) understanding that respondent did not return to employment at the Sheriff's office within six months after his military discharge and, in fact, resigned from that employment on March 28, 2005. According to PERS, under these circumstances, respondent would pay the amount of his regular PERS contributions for the period of military leave, with a calculation of \$14,084.54, in return for 2.404 years of added service credit. (Exhibit F.) Much of the ensuing correspondence relates largely to respondent's contentions that he was entitled to service credit for the period of military leave without making any further payment or contributions, and that the Sheriff's office (technically the County of Riverside) was required to make its contributions attributable to respondent's period of military leave. A PERS letter dated June 6, 2011, reiterates the position that respondent would have to pay to receive the extra service credit. (Exhibits 6 and K.)<sup>2</sup>

10. On June 24, 2011, Mr. Barton submitted respondent's appeal of PERS' decision that respondent was required to pay the amount of his contributions due during his period of military leave to receive service credit for his period of military leave. (Exhibit L.)

11. By letter dated June 29, 2011, respondent elected to pay to receive service credits for his period of military leave and authorized deductions from his retirement allowance for 180 months, as computed by PERS. (Exhibit M.) This was without prejudice to his claim for the credit at no cost. PERS acknowledged receipt and indicated the deductions would begin within 60 days. (Exhibits 8 and O.) A letter from Mr. Barton dated July 22, 2011 (exhibits Q and 7) makes clear that respondent is appealing PERS' determinations.

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<sup>2</sup> When documents were submitted in evidence by both PERS and respondent, both exhibit references are given.

12. On August 2, 2011, Mr. Barton informed PERS that it had incorrectly calculated the period of respondent's period of military leave as 2.404 years, and that it was actually in excess of three years. (Exhibit T.) Other correspondence was exchanged on this issue.

13. On December 20, 2011, PERS notified respondent that his retirement allowance was being adjusted to apply a service credit purchase of 2.404 years. (Exhibit X.) This resulted in an increase of \$364.30 to his monthly retirement allowance as of January 1, 2012, as well as a retroactive payment from the date of retirement through November 30, 2011.

14. Except as noted below, there was no evidence of any new activity relating to respondent's retirement until a letter from PERS dated January 15, 2015. (Exhibits Y and 10.) Among other things, this letter notes that: (1) the lump sum retroactive amount paid to respondent was \$4,735.90; and (2) respondent had not paid for the 2.404 years of added service credit. In fact, although respondent had authorized PERS to take monthly deductions from his retirement allowance to pay for this added service credit, PERS did not take the deductions. The January 15, 2015 letter states that PERS reviewed respondent's purchase of military service credit in October 2011. PERS denied that respondent was eligible for any service credit for his period of military leave because he did not return to employment with the County of Riverside after his military discharge. The amount of respondent's disallowed retirement allowance through January 2015 was \$18,676.35. PERS wanted to collect this amount on a monthly schedule. The added service credit of 2.404 years was to be removed. Respondent's monthly retirement allowance would be reduced by \$378.69.

15. Christine Chehak has over 12 years' experience with PERS as a benefits program specialist and then a retirement program specialist. She reviewed respondent's case. She determined that respondent was not eligible for free military service credit because he did not retire during his leave of absence, using the definition of retirement from section 20060. In Ms. Chehak's opinion, the PERS notice to respondent that he was entitled to purchase military service credit was erroneous. Ms. Chehak made these determinations, and notified the manager of the Service Credit Unit, which she testified was "probably" in 2012. (As noted in the January 15, 2015 letter, a review was performed by PERS in October 2011. It cannot be determined if these are different reviews, or the same review.) Ms. Chehak was not aware of any effort by PERS to contact respondent about the errors between her discovery and report to her manager, and the January 15, 2015 letter. Ms. Chehak drafted most of that letter (exhibit Y). She had no explanation for the lengthy delay between her discovery of the alleged overpayment and exhibit Y being sent to respondent.

## LEGAL CONCLUSIONS

1. PERS made errors in its handling of respondent's requests relating to service credit for his period of military leave. Nevertheless, respondent is not entitled to service credit for his period of military leave. PERS is entitled to remove the extra service credit for

his period of military leave, reduce his monthly retirement allowance accordingly, and recoup retirement allowance payments made to respondent based upon the extra service credit.

2. Usually, when reviewing the denial of an application for benefits, the burden of proof is on the applicant. (*Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 (retirement benefits).) Here, as noted in Legal Conclusion 14 below, the burden of proof is on PERS under section 20160, subdivision (d).

3. Several related concepts and laws relate to this situation. "Retirement," under section 20060, is defined as the granting of retirement by PERS under the Public Employees' Retirement Law (PERL). Therefore, although respondent considered himself as "retired" after he was discharged from the military and, later, when he decided to not report for duty and then separated from the Sheriff's office, he was not retired under the PERL until he submitted his application to PERS and retired effective November 1, 2010.

4. Respondent's retirement was pursuant to section 21362.3, whereby he was eligible to retire at age 50. Therefore, respondent could not formally retire under the PERL when he received his military discharge, as he had not yet become 50 years old.

5. Under section 20991, when a member was absent on military service and his employer did not make the member's retirement contributions while he was absent, that member can make those contributions "upon his or her return to state service." If this happens, the member receives service credit for those contributions "in the same manner as if he or she had not been absent from state service." Here, although respondent applied for service credit related to his period of military leave, and authorized PERS to take monthly deductions to pay for that credit, he is not entitled to that credit, for two reasons. First, the right to make the payment and get the credit is conditioned on the member returning to state service. Here, had respondent returned to service for Riverside County, he may have qualified. However, he did not return to perform any work for the Sheriff's office and, when called upon to report for duty, he decided to separate from employment. There was no evidence that respondent received any pay for the period between his military discharge and his separation from employment. Second, although respondent authorized PERS to take deductions to pay for the extra service credit, no deductions were actually made. Respondent got the benefit (added service credit and increased retirement allowance), but he never paid for it. Under section 20991, respondent is not entitled to any extra service credit and increased retirement allowance.

6. Section 20997 addresses various scenarios whereby a PERS member absent from service to his employer due to military service may receive credit for the time period of military service. PERS at some points contended that respondent satisfied subdivision (a)(1), discussed below. Respondent contends that he satisfied the requirements of subdivision (a)(5). Neither of these contentions is supported by the facts.

7. Under section 20997, subdivision (a)(1), an employer shall contribute the employer's portion and the employee's portion of retirement contributions to PERS while the employee is performing military service if the member "returns to state service within six months after receiving a discharge from military service other than dishonorable." If the requirements of this section are met, the retiree's added service credit and increased retirement allowance would essentially be free, as the law requires the employer to make its own retirement contributions and those of the employee. Respondent never returned to state service after his honorable discharge from military service. Therefore, he has not met the requirements of section 20997, subdivision (a)(1), and it does not apply. Apparently, PERS' early position that respondent was entitled to extra service credit for his period of military leave was based on the mistaken belief that respondent had returned to work for the Sheriff's office.

8. Respondent contends that section 20997, subdivision (a)(5), applies. Under this subdivision, the employer shall make the contributions for itself and the member on leave for military service if the member "retires from this system for service or disability during the course of an absence from state service for military service." Respondent was honorably discharged from military service on January 4, 2005. When required to return to work shifts for the Sheriff's office, he decided instead to separate from that employment. Respondent retired effective November 1, 2010. Respondent did not retire during his military leave, so section 20997, subdivision (a)(5), does not apply to him.

9. Under section 20997, subdivision (b), any member "on leave from state service for military service who elects to continue contributing to this system shall be entitled to a refund of those contributions upon request." Respondent is not entitled to any refund here, as he made no contributions while on military leave. Further, although he later authorized deductions, PERS never made those deductions. Respondent received the extra service credit and increased retirement allowance for free. Yet as determined in Legal Conclusion 7, he was not entitled to the extra service credit or increased allowance.

10. Respondent contends that the provisions of state law are superseded by the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), found at 38 U.S.C. 4301, et seq. (See, for example, letters from Mr. Barton, exhibits C, H, J, Q and V, and respondent's Closing Brief [exhibit BB].) Other than the bare assertion that USERRA requires that time in military service must be counted in determining retirement benefits, no specific citation is given to the language of the law relating to this assertion or to respondent's circumstances. Without citation to specific controlling law and relevant facts, it cannot be concluded that PERS is operating outside of the requirements of USERRA.

11. PERS contends it can recoup the overpayments made to respondent under section 20160 on corrections of errors and omissions. Respondent contends that PERS has not satisfied the requirements of section 20160. PERS established that it may use section 20160 to recoup the overpayments made to respondent.

12. Respondent contends that PERS has not met certain requirements of section 20160, subdivision (a). However, subdivision (a) of section 20160 does not apply here. It allows PERS to “correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member,” under certain specific circumstances. Here, PERS seeks to correct its own errors, not those of a member (respondent here) or a member’s beneficiary.

13. The authority for PERS to correct its own error is found in subdivision (b) of section 20160, which states: “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.” The errors here were by “this system,” that is, PERS.

14. The remainder of section 20160 states:

“(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.”

15. Subdivision (c) is satisfied, as PERS still has retirement allowance obligations to respondent. Subdivision (d) has been satisfied, as set forth in Factual Findings 2 through 15 and Legal Conclusions 1 through 14. Subdivision (e) is satisfied in that, by making the corrections according to the applicable laws, respondent will receive the retirement

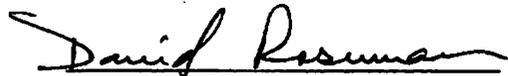
allowance to which he is legally entitled. PERS may make the corrections noted and may recoup the overage of the retirement allowance it mistakenly paid to respondent, under the authority of section 20160.

16. The handling of respondent's situation by PERS included numerous errors and delays, some of which were not adequately explained by the evidence. PERS should not be pleased with those errors and delays, nor should its members or their employers. Nevertheless, respondent may not reap the windfall that resulted.

### ORDER

The appeal of respondent Steve Rubalcava is denied. Respondent is not entitled to purchase service credit for his period of military leave. The California Public Employees' Retirement System may recover the benefits paid by error.

Dated: May 1, 2015.



DAVID B. ROSENMAN  
Administrative Law Judge  
Office of Administrative Hearings