

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Request to Purchase
Redeposit of Withdrawn Contributions and
Military Service Credit of:

MIKE V. PEREZ,

Respondent.

Case No. 2014-1125

OAH No. 2015060039

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on November 17, 2015, in Sacramento, California.

Rory J. Coffey, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Mike V. Perez (respondent) appeared and represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on November 17, 2015.

ISSUES

The issues for determination are:

- (1) Should respondent be allowed to purchase .7 years of Redeposit of Withdrawn Contributions service credit?
- (2) Should respondent be allowed to purchase military service credit?

FACTUAL FINDINGS

1. Respondent was employed by Merced County Schools (Merced), Livingston Union Elementary School District (Livingston), and Stanislaus County Schools (Stanislaus). By virtue of his employment, respondent was a local miscellaneous member of CalPERS.

2. Effective August 1, 2011, respondent retired for service and has been receiving a service retirement allowance since that date.

3. It was not clear from the evidence exactly when respondent ceased being in compensated employment for a CalPERS-covered employer. In none of the documents submitted by either party was respondent's last date of compensated employment explicitly stated. In his May 9, 2014 appeal letter, respondent stated that he left CalPERS covered employment in 2008. In addition, at the hearing, Dana DiMaggio, a Retirement Program Specialist II, confirmed that respondent stopped working for a CalPERS-covered employer in 2008.

Request to Purchase Redeposit of Withdrawn Contributions Service Credit

4. Respondent worked for Merced from September 1, 1975, through May 31, 1976.¹ He worked for Stanislaus from October 7, 1977, through May 31, 1991.

5. On April 16, 1992, respondent signed an election to terminate his membership in CalPERS and receive a refund of his total accumulated contributions. As set forth in the election, respondent waived all his rights to any future retirement benefits. As a result of the election, respondent received a refund of the retirement contributions made while he worked for Merced from September 1, 1975, through May 31, 1976, and for Stanislaus from October 7, 1977, through May 31, 1991.²

6. On November 21, 2003, CalPERS received a "Request for Service Credit Cost Information – Redeposit of Withdrawn Contributions" from respondent, dated August 5, 2003 (2003 Request). In the 2003 Request, respondent listed the following period of employment for which he withdrew contributions: "Turlock School Districts" from "Oct. 7, 1977" to "August 24, 1991." The employment that respondent listed related to the period he worked for Stanislaus, and not the period in 1975/76 that he worked for Merced.

¹ Respondent also thereafter worked for Merced. He earned service credit for this later employment and is receiving pension benefits relating to it.

² At the hearing, respondent initially disputed that he had withdrawn his retirement contribution relating to his employment with Merced from September 1, 1975, through May 31, 1976. After being shown documentation that indicated that he had withdrawn these contributions, he agreed that he made this withdrawal.

7. On March 23, 2004, CalPERS sent to respondent the service credit cost packet (2004 Cost Packet) relating to his 2003 Request. Included in the 2004 Cost Packet was an "Election to Purchase Service Credit," which respondent was required to complete and return to CalPERS within 30 days if he wished to purchase the Redeposit of Withdrawn Contributions service credit relating to his Stanislaus employment. As explained in the 2004 Cost Packet, if respondent timely elected to purchase the Redeposit of Withdrawn Contributions service credit relating to his Stanislaus employment, he would receive 13.331 years of service credit. Respondent did not complete and return the Election to Purchase Service Credit to CalPERS.

8. On December 6, 2007, CalPERS received a "Request for Service Credit Cost Information – Redeposit of Withdrawn Contributions" from respondent dated November 29, 2007 (2007 Request). In the 2007 Request, respondent listed the following periods of employment for which he withdrew contributions: "Turlock Schools (Stanislaus County)" from "10/07/1977" to "05/31/1991," and "Merced County Schools" from "09/01/1975" to "10/04/1977."

9. On December 17, 2007, CalPERS sent to respondent a service credit cost packet (2007 Cost Packet) relating to his 2007 Request. Although respondent had requested a cost estimate to purchase Redeposit of Withdrawn Contributions service credit for his employment with both Stanislaus and Merced, the 2007 Cost Packet CalPERS sent to respondent on December 17, 2007, included a cost estimate relating solely to respondent's Stanislaus employment, and not to his 1975/76 Merced employment. The lump sum cost for respondent to purchase Redeposit of Withdrawn Contributions service credit for his employment with Stanislaus was \$50,751.11 for 13.331 years of service credit. The 2007 Cost Packet included an "Election to Purchase Service Credit," which respondent was required to complete and return to CalPERS within 60 days if he wished to purchase the Redeposit of Withdrawn Contributions service credit relating to his Stanislaus employment.

10. On March 10, 2008, CalPERS received respondent's Election to Purchase Service Credit, dated March 6, 2008. In the election, respondent elected the "In-Active Member Partial Payment with Installment Payment Option." He enclosed a partial payment of \$19,000, and asked CalPERS to calculate the payment schedule for the remaining balance. CalPERS accepted respondent's election even though it was dated about a week past the 60-day deadline, due to a delay in respondent receiving a settlement check from his employer.

11. From the information included in CalPERS' file relating to respondent, it appears that CalPERS staff, in reviewing respondent's account, discovered that respondent had not been provided with a cost estimate to purchase Redeposit of Withdrawn Contributions service credit relating to his 1975/76 Merced employment. On April 15, 2008, an employee in CalPERS' Actuarial & Employer Services Division generated an internal "Request for Action" to CalPERS' Member Services Division, which stated, "Per attached request, it appears mbr wanted to receive cost info for ALL refunds, however, only the LAST refund cost info was sent to him. Please provide cost for the first refund. Thank you."

(Capitalization in original.) There was no indication in CalPERS' file that respondent initiated this request or was informed of CalPERS' mistake at the time it was discovered by CalPERS staff.

12. On April 24, 2008, CalPERS sent to respondent a cost packet (2008 Cost Packet) relating to the purchase of Redeposit of Withdrawn Contributions service credit for his 1975/76 employment with Merced. The lump sum cost for respondent to purchase Redeposit of Withdrawn Contributions service credit for his 1975/76 Merced employment was \$1,748.13 for .7 years of service credit. The 2008 Cost Packet included an "Election to Purchase Service Credit," which respondent was required to complete and return to CalPERS within 60 days if he wished to purchase the Redeposit of Withdrawn Contributions service credit relating to his 1975/76 Merced employment.

13. Respondent did not return the Election to Purchase Service Credit to CalPERS by the 60-day time deadline.

14. The 2008 Cost Packet was sent by CalPERS to the same post office box address that it had sent previous correspondence to respondent. The packet was not returned to CalPERS as undeliverable.

15. At the hearing, respondent testified that he never received the 2008 Cost Packet. According to respondent, in the past, he had received other people's mail in his post office box, and had received his own mail late because it had been put into someone else's box. He asserted that if he had received the 2008 Cost Packet, he would have timely elected to purchase the .7 years of service credit for \$1,748.13 relating to his 1975/76 Merced employment.

16. On March 12, 2012, respondent submitted an "Option Election/Life Option Beneficiary Change Form" to CalPERS. This option election triggered a review by CalPERS of respondent's account.

17. On May 31, 2013, CalPERS sent a letter to respondent, which stated that CalPERS had processed his option election form. The letter also stated, in relevant part, that:

While reviewing your retirement calculation, it was discovered that the service credit used to calculate your benefit was overstated. Our computer system calculated your service credit as 18.217 years in error. Your correct service credit is 17.857 years. This amount does not include the .700 years you refunded for the period of September 7, 1975 through March 31, 1976. Therefore, we have corrected your service credit to 17.857 years.

18. According to correspondence respondent submitted to CalPERS, the May 31, 2013 letter was the first time he was made aware that there was an issue regarding the .7 years of service credit relating to his 1975/76 Merced employment.

19. On June 7, 2013, CalPERS sent a letter to respondent that stated:

This letter is in response to your request seeking service credit cost information for Redeposit of Withdrawn Contributions as provided by provisions in the [CalPERS'] law.³ Upon review of your request, we have determined that you are not eligible for this service credit for the following reason(s):

[¶] ... [¶]

A request to purchase Redeposit of Withdrawn Contributions was submitted after your retirement date August 1, 2011 and our records indicate that you were not under compensated employment at the time of your Redeposit request.

20. On July 24, 2013, respondent sought reconsideration of CalPERS' denial of his request to purchase Redeposit of Withdrawn Contributions service credit relating to his .7 years of service with Merced in 1975/76. On October 29, 2013, CalPERS denied respondent's request for reconsideration. In a letter dated April 10, 2014, CalPERS explained further that respondent was "not eligible to purchase Redeposit service credit because your Redeposit request was received after your retirement date."

Request to Purchase Military Service Credit

21. On August 11, 2011, respondent submitted to CalPERS a Service Retirement Election Application. That application stated that respondent's date for service retirement was August 1, 2011.⁴ Also on August 11, 2011, respondent submitted a "Request for Service Credit Cost Information – Military Service." In that request, respondent stated that he was in the U.S. Air Force from November 1, 1966, to October 30, 1970.

22. On November 9, 2012, CalPERS sent a letter to respondent which stated that respondent was not eligible to purchase military service credit because, "Only CalPERS members currently employed by the State or a School are eligible." By letter dated April 10,

³ The parties did not offer at hearing any written request that respondent may have submitted to CalPERS in June 2013 for cost information relating to the purchase of the .7 years of service credit for his 1975/76 Merced employment.

⁴ At the hearing, respondent testified that he did not fill in the August 1, 2011 retirement date on his application. Instead, that date was filled in by the CalPERS staff person who assisted him.

2014, CalPERS explained further that respondent was “not eligible to purchase Military service credit because you were not in compensated employment on your request date and you did not immediately retire upon separation from CalPERS-covered employment.”

23. At the hearing, respondent testified that, on August 11, 2011, when a CalPERS staff person took his service retirement application, he asked respondent whether he was a veteran. The CalPERS staff person assisted him in filling out his request for military service credit at the same time he submitted his service retirement application. Respondent asserted that he was not aware that he needed to submit a request to receive service credit for his military service before he was so informed on August 11, 2011, when he applied for service retirement. He asserted further that employees and CalPERS members should be “clearly advised” of their rights to request such service credit.

24. CalPERS offered into evidence an Annual Member Statement that respondent received in 2004. That Annual Member Statement included a page entitled, “Additional Information.” The first section on that page was entitled “Service Credit,” and, in relevant part, stated:

You may be eligible to increase your retirement allowance by purchasing additional service credit, military service credit, maternity/paternity leave, redepositing withdrawn contributions, or many others. Please visit our Web site for more information.

25. CalPERS also submitted CalPERS’ participant notes relating to respondent. These notes reflect the multiple communications respondent had with CalPERS staff from 2003 through 2014. As set forth in these notes, on November 20, 2007, a CalPERS staff person “Gave mbr calpers website so he can download pub 12 for redeposit.” According to Ms. DiMaggio, “pub 12” was CalPERS’ Guide to Service Credit Options, which included information about purchasing military service credit. Thus, respondent was provided with information about purchasing military service credit before his last date of compensated employment with a CalPERS-covered employer in 2008.

Discussion

26. Request to Purchase Redeposit of Withdrawn Contributions Service Credit. As set forth in the statutes quoted in the Legal Conclusions below, in order to make a request to purchase Redeposit of Withdrawn Contributions service credit, the requesting individual must be a “member” of CalPERS. (Gov. Code, § 20750.) An individual ceases to be a member of CalPERS when he retires. (Gov. Code, § 20340.) When read together, these statutes make clear that an individual must be a member of CalPERS when he requests to purchase Redeposit of Withdrawn Contributions service credit. Respondent was not a member of CalPERS in 2013 when he requested to purchase .7 years of service credit for his 1975/76 Merced employment.

27. But respondent's testimony that he did not receive the 2008 Cost Packet offering him the opportunity to purchase Redeposit of Withdrawn Contributions service credit relating to his 1975/76 Merced employment was credible. That cost packet was sent to him by CalPERS after it discovered an error that it had made in the 2007 Cost Packet. Respondent did not request the 2008 Cost Packet. Other than in the 2008 Cost Packet itself, there was no indication that CalPERS ever informed respondent of its error or put him on notice that he would be receiving a second cost packet after the 2007 Cost Packet was sent to him and he elected to purchase the Redeposit of Withdrawn Contributions service credit described in that 2007 Cost Packet. Consequently, there was no reason for respondent to be on the lookout for the 2008 Cost Packet.

28. A review of the participant notes reveals that respondent was diligent about communicating with CalPERS after he received important documents. There were multiple communications reflected in the participant notes leading up to and following respondent's receipt of the 2007 Cost Packet. There were also multiple communications reflected in the participant notes relating to other correspondence respondent received from CalPERS. There were no communications in 2008 in the participant notes relating to the 2008 Cost Packet or respondent's .7 years of service credit for his 1975/76 Merced employment. The absence of such communications supports respondent's assertion that he never received the 2008 Cost Packet.

29. There were also multiple communications reflected in the participant notes relating to the May and June 2013 letters from CalPERS regarding respondent's .7 years of Merced employment. The existence of these communications supports respondent's assertion that the May 31, 2013 letter was the first time he was made aware that there was a problem regarding his .7 years of service with Merced in 1975/76. From the evidence presented at the hearing, respondent acted quickly after first learning in May 2013 of the issues relating to his 1975/76 Merced employment to seek to purchase the related Redeposit of Withdrawn Contributions service credit.

30. There was no evidence that respondent's failure to receive the 2008 Cost Packet and to submit the Election to Purchase Service Credit form within 60 days after that packet was sent to him was due to any fault of respondent's. Instead, it was the result of mistake, inadvertence, surprise, or excusable neglect, as each of these terms is used in Code of Civil Procedure section 473. Accordingly, respondent established that this error or omission should be corrected by allowing him to purchase .7 years of Redeposit of Withdrawn Contributions service credit relating to his 1975/76 Merced employment in a manner that is consistent with Government Code section 20160, subdivision (e).

31. Request to Purchase Military Service Credit. As set forth in the statutes quoted in the Legal Conclusions below, in order for an individual to purchase military service credit, that individual must elect to purchase such credit either while he is a member of CalPERS, or "immediately following" his retirement from CalPERS-covered employment. (Gov. Code, § 21029, subd. (b).) Respondent did not seek to purchase military service credit until more than three years after he retired from service with a CalPERS-

covered employer. Thus, respondent did not request to purchase military service credit within the time frames set forth in the law.

32. Respondent's failure to seek to purchase military service credit within the time frames set forth in the law cannot be found to have been due to mistake, inadvertence, surprise, or excusable neglect, as these terms are used in Code of Civil Procedure section 473 and Government Code section 20160. Respondent was provided with sufficient access to information before he left CalPERS-covered employment to become apprised of his opportunity to timely file a request to purchase military service credit. His failure to read the information made available to him in order to timely request military service credit cannot be attributed to CalPERS or to any mistake, inadvertence, surprise, or excusable neglect that may be corrected under Government Code section 20160. Consequently, respondent's request to purchase military service credit must be denied.

LEGAL CONCLUSIONS

1. Government Code section 20340, in relevant part, provides:

A person ceases to be a member:

(a) Upon retirement, except while participating in reduced worktime for partial service retirement.

2. With regard to a request to purchase service credit for withdrawn contributions, Government Code section 20750 provides:

Subject to regulations adopted by the board, a member may file an election with the board to redeposit in the retirement fund, in a lump sum or by installment payments, (1) an amount equal to the accumulated contributions that he or she has withdrawn at one or more terminations of service, or for one withdrawal at a time, but in reverse chronological order in which they occurred, and (2) an amount equal to the interest that would have been credited to his or her account to the date of completion of payments had the contributions not been withdrawn, and (3) if he or she elects to redeposit in other than one sum, interest on the unpaid balance of the amount payable to the retirement fund, beginning on the date of the election to redeposit, as if the member interest crediting rate in effect on the date of the election to redeposit had been and continued to be in effect through the completion of the payments.

3. With regard to purchasing service credit for military service, Government Code section 21029 provides:

(a) "Public service" with respect to a state member or a school member or with respect to a retired former state employee or a retired former school employee, who retired on or after December 31, 1981, also means active service, prior to entering this system as a state member or as a school member, of not less than one year in the Armed Forces of the United States, or, active service, prior to entering this system as a state or school member, of not less than one year in the Merchant Marine of the United States prior to January 1, 1950. Public service credit shall not be granted if the service described above terminated with a discharge under dishonorable conditions. The public service credit to be granted for that service shall be on the basis of one year of credit for each year of credited state service, but shall not exceed a total of four years of public service credit regardless of the number of years of either that service or subsequent state service. A state member or a school member or a retired former state employee or a retired former school employee electing to receive a credit for that public service shall have been credited with at least one year of state service on the date of election or the date of retirement.

(b) An election by a state member or a school member with respect to public service under this section may be made only while the member is in state, university, or school employment, and a retired former employee shall have retired immediately following service as a state member or as a school member. The retirement allowance of a retired former state employee or a retired former school employee, who elects to receive public service credit pursuant to this section shall be increased only with respect to the allowance payable on and after the date of election. For the purposes of this section, a member as described in subdivision (d) of Section 20776, shall also mean a former state employee or a former school employee, who retired on or after December 31, 1981.

(c) A member or retired former employee who elects to become subject to this section shall make the contributions as specified in Sections 21050 and 21052.

(d) The board has no duty to locate or notify any eligible former member who is currently retired or to provide the name or

address of any such retired person, agency, or entity for the purpose of notifying those persons.

4. Government Code section 20160 governs a request by a CalPERS member to correct an error, and in relevant part provides:

(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.

[¶] ... [¶]

(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.

Request to Purchase Redeposit of Withdrawn Contributions Service Credit

5. Respondent was not a member of CalPERS in 2013 when he requested to purchase .7 years of service credit for his 1975/76 Merced employment. (Gov. Code, §§ 20340, 20750.)

6. But, as set forth in the Findings, respondent established that his failure to receive the 2008 Cost Packet and to submit the Election to Purchase Service Credit form within 60 days after that packet was sent to him was not due to any fault of respondent's. Instead, it was the result of mistake, inadvertence, surprise, or excusable neglect, as each of these terms is used in Code of Civil Procedure section 473. Respondent met his burden of establishing that he made a request to correct the error or omission promptly after discovering it. Accordingly, respondent established that he should be allowed to have this error or omission corrected by being allowed to purchase .7 years of Redeposit of Withdrawn Contributions service credit relating to his 1975/76 Merced employment in a manner that is consistent with Government Code section 20160, subdivision (e).

Request to Purchase Military Service Credit

7. As set forth in the Findings, respondent did not seek to purchase military service credit until more than three years after he retired from service with a CalPERS-

covered employer. Thus, respondent did not request to purchase military service credit within the time frames set forth in the law. (Gov. Code, § 21029, subd. (b).)

8. Respondent did not establish that his failure to seek to purchase military service credit timely was due to mistake, inadvertence, surprise, or excusable neglect, as these terms are used in Code of Civil Procedure section 473. Consequently, respondent's request to purchase military service credit must be denied. (Gov. Code, § 20160.)

ORDER

1. Respondent Mike V. Perez's appeal regarding his request to purchase .7 years of Redeposit of Withdrawn Contributions service credit relating to his 1975/76 employment with Merced County Schools is GRANTED. Respondent shall be allowed to purchase .7 years of Redeposit of Withdrawn Contributions service credit relating to his 1975/76 Merced County Schools employment in a manner that is consistent with Government Code section 20160, subdivision (e).

2. Respondent's appeal regarding his request to purchase military service credit is DENIED.

DATED: December 3, 2015

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Karen Brandt
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KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings