

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
Additional Retirement Service Credit of:

MEI E. KWEE,

Respondent,

and

CALIFORNIA PUBLIC EMPLOYEES
RETIREMENT SYSTEM,

Respondent.

Case No. 2014-0284

OAH No. 2014100042

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, on October 28, 2015, in Sacramento, California.

Christopher C. Phillips, Senior Staff Attorney, represented the California Public Employees' Retirement System.

Will M. Yamada, Attorney at Law, represented Mei E. Kwee, who was present throughout the hearing.

Evidence was received, the record was closed and the matter was submitted for decision on October 28, 2015.

ISSUE

Should respondent Mei E. Kwee be allowed to purchase five years of Additional Retirement Service Credit?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED NOV. 24 20 15

Jonathan D. Dwyer

FACTUAL FINDINGS

1. The Statement of Issues was made and filed on August 21, 2014, by Renee Ostrander, Acting Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS). 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. Mei E. Kwee (respondent) was employed by CalPERS as an Accounting Administrator I (Specialist). She is currently employed by the California State Teachers' Retirement System. By virtue of her employment history, respondent is a member of CalPERS subject to the provisions of Government Code section 20909. Section 20909 provides in pertinent part 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.

[¶] ... [¶]

(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 May 2, 2012, respondent completed and submitted a request to CalPERS to purchase five years of Additional Retirement Service Credit (ARSC). She delivered the request in person to the Sacramento Regional Office. Respondent spoke to a CalPERS clerk in that office who advised her that there would be a long waiting period – approximately nine to twelve months before she would receive a response from CalPERS in the mail regarding her request to purchase ARSC.

5. On September 6, 2012, CalPERS processed and sent respondent an ARSC cost packet, which was valid for 60 days. This packet was sent by regular mail to respondent's residence address. CalPERS provided cost information to respondent for a lump sum purchase of five years of ARSC, as well as the estimated monthly pension increase for five

years of additional service credit. The packet also contained an Election to Purchase Service Credit form (election form). Instructions included with the ARSC cost packet provided that the election form "will be valid only if returned within 60 days" and that if it was not received within 60 days, "you must submit a new request for cost information."

6. No completed ARSC cost packet, and thus no election form, was received by CalPERS from respondent. Nor was the ARSC cost packet returned to CalPERS by the United States Postal Service as undeliverable.

7. Respondent never received the ARSC cost packet that CalPERS mailed to her on September 6, 2012. On January 1, 2013, ARSC was eliminated as a service credit purchase option.

8. On March 14, 2013, respondent was having lunch with a friend and former coworker. She learned that her friend had recently purchased service credit. Respondent also learned that her friend had submitted her request to purchase service credit in October 2012, approximately six months after respondent had submitted her request. That same day respondent went to the CalPERS Sacramento office and made inquiry about the status of her own ARSC request. The individual with whom respondent spoke in the CalPERS member services division told her that CalPERS had mailed her the ARSC cost packet in September 2012, and that it expired in November 2012.

9. On March 15, 2013, respondent sent a letter to CalPERS requesting assistance in having her ARSC request reviewed and processed. She explained that she had just been advised that the time had expired for her to submit her completed cost packet, and noted:

It is impossible. I have been expecting and been aware of getting a reply. I have been checking my mail very carefully for this kind of information. For whatever reason, I have never received this mail. I started the state service late, so this program is extremely important to my retirement. Would you please review and reprocess my case again? Your help and consideration is greatly appreciated.

10. Respondent also wrote a series of emails requesting assistance in resolving this issue. CalPERS reviewed the facts in this case and determined that it could not grant respondent's request to provide her with another ARSC cost packet. By letter to respondent dated August 9, 2013, CalPERS confirmed its determination and advised respondent of her right to appeal.

11. On September 6, 2013, respondent timely appealed from CalPERS's decision, and requested an administrative hearing.

Respondent's Testimony

12. Respondent confirmed that she never received the ARSC Cost Packet from CalPERS. She noted that she had resided at the same address for the past five years. As a CalPERS employee she was relatively familiar with the ARSC program, noting that from the moment she started working for the state in July 2007, "I always intended to purchase five years of service credit once I became eligible." She had ample funds available to her for this purpose. Respondent understood that she was eligible and could apply for ARSC two months prior to her fifth anniversary date of working for the State. She did so. She submitted her request in person on May 2, 2012. The CalPERS clerk with whom she spoke advised her that it would be a "long waiting period" of nine to twelve months before she would receive a response from CalPERS.

13. Respondent made no inquiries of CalPERS about the ARSC Cost Packet until she appeared in person at its regional office on March 14, 2013. She explained that she had "totally trusted" the mail and had been told by the CalPERS clerk that she would have to wait nine to twelve months from her initial May 2, 2012 request. She noted that had she been instructed that she would receive the packet sooner, she would have made inquiry of CalPERS much earlier. When respondent learned of her friend's experience over lunch on March 14, 2013, she immediately went to CalPERS that same day. She then wrote CalPERS a letter the following day in an attempt to resolve the matter.

14. Respondent never anticipated receiving the ARSC cost packet sooner than nine months from May 2012. Although respondent was aware or should have been aware that the ARSC or "airtime" program was ending, she understood that because she had already submitted her ARSC request she would still have an opportunity to purchase ARSC upon her receipt of the ARSC cost packet.

CalPERS's Position

15. CalPERS mailed the ARSC cost package to respondent's residence address on September 6, 2012. CalPERS staff members Jaime Flores and Susan Wong made entries in CalPERS's Customer Touch Point Report system confirming that "ARSC Cost packet sent to member for 5.000 years..." and that quality control had been completed – essentially confirming that the ARSC cost packet had been placed in the mail.

16. Kelley Solari is employed as a Staff Services Manager I with CalPERS. She testified at hearing. Ms. Solari confirmed that the ARSC program was a one-time offer to members, and that there was strict adherence to the 60-day deadline for returning the completed cost packet, no exceptions. All related documentation from members was required by that time. CalPERS members also 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.

Ms. Solari noted that in 2012, over 30,000 requests for ARSC were received by CalPERS. The largest number of requests came in November and December 2012. At that time, members were told that they could expect significant delays, up to 12 months, prior to receiving a response to their request for ARSC. However, Ms. Solari believes that CalPERS responded to requests more quickly around the time that respondent requested ARSC in May 2012. She noted that if the 60-day response period expired, a member could submit a second application through December 31, 2012. Ms. Solari also noted that other members routinely tracked the progress of their ARSC requests, sometimes by calling in monthly to CalPERS.

In this case CalPERS believes respondent failed to be more proactive in contacting CalPERS or accessing its website to determine whether or when the ARSC cost packet was mailed to her.

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

Discussion

18. Respondent is appealing CalPERS's decision not to except her from the requirement that she return the cost package within 60 days from mailing on September 6, 2012. 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:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part. Failure by a member or

beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

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

19. Here, respondent discovered the mistake on March 14, 2013, when she made inquiry about the status of her ARSC cost packet. Her decision to make inquiry of CalPERS was prompted by her learning that very same day that her friend had recently purchased service credit even though her friend had submitted a request approximately six months after respondent had submitted her request. This was confirmed by her friend's testimony at hearing.

When advised that the ARSC cost packet was mailed to her on September 6, 2012, and that the 60-day period had expired, respondent immediately requested reconsideration by CalPERS. She made written request to CalPERS the following day seeking correction. Accordingly, respondent did so well within a reasonable time after discovery of the right to make the correction.

20. 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 packet. Neither CalPERS nor respondent were at fault. One can only speculate why the cost packet was never delivered to respondent, although it is not surprising given the rather large volume of ARSC cost packets that were handled over that period.

21. 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 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 noted that respondent is a CalPERS employee and had access to its website to determine whether or when the ARSC cost packet was mailed to her. She could have done so by merely checking online on the CalPERS website, by telephone or in person. Respondent was not proactive in making such inquiry over the ten-month period between May 2012, when she submitted her ARSC request and March 2013. CalPERS believes that a reasonable member would have done more, and not waited 10 months before making inquiry about the cost packet.

22. Respondent did not act unreasonably in waiting until March 14, 2013, to make inquiry. She was told on May 2, 2012, that she could expect to wait nine to twelve months. Respondent took the CalPERS representative at her word. Such period was also consistent with CalPERS's experience in 2012, when it handled over 30,000 ARSC requests. Respondent credibly testified that she was advised in May 2012 that she could expect to wait nine to twelve months to receive the cost packet. Respondent's testimony was consistent with her past statements and actions. Her conduct was consistent with her good faith reliance on representations made to her. She made her initial request at the earliest possible time given her five-year employment service, and she had ample funds on hand to purchase the intended five years of ARSC.

23. Given the above circumstances, although respondent could have made earlier inquiry, it was not unreasonable for her to wait as she did until March 2013, to make such inquiry. A reasonable member, having been advised to wait up to twelve months and understanding that CalPERS was processing a high volume of ARSC requests, would have expected a response from CalPERS sometime between February and May 2013. CalPERS acknowledged that its members could expect such delays in ARSC requests filed in late 2012. For all these reasons it was established that respondent had good reason to expect that CalPERS would send her the service credit cost packet nine to twelve months after she submitted her ARSC request on May 2, 2012. Respondent made reasonable inquiry of CalPERS regarding her ARSC request on March 14, 2013, as would a reasonable CalPERS member under similar circumstances.

24. Accordingly, respondent has the right pursuant to Government Code section 20160, subdivision (a) to have CalPERS correct her error or omission in failing to file the Election to Purchase Service Credit form originally mailed to her on September 6, 2012.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proving that she 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

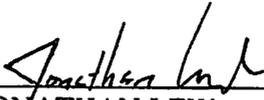
5. The matters set forth in Findings 18 through 24 have been considered. Respondent met her burden of establishing that she made a request to correct the error within a reasonable time after discovery, and that the error was the result of mistake, inadvertence, surprise or excusable neglect. Respondent also made the reasonable inquiry contemplated under Government Code section 20160, subdivision (a)(3), regarding the status of her application to purchase ARSC. She reasonably inquired of CalPERS regarding her ARSC application on March 14, 2013, as would any reasonable person in like or similar circumstances as described in Findings 21 through 23. (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 her error or omission in failing to file the Election to Purchase Service Credit mailed to her on September 6, 2012.

ORDER

CalPERS shall correct respondent Mei E. Kwee'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: November 13, 2015



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings