

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Application to Purchase
Service Credit Prior to Membership of:

SANDRA A. LOMBELLA ADAMS,

Respondent.

Case No. 2015-0016

OAH No. 2015050219

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 26, 2015, in Sacramento, California.

Christopher Phillips, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Jeffrey D. Fulton, Attorney at Law, represented Sandra A. Lombella Adams (respondent), who was present throughout the hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on October 26, 2015.

ISSUE

The question for determination is whether respondent should be allowed to purchase service credit prior to membership (SPM) for her employment as a student assistant during the period from June 1975 to October 1980.

FACTUAL FINDINGS

1. Respondent was a state employee for about 31 years. She service retired on December 31, 2011, at the age of 56. At the time of her service retirement, she was employed by the Department of General Services (DGS) as a Data Processing Manager IV. As a result of her state employment, respondent is a member of CalPERS.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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[Signature]

2. From June 1975 to October 1980, respondent worked 24 hours a week as a student assistant for DGS. On December 22, 2011, nine days before she service retired, respondent submitted to CalPERS a "Request for Service Credit Cost Information – Service Prior to Membership, CETA & Fellowship" (First SPM Request). Pursuant to her First SPM Request, respondent sought to purchase about four years of service credit for the five years she worked as a student assistant. Respondent testified that when she submitted her First SPM Request, she was assured by the CalPERS employee who assisted her that her First SPM Request was submitted timely prior to her service retirement. The CalPERS employee told her that CalPERS was behind in processing service credit purchases due to a new computer system that had been implemented, and that respondent should be receiving the SPM cost package from CalPERS in about three months.

3. On January 24, 2012, respondent submitted to CalPERS information substantiating her work as a student assistant for DGS from 1975 to 1980. Over the next nine months, respondent contacted CalPERS a number of times to inquire about when she would be receiving the information from CalPERS to purchase the service credit.

4. On September 20, 2012, respondent submitted the following inquiry to CalPERS:

Question 1: I retired on December 31, 2011 and filed paperwork to purchase my student time from 1975 to 1980. I provided copies of my 1975 NOPA (initial student assistant hire) and a copy of my first paycheck as a PFT state employee. I would like to know the status of purchasing this service credit. I had hoped the additional paperwork I provided would speed up the process. I REALLY NEED THE ADDITIONAL MONEY!
Can you please provide me a status.

(Capitalization in original.)

5. On October 3, 2012, CalPERS replied to respondent's September 20, 2012 inquiry as follows:

Thank you for contacting [CalPERS].

CalPERS implemented a new computer system in the Fall of 2011, which consolidated over 49 different systems into one new integrated system. We experienced challenges with service credit purchase functionality which caused delays in processing requests.

Although we are not able to provide a definitive date on when costing packages will be mailed, we do have a backlog reduction plan in place and plan on being current with all

requests by the end of January 2013. We apologize for any inconvenience this may cause and appreciate your patience during this transition period.

6. On August 13, 2013, one year and eight months after respondent submitted her First SPM Request, CalPERS sent a 15-page package of materials to her regarding her request to purchase service credit (CalPERS Cost Package). On the first page, the CalPERS Cost Package stated:

Thank you for your inquiry regarding the purchase of your Service Prior to Membership in [CalPERS]. Since your request to purchase service credit was received prior to your retirement date, you are being provided a one-time opportunity to purchase this service credit.

The CalPERS Cost Package explained that respondent could purchase 4.015 years of service credit for a lump sum payment of \$7,084.42, and that by purchasing this amount of service credit, her monthly pension benefit would increase by about \$701.35 per month.

7. Page two of the CalPERS Cost Package included information regarding the purchase of service credit. About halfway down on this second page, the following information was included:

NEXT STEP

- If you are not interested in purchasing the additional service credit at this time, no response is needed. However, most service types can only be elected prior to retirement.
- If you wish to purchase the additional service credit, review the remaining information within this packet, complete, sign and return the enclosed Election to Purchase Service Credit form to the address provided. The Election to Purchase Service Credit form is irrevocable and will be valid only if returned within 60 days. If the Election to Purchase Service form is not received within 60 days, you must submit a new request for cost information, which may affect your eligibility and the cost to purchase this service credit.

If you wish to use a plan-to-plan transfer or rollover funds to pay for this service credit purchase, the certification forms and check must be received with your Election to Purchase Service Credit form. If you are retired or pending

retirement, the rollover must be completed within 120 days of your retirement date.

(Bolding and underlining in original.)

On page three, the CalPERS Cost Package included a document entitled "Explanation of Payment Options," which, in relevant part, stated:

LUMP SUM

A check or money order made payable to CalPERS must be submitted with your Election to Purchase Service Credit form. Plan-to-plan transfers and rollovers from "eligible retirement plans" may be used as payment on the amount due to CalPERS for service credit conversion or purchase, with proper certification (see attached information on my/CalPERS 0946).

(Bolding and underlining in original.)

8. The CalPERS Cost Package included an "Election to Purchase Service Credit" (Election) form, which, in relevant part, stated:

We informed you on August 13, 2013 of your right to elect to contribute and receive service credit for Service Prior to Membership from CalPERS. This Election to Purchase Service Credit must be returned to CalPERS within 60 days to be valid.

The Election included three payment options from which respondent could choose to pay for her purchase of service credit. The first payment option stated:

Lump Sum Payment Option: I hereby elect to purchase additional service credit as provided by law and I enclose \$7,084.42. (Payment must be included when the election is filed with CalPERS.)

9. The CalPERS Cost Package also included a page entitled, "Using a Plan-to-Plan Transfer or Rollover for Payment." In relevant part, this page stated, "Plan-to-plan transfers and rollovers from 'eligible retirement plans' may be used as payment on the amount due CalPERS for a service credit conversion or purchase," and that, "CalPERS can accept a State DPA Savings Plus Program (SPP) transfer." It stated further that:

- CalPERS does not initiate the transfer of funds or complete documents to draw your funds. You will be responsible for obtaining certification from your plan administrator that your plan is an "eligible retirement plan" as described above. Therefore, you should contact

the plan prior to starting the transfer or rollover process to confirm the fund type and, if eligible, obtain their distribution request document.

(Bolding in original.)

10. The CalPERS Cost Package included a "Certification Form: Plan-to-Plan Transfers and Direct Rollovers" (Certification form). The top part of the Certification form was to be completed by respondent to request a plan-to-plan transfer or rollover. The bottom part of the Certification form stated, "**THIS SECTION IS TO BE COMPLETED BY THE PLAN ADMINISTRATOR OR TRUSTEE** (this is **NOT** CalPERS.) (Bolding, capitalization and underlining in original.)

11. Respondent was on an extended vacation away from her home when the CalPERS Cost Package was sent to her house on August 13, 2013. On September 20, 2013, respondent returned from vacation and found the CalPERS Cost Package. On that day, respondent completed and sent to Savings Plus a form to request funds to purchase the service credit.

12. Respondent then left town to care for an elderly parent. On October 7, 2013, Savings Plus sent respondent a letter, notifying her that she had not signed and/or dated the "Purchase of Permissible Service Credit form."¹ Although respondent was not home when the October 7, 2013 letter arrived, her son picked up her mail and read the letter to her. When respondent returned home on October 21, 2013, she called Savings Plus and was informed that she had correctly signed the form and that the October 7, 2013 letter was a mistake, but that it was "too late to process" her request.

13. On October 22, 2013, respondent called CalPERS and spoke to Michael King, a customer service representative. In a letter to CalPERS dated February 10, 2014, respondent described her conversation with Mr. King as follows:

[Mr. King] reassured me there was no problem and that all I needed to do was re-sign and date the original request and FAX it to PERS and that it would be reprocessed. I remember asking about missing the upcoming 120 day deadline and he said that resubmitting the form would restart the cycle. He said that I should not be punished for being on vacation when the forms arrived.

¹ A copy of the form that respondent sent to Savings Plus was not offered into evidence. The October 7, 2013 letter from Savings Plus to respondent described the unsigned and/or undated form as a "Purchase of Permissible Service Credit form." From respondent's testimony, it appeared that the form she sent to Savings Plus may have been the Certification form.

As reflected in the Customer Touch Point Report, Mr. King noted that, on October 22, 2013, he “Explained the SCP process to mbr; Advised mbr to resubmit SPM request form.”²

14. After talking to Mr. King, respondent again left town for an extended period to care for an elderly parent. Upon her return, on December 31, 2013, she signed and dated the First SPM Request again, and submitted it to CalPERS (Second SPM Request).

15. On January 3, 2014, CalPERS sent a letter to respondent, informing her that she was not eligible to purchase service credit because her Second SPM Request was submitted after her retirement date.

16. Respondent wrote a letter to CalPERS dated January 8, 2014. In her letter, respondent explained that on December 22, 2011, when she submitted the First SPM Request, she was “assured” that her service credit purchase “would be processed.” She stated further that she “would not have been able to retire and be financially secure without the purchase of this time.” She described the timeline of events. She stated that Mr. King “assured” her that resubmitting her request “would be OK.” She explained that, “On December 31, 2013, after returning from caring for an elderly parent’s surgery recovery, I resubmitted the request as Mr. King instructed.” When she received CalPERS’ January 3, 2014 letter, she called CalPERS and spoke to Tina Olden, a customer service representative. Respondent described her conversation with Ms. Olden as follows:

After explaining the situation, [Ms. Olden] asked why I did not elect to have the service credit purchase taken out of my monthly retirement check so that the transaction would have been completed within the 120 [day] period. I told her that it was not an option given to me by Mr. King BUT IF IT WAS, I WOULD HAVE DONE IT IN A HEART BEAT IF THAT MEANT THIS WOULD BE DONE! [Ms. Olden] did see in my file a note from Mr. King advising me to re-submit the forms, much to her surprise as this was not something she would have suggested.

(Capitalization in original.)

In her January 8, 2014 letter, respondent asserted that,

I followed the direction from Mr. King, being assured by him that I would be able to get my four years of service credit by re-submitting the forms and starting the process over. If I had been given any other option, by Mr. King, to complete the process

² “SCP” stands for service credit purchase.

within the original 120 [day] window I certainly would have done it.

17. In the Customer Touch Point Report, Ms. Olden described her conversation with respondent on January 8, 2014, as follows:

Mbr calling in regards to her request for SPM. States she requested cost info for SPM back in 12/22/2011. Cost info was sent to member on 08/13/2013. Mbr wanted to purchase this buy [sic] doing a rollover, however Savings Plus would not be able to complete her request before mbrs deadline date. Mbr contacted us to advise us of this and states she was told to resign the election and date it and resubmit it to us. States she would still be able to do a roll over because it wasn't her fault that it took us so long to complete her cost packet. Mbr received a not elig letter on 01/03/2014. States she was given wrong info and had she known that she would not be elig to do a roll over, she would have elected to take the monthly deductions from her retirement. Having mbr put this in writing and send it to MBSD for review. Thank you.

18. On January 27, 2014, Zachary Jann, a Retirement Program Specialist II, sent a response on behalf of CalPERS to respondent's January 8, 2014 letter. In the January 27, 2014 letter, Mr. Jann listed the timeline of events from CalPERS' perspective, and in relevant part stated:

- On August 13, 2013, CalPERS processed your SPM request and mailed your SPM cost package. The cost package was valid for 60 days from the date printed on the package.
- There is no further indication of contact documented until October 22, 2013. At this juncture, however, your August 13, 2013 dated SPM cost package had already expired.

The January 27, 2014 letter also stated that:

In your January 08, 2014 letter to CalPERS, you indicate you encountered difficulties which impeded the rollover of funds from your Savings Plus 401(k) plan account. While the rollover of funds may present certain challenges, including working with an unresponsive plan administrator, the rollover process must be completed by you. If a rollover of funds cannot be accomplished in the allotted 60-day period for service credit purchase eligibility, an alternative method of payment must be

elected. Your SPM cost package explained, in detail, alternative payment methods available to you.

Since a signed and completed Election to Purchase SPM was not received within the 60-day election period, your request for the purchase was closed, in accordance with the California Public Employees' Retirement Law (PERL), section 21032, which states in part:

"An election shall be effective only if accompanied by a lump-sum payment of the contributions and interest required for the credit or by authorization for immediate institution of payroll deduction of installment payment of the contributions and interest."

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 valid Election to Purchase Service Credit, with payment and/or an installment payment plan selected, must be received within 60 days to avoid placing any liability for the purchase on your employer.

19. On February 10, 2014, respondent replied to CalPERS' January 27, 2014 letter. In her February 10, 2014 letter, respondent generally repeated the information included in her January 8, 2014 letter. She asserted that, "If Mr. King had provided me with the other options available, this transaction would have been completed within the 120 [day] period."

20. On March 24, 2014, CalPERS replied to respondent's February 10, 2014 letter. In the March 24, 2014 letter, CalPERS stated that, "Your SPM cost package was valid for 60 days from the date printed on your cost package (August 13, 2013), not 120 days as indicated in your February 10, 2014 dated letter." The letter stated further that, "Although you contacted CalPERS on October 22, 2013, to receive additional information regarding your SPM purchase, at this juncture your August 13, 2013, dated cost package had already expired, and as a result you were ineligible to submit a completed and signed Election to Purchase SPM form, as well any payments towards the purchase." In addition, the letter noted that, as set forth in the CalPERS Cost Package, "Retired or retirement pending participants may only rollover funds within 120 days of their retirement date."

21. At the hearing, respondent testified that she read the CalPERS Cost Package, but she focused on the 120-day deadline for obtaining the funds to pay for the service credit she was seeking to purchase. She also testified that she was out of town when she received

the October 7, 2013 letter from Savings Plus, but that her son was collecting her mail and he opened the letter and read it to her.

22. Mr. Jann testified that there were three reasons why there was a one-year, eight-month delay in CalPERS sending to respondent the CalPERS Cost Package after she timely submitted the First SPM Request: The first reason was the delay caused by the rollout of My CalPERS, which consolidated 49 computer systems into one interface. The second reason was the backlog that CalPERS had in processing all the SPM requests it had received. The third reason was that CalPERS wanted to research whether the employment for which respondent was seeking to purchase service credit should have automatically been included as part of her covered service. CalPERS determined that, under the law, respondent's student assistant time did not automatically qualify as covered service, but she could use it to purchase service credit.

23. Mr. Jann also testified that the 120-day period for obtaining funds from Savings Plus that respondent focused on when she reviewed the CalPERS Cost Package was not relevant. According to Mr. Jann, the 120-day period set forth in the CalPERS Cost Package was a "safe harbor" provision included to reflect an IRS rule that permitted members to rollover their tax deferred funds within 120 days of retirement without adverse tax consequences. Because respondent had retired well over a year before the CalPERS Cost Package was sent to her, that 120-day provision was not relevant.

24. As Mr. Jann testified, even if the information that Mr. King gave to respondent on October 22, 2013, may not have been accurate, it was not relevant, because the CalPERS Cost Package expired on October 14, 2013. By October 22, 2013, when respondent spoke to Mr. King, it was too late for her to seek alternate ways to pay for the service credit because the time for submitting the Election and making such payment had already passed.

Discussion

25. Respondent timely submitted her First SPM Request before she service retired. She did not, however, timely submit the Election to purchase service credit within 60 days after the CalPERS Cost Package was sent to her. In fact, there was no evidence that respondent ever submitted a completed Election to CalPERS. Instead, acting upon the advice of Mr. King given eight days after the 60-day deadline for submitting the Election had expired, respondent, on December 31, 2013, submitted her Second SPM Request. That Second SPM Request was submitted two years after respondent had retired, and 78 days after the 60-day deadline to submit the Election had expired.

26. In the Statement of Issues, CalPERS framed the issue for determination in this case as whether "CalPERS correctly determined that respondent Adams is ineligible to reapply to receive SPM because she is no longer employed by a CalPERS-covered employer." But, based on the parties' evidence and arguments offered at the hearing, the primary question is not whether respondent should have been allowed to submit the Second SPM Request after she retired in order to reapply to purchase service credit. Instead, the

primary question for determination is whether the Board should excuse respondent's failure to submit the Election to CalPERS within 60 days after the CalPERS Cost Package was sent to her, after having timely submitted her First SPM Request prior to her service retirement.

27. The CalPERS Cost Package notified respondent that she had to submit the Election within 60 days. According to CalPERS, that 60-day period expired on October 14, 2013. Instead of submitting the Election to CalPERS by October 14, 2013, respondent submitted a request to Savings Plus on September 20, 2013, to obtain funds to purchase the service credit she was seeking.

28. At the hearing, respondent testified that, when she read the CalPERS Cost Package, she focused on the 120-day deadline, and not the 60-day deadline included in it. The language on page two in the CalPERS Cost Package regarding the time deadlines to submit the Election to CalPERS and to seek money from a plan such as Savings Plus to purchase service credit appears upon first reading to be somewhat contradictory: It indicated that respondent had 60 days to submit the Election to CalPERS, but that she had 120 days to obtain funding to purchase service credit from a plan such as Savings Plus, and that she could not submit the Election without also submitting payment for the service credit. But the CalPERS Cost Package contained sufficient information elsewhere in its 15 pages to explain to respondent that she could not seek to roll over any Savings Plus funds more than 120 days after she service retired and described the various other alternatives available to her to obtain the money to purchase service credit. The CalPERS Cost Package also advised respondent to "contact the plan prior to starting the transfer or rollover process." And the package stated in two places that she had to submit the Election to CalPERS within 60 days to be valid.

29. Respondent did not submit sufficient evidence to explain why she focused on the 120-day deadline for obtaining funds from Savings Plus and not the 60-day deadline for submitting the Election set forth in the CalPERS Cost Package immediately preceding the 120-day deadline. From the evidence, it was clear that respondent received and reviewed the CalPERS Cost Package by September 20, 2013, when she sent the form to Savings Plus seeking funds to purchase service credit. It was also clear that respondent learned from her son shortly after October 7, 2013, that Savings Plus had denied her request for funds. Both of these events occurred before the 60-day deadline for submitting the Election to CalPERS expired on October 14, 2013. Consequently, respondent had sufficient time before the 60-day deadline expired to contact both Savings Plus and CalPERS to discuss paying for the service credit.

30. At the hearing, respondent asked that her failure to submit the Election within 60 days to CalPERS be excused due to mistake, inadvertence, surprise or excusable neglect. But respondent did not adequately explain what was the cause of her mistake, inadvertence, surprise or excusable neglect prior to the expiration of the 60-day deadline on October 14, 2013. While respondent may have been under the stress of dealing with an elderly parent with health issues, there was not sufficient evidence to support that this stress caused her to be unable to attend to the purchase of service credit. If respondent's mistake, inadvertence, surprise or excusable neglect was her failure to fully read the CalPERS Cost Package before

she sent the funding request to Savings Plus on September 20, 2013, then such a failure is not excusable under Government Code section 20160.

31. Respondent argued that CalPERS' delay of one year and eight months in sending to her the CalPERS Cost Package established cause to excuse her delay in submitting the Election timely. Respondent's argument was not persuasive. CalPERS' delay did not excuse respondent's failure to submit the Election timely. Respondent had 60 days to submit that Election after the CalPERS Cost Package was sent to her. This was adequate time for her to address any issues she may have had in paying for the service credit before submitting the Election by the 60-day deadline.

32. Respondent also argued that the alleged misinformation Mr. King gave to her should excuse her delay in submitting the Election. This argument was also not persuasive. Respondent did not contact Mr. King until after the 60-day deadline for submitting the Election had already expired. Thus respondent cannot blame her failure to act before the 60-day deadline on any misinformation Mr. King may have given her after the expiration of that deadline.

33. When all the evidence is considered, respondent did not establish that her failure to submit the Election within 60 days after the CalPERS Cost Package was sent to her should be excused based on mistake, inadvertence, surprise or excusable neglect. Her Second SPM Request could not legally be accepted by CalPERS because it was submitted after she retired. Consequently, respondent's appeal must be denied.

LEGAL CONCLUSIONS

1. Government Code section 21032 provides:

A member may elect at any time prior to retirement, in accordance with regulations of the board, to receive credit for public service, under any of the definitions in this article, in addition to his or her current and prior service credit. An election shall be effective only if accompanied by a lump-sum payment of the contributions and interest required for the credit or by authorization for immediate institution of payroll deduction of installment payment of the contributions and interest. The right of election is subject to Sections 20894 and 20961, and shall be ineffective with respect to any time or employment for which the member subsequently becomes entitled to or eligible to elect to receive service credit in another system supported in whole or in part from public funds, in which case accumulated contributions on deposit for the period of service credit shall be paid to the member.

2. 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.

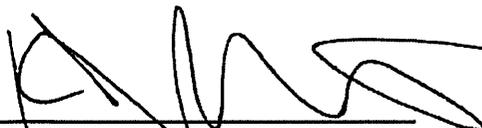
(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

3. As set forth in the Findings, respondent did not establish that her failure to submit the Election within 60 days after the CalPERS Cost Package was sent to her should be excused based on mistake, inadvertence, surprise or excusable neglect. (Gov. Code, § 20160.) Her Second SPM Request could not legally be accepted by CalPERS because it was submitted after she retired. (Gov. Code, § 21032.) Consequently, respondent's appeal must be denied.

ORDER

The appeal of respondent Sandra A. Lombella Adams is DENIED.

DATED: November 4, 2015


KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings