

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Optional Membership
Election and Mandatory Arrears for:

CALVIN SUNG,

Respondent.

and

CALIFORNIA STATE ASSEMBLY
COMMITTEE ON RULES,

Respondent.

Case No. 2014-1171

OAH No. 2015020312

In the Matter of the Optional Membership
Election and Mandatory Arrears for:

ANDREA F. GRAHAM,

Respondent.

and

CALIFORNIA STATE ASSEMBLY
COMMITTEE ON RULES,

Respondent.

Case No. 2014-1253

OAH No. 2015020877

PROPOSED DECISION

These consolidated matters were heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, on January 5, 2016, in Sacramento, California.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Jan. 22 2016
C. Bodley

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

Daniel J. R. Kessler, Deputy Legislative Counsel, represented respondent California State Assembly Committee on Rules (Assembly).

There was no appearance by or on behalf of respondents Calvin Sung and Andrea F. Graham (collectively, individual respondents).

Evidence was received, the record was closed, and the matter was submitted for decision on January 5, 2016.

ISSUES

The issues for determination are:

- (1) Are the individual respondents entitled to membership in CalPERS on the dates they signed their optional membership elections; and
- (2) If so, should mandatory arrears be assessed against the individual respondents and the Assembly for the period between when they signed their optional membership elections and when the Assembly entered them into the CalPERS system?

FACTUAL FINDINGS

1. CalPERS established that the individual respondents were timely served with the notice of hearing. Consequently, this matter proceeded as a default hearing against them under Government Code section 11520 in their absence.

2. Assembly employees are excluded from membership in CalPERS unless they file an election with CalPERS to become members. The individual respondents in this matter are Assembly employees who signed elections to become CalPERS members. Their elections were thereafter received by the Assembly and entered into the CalPERS system. CalPERS determined that the individual respondents became CalPERS members when they signed their elections, and charged mandatory arrears against the individual respondents and the Assembly for contributions to CalPERS for the period of time between when the individual respondents signed their elections and when the Assembly entered them into the CalPERS system. The Assembly appealed from the arrears assessments, asserting that under applicable law cited below, the individual respondents did not become members of CalPERS until the Assembly received their elections and entered them into the CalPERS system.

Respondent Graham's Optional Membership Election

3. Respondent Graham began working in a permanent position with the Assembly on December 1, 2008. On December 15, 2008, respondent Graham signed an "Election of Optional Membership – Legislative Employee" form (Graham Election). On January 29, 2009, the Assembly received the Graham Election. On February 1, 2009, the Assembly entered respondent Graham's membership into the CalPERS system.

4. By letter dated July 22, 2014, CalPERS notified respondent Graham and the Assembly that CalPERS had determined that respondent Graham was entitled to membership in CalPERS from December 15, 2008, the date she signed her Election, and that mandatory arrears for contributions to CalPERS were being assessed against respondent Graham and the Assembly for the period from December 15, 2008, through January 31, 2009.

Respondent Sung's Optional Membership Election

5. Respondent Sung began working in a permanent position with the Assembly on December 19, 2012. On July 30, 2013, respondent Sung signed an "Election of Optional Membership – Legislative Employee" form (Sung Election). On August 26, 2013, the Assembly received the Sung Election. On September 1, 2013, the Assembly entered respondent Sung's membership into the CalPERS system.

6. By letter dated June 25, 2014, CalPERS notified respondent Sung and the Assembly that CalPERS had determined that respondent Sung qualified for membership in CalPERS during the period from August 1 through 31, 2013, and that mandatory arrears for contributions to CalPERS were being assessed against respondent Sung and the Assembly for that period.

Applicable Statute and CalPERS' State Reference Guide and Circular Letter

7. Government Code section 20324, which is quoted in full in Legal Conclusion 1 below, governs when and how an Assembly employee may become a member of CalPERS. As set forth in subdivision (a), an Assembly employee is "excluded from membership in [CalPERS] unless he or she *files with the board* an election in writing to become a member." (Italics added.) Under subdivision (b), an Assembly employee who elects to become a member of CalPERS may purchase service credit for the period of time he or she worked for the Assembly prior to becoming a CalPERS member. For Assembly employment completed after the employee has elected to become a member of CalPERS, both the employee and the Assembly make contributions to CalPERS. For the period of Assembly employment prior to electing to become a CalPERS member, the employee may pay for service credit, and no contributions are required from the Assembly.

8. CalPERS has issued a State Reference Guide (Guide), which provides information about membership in CalPERS. At the end of the table of contents, the Guide states:

The information provided in this publication is for your convenience and reference as a general guide only and cannot be relied upon as an authoritative source of the law, practices, or policies of CalPERS. While CalPERS tries to include only accurate, timely and complete information in its publications, summaries, guidelines and other advisory printed materials, sometimes information provided in printed materials may be or become inaccurate, untimely, incomplete, unclear or misleading. In all instances, the law then in effect, not this publication, controls the application of the Public Employees' Retirement Law. It is the reader's responsibility to independently verify the accuracy of the information contained in this publication before engaging in a course of action.

(Italics in original.)

9. The Guide includes a section entitled “‘Optional’ Members of CalPERS.” In relevant part, this section of the Guide states:

- “Optional” membership may not be established unless and until the eligible person signs and submits an election to join CalPERS.
- Membership may be elected at any time while in an eligible position. However, membership is established on a prospective basis, usually with the effective date matching the first day of the pay period starting after the election for membership is signed....

10. CalPERS issued a Circular Letter dated July 30, 2015 (Circular Letter), regarding “Optional Members of CalPERS.” In this Circular Letter, CalPERS, in relevant part, stated:

Optional Member Enrollment Date

Optional members may elect membership at any time while in the eligible position, but membership is established on a prospective basis. The recommended membership effective date is the signature date on the optional member election form; however, the date must not be later than the first day of the pay period following the election signature date.

11. There was no evidence submitted at hearing that CalPERS had adopted any regulations either to define the term “files with the board” as used in Government Code section 20324, subdivision (a), or to otherwise interpret Government Code section 20324.

There was also no evidence that CalPERS had adopted the Guide or Circular Letter as regulations. In addition, there was no evidence to describe the process by which the Guide and Circular Letter were drafted and issued.

The Assembly's Evidence

12. Lynda Roper is the Assembly's Deputy Administrative Officer. Ms. Roper testified that the Assembly has about 1,250 employees, approximately 1,200 of whom are eligible to be members in CalPERS. Of these 1,200 employees, approximately 1,000 have elected to become CalPERS' members.

13. The Assembly's employees are located throughout the state, in approximately 100 offices. The Assembly provides a benefits package to its eligible employees, which explains how they may elect to become members of CalPERS. The package includes a blank election form that employees may complete if they decide to become CalPERS' members. Assembly employees deliver completed election forms to the Assembly's benefits office. The Assembly pays its employees twice a month. When the Assembly's benefits office receives a completed election form from an employee, it date-stamps the form, and enrolls the employee in the CalPERS system at the beginning of the pay period following the receipt of the election. In this way, the Assembly can initiate the appropriate payroll deductions from the employee's paycheck and the contributions required from the Assembly.

14. The Assembly does not have a mechanism to initiate payroll deductions and make Assembly contributions prior to the time it receives an employee's election form. If CalPERS requires the Assembly to enroll employees in CalPERS before the Assembly receives a completed election form, the Assembly must manually adjust what was initially reported to CalPERS, and go back to the employee to collect any arrears not previously deducted from the employee's paycheck.

15. The Assembly has historically enrolled its employees in CalPERS from the time it receives a completed election form. CalPERS has audited the Assembly in the past. CalPERS has not previously informed the Assembly that the manner in which it enrolled its employees in CalPERS was inconsistent with CalPERS' interpretation of the law.

Discussion

16. The Assembly received the Elections from the individual respondents some time after they began working for the Assembly, and they signed and dated those Elections. The Assembly acted promptly after it received the Elections to input them into the CalPERS system to ensure that the individual respondents' membership in CalPERS would start at the beginning of the next pay periods after receipt of the Elections.

17. Government Code section 20324, subdivision (a), states that Assembly employees are excluded from CalPERS membership unless they *file* with CalPERS an election in writing to become members. No statutory or regulatory definition of "file"

applicable to CalPERS was offered at hearing. Generally, something is deemed to be “filed” with a governmental agency when it is received. For example, under California Code of Regulations, title 1, section 1006, subdivision (h), any document delivered to OAH either in hardcopy or by facsimile is deemed to be “filed” when it is received by OAH during business hours; if it is received after business hours, it is deemed to be “filed” the next business day.¹

18. There is nothing in Government Code section 20324, subdivision (a), to suggest that the legislature, when it included the term “files with the board” in the statute intended that term to have anything other than its usual, plain language meaning, i.e., that an election by an Assembly employee to be a member of CalPERS would become effective when CalPERS received the election.

19. This plain language definition is consistent with the manner in which the Assembly has historically been inputting its eligible employees’ elections into the CalPERS system. Because Assembly employees are excluded from CalPERS’ membership until they elect to become members, the Assembly cannot know whether an employee wishes to become a member of CalPERS until the Assembly receives the employee’s completed election form.

20. The advice CalPERS has included in its Guide and Circular Letter is inconsistent with the plain language of Government Code section 20324, subdivision (a). The Guide and Circular Letter provide that an employee will be deemed to be a CalPERS member either as of the date on his or her election form, or no later than the beginning of the first pay period after that date, no matter when the Assembly or CalPERS may receive that election. There is no way for the Assembly or CalPERS to determine when an employee has actually signed an election form if the completed form is received some time after the signature date. Because an Assembly employee may decide to become a CalPERS member long after he or she begins her employment, under the Guide and Circular Letter, an unscrupulous employee could backdate the election form to a time well before the employee submits it in an effort to obtain undeserved contributions from the Assembly.²

¹ California Code of Regulations, title 1, section 1006, subdivision (h), provides:

(h) Papers delivered by the U.S. Postal Service are filed on the date received by OAH. Papers hand delivered to OAH and complete papers received by OAH by facsimile transmission during regular business hours (8 a.m. to 5 p.m.) will be filed on the date received. Papers received after regular business hours are deemed filed on the next regular business day.

² There was no evidence that the individual respondents were unscrupulous or did anything inappropriate when submitting their Elections to the Assembly.

21. CalPERS' position that an employee should be deemed to be a member of CalPERS based upon the signature date on an election form, instead of when that form is received and inputted into the CalPERS system, is inconsistent with the plain language of Government Code section 20324, subdivision (a). Consequently, the Assembly's appeal must be granted.

LEGAL CONCLUSIONS

1. Government Code section 20324 provides:

(a) An employee of the Senate or the Assembly, or the respective committees thereof, whose salaries or wages are paid from the Senate Operating Fund or the Assembly Operating Fund or the Operating Funds of the Assembly and Senate, shall be deemed a "legislative employee." A legislative employee is excluded from membership in this system unless he or she files with the board an election in writing to become a member. The election shall not be required of a legislative employee who was a member of this system on October 1, 1963.

(b) Upon electing to become a member, a legislative employee may further elect at any time prior to retirement to receive service credit for his or her prior, excluded legislative service and he or she shall have the option as to how much of that prior legislative service is to be credited. The legislative employee shall make contributions to this system as specified in Sections 21050 and 21051 for the previous service as a legislative employee for which he or she desires to receive service credit.

2. The plain language of Government Code section 20324, subdivision (a), controls over CalPERS' interpretation of that statute as set forth in the Guide and Circular Letter. (*Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 930. See also *Ligon v. State Personnel Board* (1981) 123 Cal.App.3d 583, 588.) Under Government Code section 20324, subdivision (a), an Assembly employee is excluded from membership in CalPERS "unless he or she files with the board an election in writing to become a member." The plain language meaning of "files with the board" is when CalPERS receives the employee's election. (Findings 17 through 19.) The Assembly inputted the individual respondents' elections into the CalPERS' system promptly at the beginning of the first pay period after the Assembly received those elections. In accordance with the plain language of Government Code section 20324, subdivision (a), the individual respondents became members of CalPERS when the Assembly inputted their elections into the CalPERS system.

3. Consequently, the Assembly's appeal must be granted. CalPERS' determinations regarding the dates that the individual respondents became CalPERS members and the mandatory arrears assessed against the individual respondents and the Assembly must be reversed.³

ORDER

1. The appeal of the California State Assembly Committee on Rules is GRANTED.

2. The determinations of the California Public Employees' Retirement System regarding the dates that respondents Calvin Sung and Andrea F. Graham became members and the mandatory arrears assessed against the individual respondents and the California State Assembly Committee on Rules are REVERSED.

3. Respondents Calvin Sung and Andrea F. Graham became members of the California Public Employees' Retirement System on the dates originally inputted by the California State Assembly Committee on Rules.

DATED: January 20, 2016

DocuSigned by:
Karen Brandt
5D48770EB30B4DC...

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings

³ Nothing in this decision is intended to prohibit the individual respondents from purchasing service credit from CalPERS under Government Code section 20324, subdivision (b), for any period of time they were employed by the Assembly in eligible positions prior to becoming members of CalPERS. Because this decision grants the Assembly's appeal, there is no need to reach the Assembly's argument that CalPERS was prohibited from assessing mandatory arrears because it notified the Assembly more than six months after discovering the right to make the assessment.