

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:

JAMES R. NICHOLAS,

Respondent,

and

LOS ANGELES COUNTY,

Respondent,

and

CITY OF GLENDALE,

Respondent.

Case No. 2015-0398

OAH No. 2015050771

PROPOSED DECISION

This matter regularly came for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on January 28, 2016.

Christopher C. Phillips, Senior Staff Attorney, represented Complainant Carene Carolan, Chief, Member Account Management Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

James R. Nicholas (Respondent) represented himself.

Respondents Los Angeles County (Respondent County) and City of Glendale (Respondent City) did not appear at the hearing.

CalPERS reduced Respondent's retirement allowance after disallowing 9.273 years of service credit because Respondent had already received credit for the same work when he retired from another public retirement system, the Los Angeles City Employees' Retirement System (LACERS). Respondent worked for the State Department of Water Resources (DWR) for approximately nine years. He withdrew his contributions upon leaving State employment,

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but repurchased them while working for the City of Los Angeles. Respondent retired from the City of Los Angeles and thereafter started working for Respondent City, a CalPERS contract employer. During his employment with Respondent City, CalPERS accepted Respondent's election to redeposit contributions withdrawn from DWR. Respondent objects to the reduction of his retirement allowance because he informed CalPERS about having purchased the DWR service credit toward his retirement from LACERS and CalPERS accepted his redeposit. Respondent argues that it would be unfair to allow CalPERS to renege on his contractual obligation to him. He relied on the decisions of CalPERS, and had been receiving a retirement allowance based in part on the disputed service for over four years. Respondent argues that the decrease in his monthly allowance will present a significant financial hardship.

Oral and documentary evidence was received at the hearing, and the matter was submitted for decision on January 28, 2016.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. Respondent first became eligible for CalPERS membership while working at DWR, from April 1, 1965, to September 30, 1973. He withdrew his CalPERS retirement contributions upon the termination of his employment with DWR. CalPERS refunded \$4,061.59 to Respondent, and removed 8.300 years of service credit from his account.
3. Respondent returned to work for DWR on April 22, 1974, and remained in the employ of the agency until November 11, 1974. He thereafter withdrew his contributions to CalPERS, and received a refund of \$419.61. CalPERS removed 0.673 years of service credit from his account.
4. Respondent worked for Respondent County from November 12, 1974, through September 30, 1976. While employed for Respondent County, Respondent joined the Los Angeles County Employees' Retirement Association (LACERA).
5. In May 1980, Respondent started working for the City of Los Angeles, and joined LACERS.
6. LACERS has reciprocity agreements with CalPERS and LACERA. On June 16, 1997, Respondent entered into a Contract to Purchase Governmental Service with the City of Los Angeles to purchase service earned while employed at DWR and Respondent County. He agreed to purchase a total of 10.83333 service years from CalPERS and LACERA, at a cost of \$21,279.76 plus interest of \$2,245.96, or \$23,525.72. LACERS estimated that nine years of service credit purchased through redeposit of withdrawn contributions was attributable to employment with DWR.
7. Respondent retired from the City of Los Angeles on July 7, 1999.

8. On September 5, 2000, Respondent started working for Respondent City, a contract employer with CalPERS.

9. While employed by Respondent City, on three occasions Respondent obtained cost estimates to redeposit contributions previously withdrawn from CalPERS for work at DWR. On October 31, 2003, CalPERS informed Respondent that it would cost \$29,440.22 to redeposit contributions previously withdrawn from DWR, which would restore 8.6 years of service credit. On June 25, 2004, the cost for the same redeposit was \$33,231.38, and the number of years to be restored was changed to 9.273. The last estimate, provided on October 24, 2005, was \$35,924.58 to purchase 9.273 years of service credit.¹

10. Respondent accepted that third offer, and on December 1, 2005, he completed an Election to Purchase Service Credit (Election). The document contained the following statement: "I declare, under penalty of perjury, that I have not received credit for this service in any other system supported wholly or in part by public funds." (Exh. 12.) Respondent made a partial payment of \$500 and agreed to make monthly contributions of \$149.86.

11. Respondent included with his Election a letter dated November 22, 2005, which stated: "When I worked for the City of Los Angeles, I purchased PERS service credit for the period of time I worked for the State of California, Dept of Water Resources from 1965 thru 1974[.] Your office in Glendale, CA indicated that I may be able to purchase these credits and put them toward my Cal PERS account[.] However, it was recommended that I contact you to determine if this is a conflict with my election to redeposit the service credits[.] [¶] Thank you for your consideration[.] If you have any questions, please contact me at the above phone numbers[.]" (Exh. 13.)

12. CalPERS did not respond to Respondent's November 22, 2005 letter and accepted Respondent's Election. Respondent paid the entire amount required by the Election, the last \$26,544.32 in a lump sum shortly after his retirement. On January 3, 2006, CalPERS posted 9.273 years of service credit to Respondent's account.

13. On December 31, 2010, Respondent retired from Respondent City.

14. On March 4, 2011, a CalPERS analyst raised concerns in an internal note that Respondent may have already received credit from LACERS for the DWR employment and a

¹ It is unclear why the first estimate was for 8.6 years service credit and the last two were for 9.273 years. As set forth in factual finding numbers 2 and 3, CalPERS had previously estimated that the service earned was approximately 9 years (8.3 plus .673). Christine Mercado (Mercado), CalPERS Program Specialist II, explained at the hearing that 9.273 was the correct, most complete estimate, and that the difference may be explained by how the actual years of employment relate to the fiscal year CalPERS uses in its calculations. In any event, Respondent had only worked for the State of California during his two stints with DWR, and it was this service credit he was seeking to restore through his redeposit. The estimate on which he based his decision was for 9.273 years, the same period CalPERS seeks to remove from his account.

staff review of the matter commenced. On June 26, 2014, a CalPERS manager contacted LACERS to obtain information about Respondent's purchase of the DWR credit prior to his retirement from the City of Los Angeles. Upon receipt of information from LACERS that Respondent had already received credit for the time worked at DWR, CalPERS concluded that it could not give credit for the same 9.273 years in Respondent's CalPERS retirement allowance.

15. No evidence was presented at the hearing to explain why no action was taken between March 4, 2011, and June 26, 2014, to investigate the potential DWR service credit problem. Mercado surmised that the delay may have been related to the massive merging of CalPERS computer systems that occurred in 2011. CalPERS' delay in investigating the matter was unreasonable and resulted in injury to Respondent. Respondent continued to rely on the correctness of CalPERS's initial calculation of his retirement allowance as the potential overpayment amount increased and his options to continue working or to purchase Additional Retirement Service Credit (ARSC) to make up any income shortfall disappeared.

16. On September 19, 2014, Eleni Papailias (Papailias), Staff Services Manager, Customer Account Services Division, CalPERS, informed Respondent that Government Code section 20894, subdivision (a), prohibits an individual from receiving credit for the same service in two public retirement systems. Since Respondent had already received credit for the 9.273 years worked at DWR in his LACERS retirement, he could not again receive credit in his CalPERS retirement allowance. Papailias stated that CalPERS had the obligation to correct the error and that 9.273 years of redeposit credit would be removed from Respondent's account.

17. The September 19, 2014 letter was the first notice Respondent had received that there was a problem with his repurchase of DWR service credit. He appealed Papailias's determination, and on December 30, 2014, Sharon Hobbs (Hobbs), Staff Services Manager II, Service Credit Costing, Tier and Support, CalPERS, denied the appeal. In her letter Hobbs, informed Respondent that removal of 9.273 years of service credit would result in a decrease in his retirement allowance of \$1,440.29 per month.

18. On January 16, 2015, Respondent appealed Hobbs' initial determination. On January 30, 2015, Hobbs made a formal determination that Respondent could not receive credit for the DWR employment because the service had already been credited by another public retirement system. Respondent thereafter requested a hearing.

19. Respondent started receiving a reduced monthly allowance of \$1,769.50 in March 2015.²

² CalPERS has not attempted to collect any alleged overpayment resulting from the payment of a retirement allowance that included the DWR service credit. The Statement of Issues states that "The appeal is limited to the issue of whether CalPERS was correct in determining that [Respondent]'s Redeposit service credit of 9.273 years was invalid and should be rescinded." (Exh. 1, at p. 9.) Accordingly, no factual findings or legal conclusions are made about whether CalPERS can collect any alleged overpayment.

20. Respondent testified that he has been injured by CalPERS's negligence, and presented a "List of Potential Damages." (Exh. G.) These potential damages include the reduction in his monthly allowance, and the opportunity cost of the funds used for redepositing the contributions for the disallowed service credit. Respondent also included costs of retiring when he did based on the assumption that the purchase of 9.273 years of service credit had been approved. Respondent asserts that had he known the purchase would not be allowed, he and his wife could have worked longer and would not have incurred expenses in moving out of state after the early retirement.

LEGAL CONCLUSIONS

1. Government Code section 20894, subdivision (a), provides: "A person shall not receive credit for the same service in two retirement systems supported wholly or in part by public funds under any circumstance."

2. The language of the statute is clear and precludes Respondent from receiving credit for the same service in two public retirement systems "under any circumstance." The facts are not in dispute. As set forth in factual finding numbers 2 through 7, Respondent worked for three retirement systems supported by public funds, including CalPERS and LACERS. As set forth in factual finding numbers 6 and 7, he received credit for his work for DWR from LACERS. He cannot receive credit for the same service from CalPERS.

3. CalPERS has the duty and the power to correct its mistakes. (Gov. Code, §§ 20160, subd. (b), 20164.) Moreover, "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled." (Gov. Code, § 20163, subd. (a).) In this case, CalPERS mistakenly permitted Respondent to redeposit withdrawn contributions to purchase 9.273 years of service credit for employment at DWR. It mistakenly included the 9.273 years in the calculation of Respondent's retirement allowance. CalPERS can correct these mistakes pursuant to Government Code sections 20160, subdivision (b), and 20163, subdivision (a), through reduction of Respondent's retirement allowance.

4. The doctrine of equitable estoppel is available in certain circumstances to those who detrimentally rely on representations made by another. In order for equitable estoppel to apply, the following requirements must be met: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true facts; and (4) he must rely upon the conduct to his injury." (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Although the doctrine can be applied against the government "where justice and right require it," it cannot be applied against the government where to do so would effectively nullify a "strong rule of policy, adopted for the benefit of the public . . ." (*City of Long Beach v. Mansell, supra*, 3 Cal.3d at p. 493.) Where the rule of policy is clearly embodied in statutory

or constitutional limitations, courts have not invoked the principles of equitable estoppel. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28; *Chaidez v. Board of Administration* (2014) 223 Cal.App.4th 1425, 1431-32; *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 869.) Nor can estoppel be applied where to do so would enlarge the power of a governmental agency or expand the authority of a public official. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.)

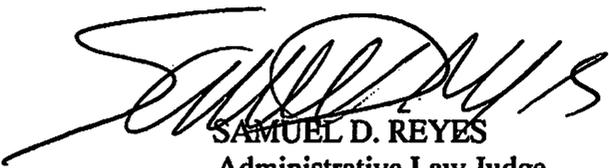
Respondent may not avail himself of the equitable estoppel doctrine to obtain relief. Respondent made personal and financial decisions in reliance of CalPERS's acceptance of his Election and his contributions. Through no fault of his own, the error was not discovered for almost 10 years, which negated any opportunity he may have had to work additional time or to purchase ARSC. Disallowance of the redeposit of contributions to purchase the 9.273 years of service credit caused financial injury to Respondent, as his retirement allowance was cut almost in half. However, even if the first four elements of equitable estoppel are present, Government Code section 20894, subdivision (a), embodies a clear policy of the State of California, and he may not receive credit with CalPERS he has already received through LACERS. Moreover, application estoppel would enlarge the power of CalPERS, which cannot otherwise provide retirement credit for service already credited by another public retirement system.

5. All arguments and contentions of Respondent have been considered. However, Government Code section 20894, subdivision (a), mandates the Order that follows, by reason of factual finding numbers 1 through 19 and legal conclusion numbers 1 through 4.

ORDER

Respondent's appeal is denied.

DATED: 2/22/16


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings