ATTACHMENT E

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: DIANE D. EUER, Respondent.	Case No. 2015-0121 OAH No. 2015050721

PROPOSED DECISION

This matter was heard before Marcie Larson, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 19, 2015, in Sacramento, California.

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

Diane D. Euer (respondent) was present and represented herself.

Evidence was received, the record was closed, and the matter was submitted for decision on October 19, 2015.

ISSUE

The issue for determination in this matter is whether CalPERS correctly determined that respondent is no longer eligible to purchase service prior to membership (SPM) service credit because she service retired effective July 31, 2014, and is no longer employed by a CalPERS covered employer.

FACTUAL FINDINGS

Background and Procedural History

1. On May 8, 2015, Carene Carolan, Chief of the Customer Account Services Division signed and thereafter filed the Statement of Issues in her official capacity.

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2. Between March 17, 1975, through February 28, 1976, respondent worked as a seasonal clerk for the Employment Development Department (EDD), which amounted to 1.005 years of service. On or about March 16, 1976, respondent was hired by EDD as a permanent employee. As a permanent employee, respondent became a member of CalPERS and made contributions towards her retirement. On or about November 27, 1983, respondent terminated her employment with EDD. At that time, she elected to withdraw her retirement contributions from CalPERS.

3. In approximately 1986, respondent returned to work at EDD. Prior to her retirement on July 31, 2014, respondent was employed as a Senior Tax Compliance Representative. By virtue of her employment with EDD, respondent is a member of CalPERS.

4. On March 28, 2012, respondent submitted to CalPERS a request for service credit cost information for the purchase of SPM for the period of time that she was employed as a seasonal clerk for EDD. Respondent also submitted a request for the cost information to redeposit the contributions she withdrew from CalPERS in 1983.

5. On or about January 14, 2013, CalPERS mailed respondent a document concerning the cost to redeposit the contributions she withdrew from CalPERS. The cost for the 4.646 years of service credit she earned between March 16, 1976, through November 27, 1983, totaled $6,163.48. Respondent was informed that if she wished to redeposit the withdrawn contributions, she was required to complete and submit to CalPERS within 60 days, an Election to Purchase Service Credit form (Service Credit Form).

6. On January 31, 2013, respondent completed and submitted to CalPERS the Service Credit Form. Thereafter, CalPERS processed her request.

7. On or about May 19, 2014, CalPERS mailed respondent a document concerning the cost to purchase SPM. The cost to purchase the 1.005 years of service she earned when she worked as a seasonal employee for EDD was $1,408.70. Respondent was informed that if she wished to purchase the SPM, she was required to complete and submit a Service Credit Form to CalPERS within 60 days. Respondent was also informed that if CalPERS did not receive the Service Credit Form within 60 days, respondent must submit a new request for cost information, which may affect her eligibility and the cost to purchase the SPM. Respondent had until July 19, 2014, to submit her request. Respondent did not submit the Service Credit Form within 60 days as required. Effective July 31, 2014, respondent retired from state service.

8. At hearing, Nora Horton, Staff Service Manager II for the Service Credit Purchase Unit at CalPERS, testified that there was an over two-year delay in the date that respondent made her request for SPM cost information and the date the information was mailed to her because of an extreme backlog in work and the implementation of a new computer database system. In addition, Ms. Horton's staff of 15 serviced approximately 1.8 million CalPERS members. As a result, at times there was delays in service.

9. Ms. Horton also testified that the purpose for the requirement that a member submit the Service Credit Form to CalPERS within 60 days of receipt of the cost information is because the calculations used to factor the cost to purchase SPM include actuarial factors. These factors can change after 60 days and the cost to purchase SPM could increase. If the member fails to submit the Service Credit Form within 60 days, that member has the option of submitting a new request for cost information. However, in respondent's case, since she retired on July 31, 2014, she was no longer eligible to purchase SPM.

10. On or about September 5, 2014, respondent telephoned CalPERS and thereafter sent a letter CalPERS which explained that she had "over looked" the May 19, 2014 SPM cost information. Respondent explained that during May 2014 she was visiting family in Colorado. She became ill and had to be hospitalized. Respondent returned to California, but she continued to have health problems. Respondent wrote that she had to "reserve her energy for issues that required immediate attention such as [her] bills." Respondent further stated that she did not become aware of the May 19, 2014 letter from CalPERS concerning her request to purchase SPM, until September 4, 2014. Respondent stated that had she been aware of the letter and the deadline to submit the Service Request Form, she would have done so. Respondent asked that CalPERS allow her to purchase the SPM. Respondent also submitted an incomplete Service Request Form.

11. On September 18, 2014, Sarah Malm-Annan, Manager for the Service Credit Section, sent respondent a letter in response to her September 5, 2014 request. Ms. Malm-Annan informed respondent that pursuant to Government Code section 21073.7, an election to purchase SPM must be made prior to retirement. Because respondent had retired, she was not longer eligible to purchase SPM credit. Ms. Malm-Annan also informed respondent that if she reinstated from her retirement, she could submit a new request to purchase SPM.

Respondent's Evidence

12. At hearing, respondent explained the circumstances that resulted in her failure to timely submit the Service Credit Form to purchase SPM service credit. Respondent's last day at EDD was March 19, 2014. Respondent arranged with EDD to use her leave credits until her retirement on July 31, 2014. As of March 19, 2014, respondent was not aware that she was eligible to purchase SPM credit, because she had not receive a cost estimate from CalPERS.

13. In early May 2014, respondent travelled to Utah and Colorado to visit her children. While in Colorado, respondent became extremely ill. She was admitted to the hospital and her gallbladder was removed. Respondent recovered in Colorado. On or about May 26, 2014, she was cleared by her physician to fly back to California.

After respondent returned home, her health continued to deteriorate. Respondent was diagnosed with systemic lupus 20 years ago. This disease affects her ability to recover from illness. Respondent was not able to manage alone, so her son and his family moved into her home to help care for her and her affairs. On August 4, 2014, respondent was diagnosed

with infections in her liver and pancreas. Respondent began to heal and by September 2014 she was able to address her affairs. During the summer of 2014, respondent's mail was stacked on her dresser and later placed in a box to be addressed at a later date.

14. On September 4, 2014, respondent had recovered from her illness to the point that she began to review her mail. That evening she discovered the May 19, 2014 SPM cost package mailed to her by CalPERS. The next day respondent contacted CalPERS to get information about filing the Service Credit Form late. Respondent was told that it would not be accepted because she had retired, but she was given the option to send in the Service Credit Form and request that it be considered.

15. Respondent contended that she missed the 60-day deadline to purchase SPM service credit because of her poor health. She further contended that CalPERS failed to do its due diligence in ensuring that she timely received a cost estimate for purchase of SPM service credit. She also believed that CalPERS should have contacted her after the May 19, 2014 package was mailed to her and before the 60-day time limit to elect to purchase the SPM service credit had expired, to ensure that she received the package. Had CalPERS done so, she would have been alerted that the information had been sent to her and she would have immediately submitted the Service Credit Form, just as she did when she elected to purchase her withdrawn contributions.

Discussion

16. The evidence established that on May 19, 2014, CalPERS mailed to respondent information on how to purchase SPM service credit. Respondent had 60 days to elect to purchase SPM service credit and to return the Service Credit Form to CalPERS. It is evident that respondent suffered from health issues at the time CalPERS mailed the Service Credit Form. However, respondent's illness did not alleviate her obligation to return the form to CalPERS within 60 days from the date of mailing. By the end of May 2014, respondent was cleared by her physician in Colorado to return to California. When respondent returned to California, she was able to attend to her bills and she had family assist her at home. Furthermore, by law, once respondent service retired, she was no longer eligible to purchase SPM service credit. To allow respondent to purchase SPM service credit in a retroactive manner, is prohibited by law.

17. Respondent had the burden of proving that she was eligible to purchase SPM service credit after she retired, or that there was a correctable error or omission in her failure to timely elect to purchase SPM service credit. Respondent failed to meet that burden. The evidence established that CalPERS correctly determined that respondent is no longer eligible to purchase SPM service credit because she service retired effective July 31, 2014.

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LEGAL CONCLUSIONS

1. The purpose of the Public Employees' Retirement Law (PERL) is "to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits." (Gov. Code § 20001.)

2. The PERL provides an opportunity for CalPERS members to elect to purchase SPM, which will affect the member's ultimate retirement compensation. This option is delineated in Government Code section 21032 which states:

> 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.

3. The party asserting the affirmative in an administrative action has the burden of going forward and the burden of persuasion by the preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) An applicant for retirement benefits has the burden of proof to establish a right to the entitlement, absent a statutory provision to the contrary. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54, 57.) Thus, respondent has the burden of proof to establish that she was eligible to purchase SPM service credit after she retired from state service, or that there was a correctable error or omission in her failure to timely elect to purchase SPM service credit.

4. Government Code section 20160 governs a request made by a CalPERS member to correct an error and provides that:

> (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.

5. As set forth in Factual Findings and Legal Conclusions as a whole, CalPERS correctly determined that respondent is no longer eligible to purchase SPM service credit because she service retired effective July 31, 2014. Furthermore, any correction made to allow respondent to purchase SPM service credit after her service retirement is expressly excluded by Government Code section 20160, subdivision(e)(2).

ORDER

The appeal of respondent Diane D. Euer is DENIED.

Dated: October 30, 2015

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Marcie Larson
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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings