

ATTACHMENT E
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application to
Purchase Military Service Credit:

CHARLES L. BERGSON,

Respondent,

and

CITY OF WILLIAMS,

Respondent.

Case No. 2015-0308

OAH Case No. 2015050020

PROPOSED DECISION

This matter was heard before Administrative Law Judge Erin R. Koch-Goodman, Office of Administrative Hearings, State of California, on February 22, 2016, in Sacramento, California.

Preet Kaur, Staff Counsel, represented California Public Employees' Retirement System (CalPERS).

Charles L. Bergson (respondent) appeared and represented himself.

There was no appearance by or on behalf of the City of Williams (Williams). The matter proceeded as a default against Williams pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on February 22, 2016.

ISSUES

1. Did CalPERS properly determine respondent's election to purchase military service credits was invalid because he did not submit payment with his election?

2. Did CalPERS properly deny respondent's request to extend the 60-day timeline to submit an election and payment to purchase military service credits?

3. Did CalPERS properly determine respondent was ineligible to reapply to purchase military service credits on or after February 27, 2014?

FACTUAL FINDINGS

1. Respondent worked for the City of Williams from 2009 to 2013. By virtue of his employment with the City of Williams, respondent is a miscellaneous member of CalPERS. On January 1, 2014, respondent separated from his employment with the City of Williams. His retirement date was February 27, 2014.

2. On January 2, 2014, respondent signed and submitted a Request for Service Credit Cost Information – Military Service to CalPERS to purchase four years of public agency military service credit (MSC). From December 1976 through January 1994, respondent was on active duty with the United States Navy, and was honorably discharged.

3. On January 31, 2014, CalPERS mistakenly sent respondent a letter declaring him ineligible to receive MSC because the City of Williams did not contract for MSC for inactive participants. On February 10, 2014, respondent requested reconsideration of CalPERS's ineligibility determination.

4. On May 28, 2014, CalPERS generated and mailed respondent a MSC cost package for four years of service credit at a cost of \$107,335.80. CalPERS wrote, in part:

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.

Attached are the following forms for your review and/or response:

- Explanation of Payment Options
- Election to Purchase Service Credit
- Installment Payment Guidelines (my|CalPERS 0632)
- Choose Your Installment Payment (my|CalPERS 0634)
- Rollover/transfer information and certification forms (my|CalPERS 0946, 0371, 0892)

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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.

5. The Election to Purchase Service Credit (Election) form states, in part:

We informed you on May 28, 2014 of your right to elect to contribute and receive service credit for Public Agency Military – Active from CalPERS. This Election to Purchase Service Credit must be returned to CalPERS within 60 days to be valid.

CHECK THE OPTION(S) DESIRED

- **Lump Sum Payment Option:** I hereby elect to purchase additional service credit as provided by law and I enclose \$107,335.80. (Payment must be included when the election is filed with CalPERS.)
For Plan-to-Plan Transfer or Rollovers:
 - I have included the appropriate plan-to-plan/rollover certification documents to this election.
- **Installment Plan Option:** I hereby elect to purchase additional service credit as provided by law and I authorize benefit roll deductions in the amount of \$980.11 for 180 payments or I authorize benefit roll deductions in the amount of \$ _____ for _____ payments. This payment schedule includes interest through the completion of payments at the rate of 7.50%.
- **Initial Payment with Installment Option:** I hereby elect to purchase additional service credit as provided by law and enclose \$ _____ as a partial payment. I authorize the minimum deduction amount allowed by the retirement law or I authorize deductions from my retirement allowance in the amount of \$ _____ (by law a payment schedule may be a maximum of 15 years with a minimum payment of \$15.00). This payment schedule includes interest through the completion of payments at the rate of 7.50%.

6. CalPERS maintains a Customer Touch Point (CTP) log for each member, noting telephone calls, walk-in, and mail contacts with the member, as well as a brief summary of the information provided. CTP reflects a June 9, 2014 telephone call from respondent to CalPERS requesting assistance in completing the Election form. CTP reflects a July 24, 2014 in-person visit by respondent to the Sacramento CalPERS office requesting assistance in completing the Election form. At the in-person meeting, CalPERS staff informed respondent he had 60 days to submit the Election form or his election would not be valid, and he will not be able to reapply because he is now retired. In turn, respondent verbally requested an extension of the 60-day deadline and informed CalPERS staff he would file a written appeal. After respondent left, CalPERS staff referred the file to Nova Horton, Staff Services Manager II, for intervention. Ms. Horton reviewed the file and contacted respondent by phone. Ms. Horton reiterated the requirements of the Election: 60 days to submit the Election or it is invalid, CalPERS cannot grant an extension of time beyond 60 days, and respondent cannot reapply for MSC because he is retired. Respondent informed Ms. Horton he was trying to get a loan for the money, but needed more time. Ms. Horton directed respondent to the Installment Plan Option, explaining he could choose the installment plan, and then secure outside funding at a lower interest rate and pay off the CalPERS loan without a prepayment penalty. Ms. Horton explained to respondent he must pay for the entire cost of the benefit because it is a present value calculation; otherwise, it was an unfunded liability to the employer. Respondent informed Ms. Horton he would file the Election form and an appeal of the 60-day deadline.

7. On July 24, 2014, respondent returned to the Sacramento CalPERS office and submitted the Election form, choosing the lump-sum payment option. However, respondent did not submit a payment with his Election. Instead, respondent submitted a written request for an extension of the 60-day timeframe to secure the \$107,335.80: four months or December 1, 2014.

8. On August 8, 2014, Ms. Horton sent a letter to respondent denying his request for an extension. Ms. Horton wrote, in part:

CalPERS must receive a valid election to purchase service credit, with payment and/or an installment payment plan selected within 60 days, to ensure proper funding. The California Public Employees' Retirement Law (PERL) government code section (GC) 21024 (b), states in part, "the member shall pay the contributions as specified under GC 21050 and 21052." This government code section prevents CalPERS from granting extensions to the 60 day timeframe as this would create an unfunded liability and would essentially transfer that liability to the employer.

CalPERS received your PA Military election and letter of appeal on July 24, 2014, however your election is invalid as you selected the lump sum payment option and did not submit

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payment along with your election as specifically stated on the CalPERS election form my|CalPERS 0889, "payment must be included when the election is filed with CalPERS." This requirement is defined in the PERL government code section 21050 (a) and specifically states in part, "the election shall be effective only if accompanied by a lump sum payment."

Unfortunately, your request for CalPERS to extend the timeframe to purchase PA Military cannot be approved, as this would create an unfunded liability and would transfer the liability to the employer, which is unlawful. Additionally, you are not eligible to reapply for the PA Military service since you retired on February 27, 2014.

9. On September 8, 2014, respondent sent a letter to CalPERS requesting an appeal of its decision not to grant an extension. On September 22, 2014, Ms. Horton sent a letter to respondent explaining the appeal process. On October 14, 2014, respondent sent a letter to CalPERS formally appealing its decision. On April 26, 2015, CalPERS made and filed a Statement of Issues in this case.

Respondent's Position

10. Respondent asserts CalPERS practices are misleading and unfair and harm veterans. Respondent reports he did not have access to \$100,000 in 60 days and the CalPERS financing, 7.50 percent interest rate, was too high. Further, respondent believes the CalPERS loan would have required him to make payments for the entire duration of his retirement. Given the above, respondent felt forced to negotiate private financing for the \$107,335.80, requiring at least three to four months. Respondent argues he should be permitted the three to four months to secure a private loan, because CalPERS took five months to issue the MSC cost package to respondent after his request. In the end, respondent concedes his extension of time would create an unfunded liability for his employer, but it would be an insignificant amount compared to the City's overall budget.

11. In his written request for extension, dated July 24, 2014, as well as at hearing, respondent argues the options presented in the CalPERS service credit letter are a "catch-22" for him and other veterans. He wrote:

- a. Lump Sum Payment – as noted above, arranging this level of funds takes about three months, CalPERS allows two months.
- b. Installment Payment – If this option is taken, CalPERS is permanently taking nearly \$12,000 a year from the contributor. This is whether we pay off the balance or not.

- c. Initial Payment – As shown in the Lump Sum Payment, arranging for significant level of funds takes a significant amount of time. CalPERS does not allow adequate time.

All of these offers are impractical, misleading, and unfair.

Pragmatically speaking, CalPERS should have advised potential retirees that CalPERS offers Military Service Credit, the Military Service Credit policy has problems, it does not pay, and needs legislative action to correct these problems.

LEGAL CONCLUSIONS

Burden of Proof

1. “As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence....” (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044; Evid. Code, § 500.) In this matter, respondent bears the burden of proof. In addition, respondent as the party seeking correction of an error or omission has the burden to establish the right to correction. (Gov. Code, § 20160, subd. (d).)

Relevant Laws

2. Government Code section 21024 outlines a member’s eligibility for military service retirement benefits stating, in part:

- (a) “Public service” with respect to a local member, other than a school member, also means active service with the Armed Forces or the Merchant Marine of the United States, including time during any period of rehabilitation afforded by the United States government other than a period of rehabilitation for purely educational purposes, and for six months thereafter prior to the member’s first employment by the employer under this section in which he or she was a member.

- (b) Any member electing to receive credit for that public service shall make the contributions as specified in Sections 21050 and 21052.

[¶] . . . [¶]

- (e) This section shall apply to a member only if he or she elects to receive credit while he or she is in state service in the

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employment of one employer on or after the date of the employer's election to be subject to this section.

3. Government Code section 21050 requires members to pay for their service credit election in a lump-sum or with an authorization for payments. Section 21050 states, in part:

(a) An election by a member to receive credit for service under this part, in addition to his or her current and prior service credit, shall be effective only if accompanied by a lump-sum payment or an authorization for payments, other than a lump-sum payment, in accordance with regulations of the board.

(b) If a member electing to receive credit for service under this part is authorized to pay for that service in installment payments beginning on or after January 1, 2004, the amount of the installment payments shall include an actuarial adjustment, as determined by the chief actuary, as necessary to take into account the provisions of Section 21037. The amount of the actuarial adjustment may not exceed one-half of 1 percent of the total installment payment.

4. Government Code section 21052 requires an employee electing service credit to "contribute, in accordance with Section 21050, an amount equal to the increase in employer liability, using the payrate and other factors affecting liability on the date of the request for costing of the service credit."

Determination

5. On January 2, 2014, respondent, an active CalPERS member, requested a cost package to purchase four years of MSC. On or about May 28, 2014, respondent received the cost package from CalPERS requiring the Election form and payment within 60 days. On July 24, 2014, respondent filed his Election form, selecting the lump sum payment option, but submitted no payment. Respondent's Election was invalid because he failed to submit a lump sum payment. (Gov. Code, § 21050.)

6. On July 24, 2014, respondent filed a written request to extend the 60-day timeframe offered by CalPERS in its May 28, 2014 letter. Respondent's request for extension of the 60 day timeframe was properly denied; because to grant an extension would transfer liability/cost for respondent's MSC to the employer for the period of the extension, in violation of Government Code section 21024.

7. Respondent was provided reasonable payment options by CalPERS for his MSC. The Election form itself is quite clear. In addition, on July 24, 2014, Ms. Horton informed respondent he could select the installment payment option and receive a loan from

CalPERS for \$107,335.80 at 7.50 percent and make 180 monthly payments (15 years) of \$980.11; then, secure a private loan with a lower interest rate in the next three to four months and pay off the CalPERS loan with no prepayment penalty. Here, respondent misunderstood the installment payment option. He argued the installment plan option was not tenable because he would be forced to pay the monthly payments for the life of his retirement disbursements and he was never informed he could pay off the CalPERS loan early. The Election form is clear. Respondent had reasonable and workable payment options to secure his MSC within the 60 days.

8. On February 27, 2014, respondent retired for service. According to Government Code section 21024, subdivision (e), "This section shall apply to a member only if he or she elects to receive credit while he or she is in state service . . ." On and after February 27, 2014, respondent was no longer in state service, and therefore, no longer eligible to apply and elect to purchase MSC.

9. Finally, CalPERS must ensure the rights of members and retirees to their "full, earned, benefits." (*City of Oakland v. Public Employees' Retirement System* (2002), 95 Cal.App.4th 29, 46.) The Board's fiduciary duty is to all members, not to one. To allow respondent an extension of time would "provide the party seeking correction with a status, right, or obligation not otherwise available" by statute. (Gov. Code, § 20160, subd. (a)(3).) CalPERS must ensure equal application of the PERL. Ultimately, respondent's request is untenable and is contrary to the fair administration and purpose of public pension plans, as well as in violation of the law.

10. As set forth in the Factual Findings and Legal Conclusion as a whole, respondent failed to meet the requirements of an election to purchase MSC. Respondent was offered reasonable and workable payment options and a 60-day deadline; respondent was unable to meet either prong. Because respondent is no longer in state service, he is no longer eligible to purchase MSC.

ORDER

The appeal of Charles L. Bergson for an extension of the 60 day timeline is DENIED.

DATED: March 10, 2016

DocuSigned by:

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ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings

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