

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Appeal of the Redeposit  
of Withdrawn Contributions Election of:

Case No. 2015-0824

MARK M. MIXSON,

OAH No. 2016010167

Respondent,

and

DEPARTMENT OF FORESTRY AND  
FIRE PROTECTION; SACRAMENTO  
METROPOLITAN FIRE DISTRICT,

Respondents.

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Ed Washington, Office of Administrative Hearings, in Sacramento, California, on July 8, 2016.

Senior Staff Attorney John L. Shipley represented the California Public Employees' Retirement System (CalPERS).

Mark M. Mixson (respondent) was present and represented himself.

There was no appearance by or on behalf of respondent Department of Forestry and Fire Protection (Cal Fire) or respondent Sacramento Metropolitan Fire District (Metro Fire). At the hearing, CalPERS established that both Cal Fire and Metro Fire were properly served with the Statement of Issues and Notice of Continued Hearing. This matter therefore proceeded as a default against those respondents pursuant to Government Code section 11520.<sup>1</sup>

Evidence was received, the record was closed, and the matter was submitted for decision on July 8, 2016.

<sup>1</sup> All further statutory references are to the Government Code unless otherwise specified.

PUBLIC EMPLOYEES RETIREMENT SYSTEM  
FILED August 11, 2016  
*Rachelle E. Schrey*

## ISSUE

The issue for determination in this matter is whether CalPERS correctly determined that respondent is no longer eligible to purchase redeposit service credit because he service retired effective November 12, 2011, and is no longer employed by a CalPERS employer.

## FACTUAL FINDINGS

### *Background and Procedural History*

1. On January 4, 2016, Carene Carolan, Chief of the Member Account Management Division signed and thereafter filed the Statement of Issues in her official capacity.
2. From June 16, 1978, through October 17, 1980, respondent worked as a Seasonal Firefighter for Cal Fire. By virtue of his employment with Cal Fire, respondent became a member of CalPERS. On two occasions during this period, respondent separated from employment with Cal Fire and terminated CalPERS membership by taking a refund on his member retirement contributions. Those contributions amounted to 1.010 years of retirement service credit.
3. On or about March 1, 1990, Metro Fire hired respondent as a permanent employee. As a permanent Metro Fire employee, respondent reestablished membership in CalPERS and made contributions towards his retirement.
4. On September 16, 2011, respondent submitted to CalPERS a Request for Service Credit Cost Information—Service Prior to Membership, CETA & Fellowship form seeking cost information for the purchase of service prior to membership, for the period of time he was employed as a Seasonal Firefighter for Cal Fire. The form also specifies that respondent submitted a retirement application to CalPERS, requesting service retirement effective November 12, 2011. Respondent service retired on that date.
5. Because respondent's employment with Cal Fire did not constitute service prior to membership, CalPERS determined that respondent should have requested redeposit of withdrawn retirement contributions, rather than the purchase of service prior to membership. About February 7, 2013, CalPERS mailed a letter to respondent detailing the cost and effect of the redeposit of withdrawn retirement contributions stemming from his employment with Cal Fire. The letter specifies that "[s]ince 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 to the letter was an Election of Payment Options form, an Election to Purchase Service Credit form (Election Form), Installment Payment Guidelines, and rollover/transfer information forms. The letter also includes the following information:

## **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 have any questions, please visit our website [www.calpers.ca.gov](http://www.calpers.ca.gov), or you may contact us toll free at **888 CalPERS (or 888-225-7377)**.

(Bolding, bullet points, and underlining in original.)

6. Although the February 7, 2013 letter from CalPERS specifies that respondent must complete and return the Election Form within 60 days to purchase the additional service credit, respondent did not submit the completed Election Form until June 10, 2013; 123 days after February 7, 2013. By letter dated June 10, 2013, CalPERS informed respondent that it could not process his Election Form because the election had to be made no later than April 7, 2013. Through this letter, CalPERS also informed respondent that because he had retired he was ineligible to purchase service credit unless he reinstated with a CalPERS employer.

7. Sarah Malm-Annan is a Staff Service Manager I for the Service Credit Purchase and Elections Unit at CalPERS. She manages the unit responsible for determining eligibility for and the processing of service credit purchases. Ms. Malm-Annan is familiar with respondent's request to redeposit contributions. She testified that a member must submit the Election Form to CalPERS within 60 days because the calculations used to determine the cost to redeposit withdrawn contributions include actuarial factors. These factors can change after 60 days and the cost to purchase service credit could increase. When a member fails to submit the Election Form within 60 days, the member may submit a new request for cost information if employed by a CalPERS employer.

8. Ms. Malm-Annan testified that although respondent incorrectly submitted the Service Prior to Membership cost information form on September 16, 2011, because that

form was submitted prior to his retirement, CalPERS gave respondent a one-time opportunity to redeposit withdrawn retirement contributions by submitting the correct materials (i.e., the Election Form) within 60 days. Because respondent did not return the materials to CalPERS within 60 days and was no longer employed by a CalPERS employer, the service credit cost information was no longer valid and respondent was no longer eligible to request redeposit of withdrawn contributions. Ms. Malm-Annan explained that CalPERS will occasionally accept late applications to purchase service credit due to a member's reasonable mistake, but added that doing so creates an "unfunded liability" and can cause increased pension rates for CalPERS employers and employees. She also testified that respondent's initial request to purchase service credit prior to membership was delayed for several months due to internal changes and a large work backlog at CalPERS. However, that delay did not affect respondent's eligibility to redeposit withdrawn contributions, as his request would have been processed retroactive to September 16, 2011, if he completed and returned the Election Form by April 7, 2013, as instructed.

### *Respondent's Evidence*

9. At hearing, respondent explained the circumstances that led to his failure to timely submit the Election Forms to CalPERS. He asserted he was not aware that if he missed the 60-day window he could not resubmit a request until returning to employment with a CalPERS employer. Although the election letter states that he must complete and return the materials within 60 days and that failure to do so may affect his eligibility and cost to purchase service credit, respondent claimed this information was not sufficiently emphasized "through the delivery and format of the letter" to indicate its significance.

10. Respondent felt that had CalPERS made the importance of the 60-day timeframe "explicit and obvious" in its materials, he would have appreciated the effect his failure to timely return those materials would have on his retirement. He testified that because the letter was sent by regular mail, rather than by certified mail, he was not alerted to its importance. Respondent also felt that because CalPERS took approximately 16 months to reply to his initial request for cost information, there was no urgency associated with his response.

11. Respondent also explained that he initially only gave the election letter a cursory reading when he received it because he was extremely busy. Most of his time was consumed with caring for a very close friend battling cancer. Respondent stated that he also spent significant time planning a 30-year anniversary celebration for a non-profit organization around the time the letter from CalPERS arrived.

### *Discussion*

12. The evidence established that on February 7, 2013, in response to respondent's attempt to redeposit withdrawn retirement contributions, CalPERS mailed respondent information explaining what it would cost to redeposit his contributions and what he must do to redeposit them for service credit. Respondent had 60 days from February 7, 2013, to elect

to redeposit the contributions by returning the Election Form to CalPERS. He did not return the completed Election Form until June 10, 2013; 123 days after February 7, 2013. Though respondent may have been busy and experiencing personal challenges when he received the February 2013 letter from CalPERS, that does not relieve him of the obligation to return the Election Form to CalPERS within 60 days, as instructed. Nor does it excuse him of the effect of his failure to do so.

13. Respondent's assertion that the pertinent information was not sufficiently explicit and obvious was not persuasive. The letter expressly provides in plain language what respondent's "next step" is, what he must do to complete the "next step," when the next step must be completed, and what will occur as a result of his "next step." The letter also directs respondent to the CalPERS' website or its toll free phone number if he has questions. There was no evidence that respondent contacted CalPERS during the 60-day timeframe with questions regarding the redeposit of his withdrawn contributions. To the extent respondent feels the letter failed to sufficiently explain the requirements for his redeposit of withdrawn contributions, his failure to make any reasonable inquiry to gain a better understanding does not constitute a correctable "error or omission." (Gov. Code § 20160 (a)(3).)

14. Respondent had the burden of proving that he was eligible to redeposit withdrawn contributions after he retired, or that there was a correctable error or omission in his failure to timely elect to redeposit his withdrawn contributions due to mistake, inadvertence, surprise, or excusable neglect. Respondent failed to meet that burden. The evidence established that CalPERS correctly determined that respondent is no longer eligible to redeposit withdrawn contributions because he service retired effective November 12, 2011, and failed to exercise his one-time opportunity to redeposit withdrawn retirement contributions by submitting his Election Form to CalPERS by April 7, 2013.

## LEGAL CONCLUSIONS

1. The purpose of the Public Employees' Retirement Law 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. A CalPERS member may file an election with CalPERS' Board of Administration to redeposit withdrawn retirement contributions into their retirement fund. (Gov. Code § 20750.)

3. A CalPERS member ceases to be a member upon retirement. (Gov. Code § 20340.)

4. 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 he was eligible to redeposit withdrawn retirement contributions after he retired from state service, or that there was a correctable error or omission in his failure to timely elect to redeposit his withdrawn contributions due to mistake, inadvertence, surprise, or excusable neglect.**

**5. 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.**

**6. As set forth in the Findings and Legal Conclusions as a whole, CalPERS correctly determined that respondent is no longer eligible to redeposit withdrawn retirement contributions because he service retired effective November 12, 2011, and failed to exercise his one-time opportunity to redeposit withdrawn retirement contributions by submitting his Election Form to CalPERS by April 7, 2013.**

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**ORDER**

**The appeal of respondent Mark M. Mixson is DENIED.**

**Dated: August 5, 2016**

DocuSigned by:  
*Ed Washington*  
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**ED WASHINGTON**  
**Administrative Law Judge**  
**Office of Administrative Hearings**