

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Statement of Issues of:

CHRISTIAN CANALES,

Respondent,

and

CITY OF BURBANK,

Respondent.

Case No. 2015-0434

OAH No. 2015070843

PROPOSED DECISION

This matter was heard before Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 14, 2016, in Glendale. Elizabeth Yelland, Senior Staff Attorney, represented California Public Employees' Retirement System (CalPERS). Bill H. Seki, Seki, Nishimura & Watase, LLP, represented Christian Canales (respondent), who was present. No appearance was made by or on behalf of the City of Burbank.

Oral and documentary evidence was received. The parties jointly presented exhibits 1-20. CalPERS presented the testimony of Paul Willover, Retirement Program Specialist II. Respondent testified on his own behalf. The argument of counsel was heard and CalPERS's closing brief was marked as exhibit 21. The record was closed and the matter was submitted on July 14, 2016.

ISSUE

Is respondent Canales eligible to purchase five years of additional retirement service credit?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 17 Aug 20 11
[Signature]

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Statement of Issues was made and filed on July 15, 2015, by Carene Carolan, in her official capacity as Chief of the Member Account Management Division of CalPERS.

2. Respondent began his employment as a police officer for the City of Burbank (City) on November 6, 2000. He was promoted to the rank of sergeant in 2008. By virtue of this employment, respondent is a local safety member of CalPERS.

3. The City terminated respondent's employment on June 16, 2010. Respondent appealed the termination to arbitration. The arbitrator issued a decision in October 2013 and found that the City did not have just cause to terminate respondent and ordered the City to reinstate respondent as of the day he was terminated with full back pay, seniority, and benefits. The City provided respondent with back pay and benefits for the period from June 26, 2010, to June 7, 2014. Respondent returned to work as a police sergeant on June 9, 2014.

4. (A) On June 5, 2014, CalPERS staff received a telephone call from respondent, during which respondent stated that his employment with the City was being reinstated and he wished to pursue his purchase of additional retirement service credit (ARSC), which he claimed he was unable to finish because of his wrongful termination. Respondent's inquiry was forwarded to appropriate CalPERS staff for response.

(B) On June 6, 2014, CalPERS staff telephoned respondent regarding his ARSC inquiry. The staff explained to respondent that ARSC was no longer a purchasable service credit type as of January 1, 2013, and advised that if he still believed he was eligible to purchase ARSC, he should write a letter of reconsideration to CalPERS.

(C) Thereafter, respondent wrote a letter to CalPERS dated June 9, 2014, in which he "requested consideration in order to permit me to purchase five years of PERS service credit." (Exh. 3.) In the letter, respondent indicated that he had been in the process of purchasing five years of ARSC in May 2010 when he was unexpectedly terminated, and he was unable to complete the purchase process for four years until his wrongful termination case with the City was resolved.

5. By letter dated June 12, 2014, CalPERS notified respondent of its determination that respondent is not eligible to purchase ARSC based on Government Code section 20909, subdivision (g), and the implementation of the Public Employee's Pension Reform Act of 2013, which made the purchase of ARSC no

longer available to members as of January 1, 2013. The letter briefly summarized CalPERS's records regarding respondent's previous four attempts to purchase ARSC between 2005 and 2008 that were not completed.

6. By letter dated July 1, 2014, respondent requested reconsideration of CalPERS's determination and an administrative hearing in order to allow him to purchase five years of ARSC. This hearing ensued.

Previous Requests to Purchase ARSC

7. On January 1, 2004, pursuant to Government Code section 20909, CalPERS began offering the purchase of ARSC to eligible members with at least five years of credited state service. The option to purchase ARSC was discontinued as of January 1, 2013.

8. Respondent first met the eligibility requirement to purchase ARSC on November 6, 2005 (five years after he was hired by the City). Between 2005 and 2008, respondent made four requests to CalPERS to purchase ARSC. Those requests are discussed below.

9. (A) On December 18, 2005, respondent submitted his first request to CalPERS for cost information for the purchase of ARSC. He was seeking to purchase five years of ARSC.

(B) On February 24, 2006, CalPERS mailed respondent an ARSC cost packet for the purchase of five years of ARSC for the lump sum cost of \$93,350.13. This cost packet was valid only for 60 days (i.e., until April 24, 2006). The cost packet explained that the cost was calculated using a "present value" method and involved a number of actuarial assumptions. The cost packet included "detailed information on the purchase of ARSC including disclosures on purchasing such service credit, payment options, and use of certain payment options," and various forms for respondent's "review and/or response." (Exh. 7, p. 2.)

(C) The February 24, 2006 cost packet advised respondent of the "next step" in the process as follows:

- If you are not interested in purchasing the additional service credit at this time, no response is needed. You may request to purchase this service anytime prior to your retirement date, while still in eligible employment.
- If you wish to purchase the additional service credit, review the remaining information within this packet, complete, sign and return the enclosed Employment Certification and Your Payment Options worksheet

along with the Election to Purchase ARSC, to the address provided. *The Election to Purchase ARSC is irrevocable and must be returned within 60 days. If not received within this time frame you must submit a new request for ARSC cost information*, which may affect your eligibility and the cost to purchase this service credit. (Emphasis in original, italics added; Exh. 7, p. 4.)

(D) The Election to Purchase ARSC form included in the February 24, 2006 cost packet stated that respondent had to return this form within 60 days and, if his completed form was not received within the 60-day time frame, he must submit a new request for ARSC cost information. (Exh. 7, p. 12.) On this Election to Purchase ARSC form, respondent also had to select a method of payment, either a lump sum payment or one of the two installment payment options listed.

(E) CalPERS received no response from respondent within the 60-day time frame. Consequently, the cost packet expired and CalPERS could take no further action on it.

10. (A) On February 24, 2006, respondent submitted a second request to CalPERS for cost information for the purchase of ARSC. He was seeking to purchase five years of ARSC.

(B) On April 19, 2006, CalPERS mailed respondent an ARSC cost packet for the purchase of five years of ARSC for the lump sum cost of \$94,189.78. This cost packet was only valid for 60 days (i.e., until June 19, 2006). It included the same information and forms as the first cost packet, and the same explanation of the "next step" in the process discussed in Finding 9(C), above. (Exh. 9, pp. 2, 4.) The Election to Purchase ARSC form included in this cost packet was similar to the form discussed in Finding 9(D), above. (Exh. 9, p. 12.)

(C) CalPERS received no response from respondent within the 60-day time frame. Consequently, the cost packet expired and CalPERS could take no further action on it.

11. (A) On October 30, 2006, respondent submitted a third request to CalPERS for cost information for the purchase of ARSC. This time, respondent was seeking to purchase three years of ARSC.

(B) On February 14, 2007, CalPERS mailed respondent an ARSC cost packet for the purchase of three years of ARSC for the lump sum cost of \$63,832.49. The February 14, 2007 cost packet was only valid for 60 days (i.e., until April 14, 2007). Like the prior two cost packets discussed above, this cost packet included the same information and similar forms, and the same explanation of the "next step" in the process. (Exh. 11, pp. 2, 4, 12.)

(C) CalPERS received respondent's response to the February 14, 2007 cost packet on December 19, 2007. The response was untimely, as it was submitted eight months after expiration of the 60-day period for this cost packet. CalPERS received an Election to Purchase ARSC form that respondent had signed and dated July 13, 2007, along with other forms and documents. CalPERS was unable to process the forms and documents because they were submitted too late (i.e., after the cost packet had expired and was no longer valid). The documents were also incomplete and did not include payment for the ARSC purchase. By letter dated December 31, 2007, CalPERS notified respondent that it was unable to process his election to purchase ARSC because the information from the February 24, 2007 cost packet was no longer valid. Respondent was instructed to submit a new request for ARSC cost information.

12. (A) On January 14, 2008, respondent submitted a fourth request to CalPERS for cost information for the purchase of ARSC. He was seeking to purchase four years of ARSC.

(B) On May 19, 2008, CalPERS mailed respondent a cost packet for the purchase of four years of ARSC for the lump sum cost of \$95,675.48. This cost packet was only valid for 60 days (i.e., until July 19, 2008). Like the prior three cost packets discussed above, this cost packet included the same information and similar forms, and the same explanation of the "next step" in the process. (Exh. 15, pp. 2, 4, 12.)

(C) CalPERS received no response from respondent within the 60-day time frame. Consequently, the cost packet expired and CalPERS could take no further action on it.

13. After the May 19, 2008 cost packet was mailed to respondent, CalPERS received no other written request from respondent for cost information to purchase ARSC.

Termination and Reinstatement

14. The City terminated respondent's employment as a police sergeant effective June 16, 2010. Respondent appealed the termination and prevailed at arbitration. The arbitrator's Award & Opinion found and ordered as follows: (1) the City "did not have just cause to terminate [respondent]"; (2) the City "will make him whole by re-instating him as of the day he was terminated with full back pay, seniority, pension credit, and other emoluments of employment"; (3) the City "will reduce his back pay by any interim earnings made possible by his termination"; and (4) the City "will deduct all normal employment tax and employee pension contributions from his back pay award." (Exh. 18, p. 12.)

15. The parties presented a Reinstatement Summary report showing the earnings, vacation and sick leave, and other employee contributions owed, that were restored when the City reinstated respondent's employment as a police sergeant. The Reinstatement Summary covers the period June 26, 2010, to June 7, 2014. The Reinstatement Summary indicates that respondent's CalPERS employee contribution for that period was paid by the City as part of the reinstatement of respondent's employment. (Exh. 19.)

Respondent's Testimony

16. Respondent testified at this hearing. He explained that he did not respond to or take action on the first two cost packets sent by CalPERS because he was still trying to figure out how to pay for the ARSC purchase. For the third cost packet, respondent determined that he could pay for the ARSC purchase from an existing IRA account he had. He submitted his paperwork after the 60-day period for the third cost packet had expired. The paperwork was incomplete and did not include payment for the purchase. Respondent explained that he was working undercover and "lost track of time" but was able to submit his paperwork late when there came a lull in the undercover investigation. As for the fourth cost packet, respondent did not act or respond because, at that time, he was under investigation by the sheriff's department and the F.B.I. and "his mind was somewhere else." Respondent did not submit a fifth request for cost information to purchase ARSC. The January 14, 2008 request for cost information, which was his fourth request, was his last such request.

17. Respondent contends that, in May 2010, he made a request to purchase ARSC during a telephone call with CalPERS staff. In May 2010, respondent had been placed on administrative leave at the City, he knew he had an IRA account, and he knew he had to get something started to purchase ARSC. According to respondent, he telephoned CalPERS and requested a cost packet. Respondent contends he never received a cost packet. Respondent testified that when he was terminated in June 2010, he again spoke by telephone with CalPERS staff to ask if he could continue the ARSC purchase process. According to respondent, the CalPERS staff told him he could not continue the ARSC purchase process since he was no longer employed by the City, but he could start the process again if he is rehired by the City.

18. When a member contacts CalPERS, the CalPERS staff documents the contact by entering a note in the Customer Touch Point computer system. A Customer Touch Point Report (CTP Report) was presented which included entries related to contacts between respondent and CalPERS staff. The CTP Report does not contain entries for any contacts between respondent and CalPERS staff in May 2010 and June 2010 as testified to by respondent.

19. On May 23, 2011, CalPERS staff received a telephone call from respondent during which he asked whether he had purchased five years of ARSC. The CTP Report includes an entry for the call that respondent "was separated in August 2010 and was inquiring as to whether he purchased ARSC (5 years). He is requesting reinstatement from agency." (Exh. 16, pp. 3-4.) According to the CPT Report, the next contact between respondent and CalPERS staff was during the June 5 and 6, 2014 telephone calls discussed in Finding 4 above.

LEGAL CONCLUSIONS

1. Cause exists to deny respondent's appeal, in that respondent did not establish his eligibility for the purchase of five years of ARSC, based on Factual Findings 1-19 and Legal Conclusions 2-9 below.

2. When a person seeks to establish eligibility for a government benefit or service, the burden of proof is on him or her to establish such eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161; *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57.) In state administrative hearings, unless indicated otherwise, the standard of proof is "persuasion by a preponderance of the evidence." (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

3. Government Code section 20909 sets forth the requirements for the purchase of ARSC by eligible members of CalPERS.¹ ARSC is defined as "time that does not qualify as public service, military service, leave of absence, or any other time recognized for service credit by the retirement system." (§ 20909, subd. (c).) Prior to retirement, any member "who has at least five years of credited state service, may elect, by written notice filed with the board, to make contributions pursuant to this section and receive not less than one year, nor more than five years, in one-year increments, of additional retirement service credit in the retirement system." (§ 20909, subd. (a).) A member may not elect ARSC under section 20909 more than once. (§ 20909, subd. (b).) In addition, purchasing ARSC is only available to members while employed in state service at the time of the ARSC election. (§ 20909, subd. (e)(1).)

4. CalPERS first began offering its members the opportunity to purchase ARSC on January 1, 2004. ARSC was available as a service credit purchase option pursuant to section 20909 until January 1, 2013, when it was eliminated pursuant to the Public Employees' Pension Reform Act of 2013 (PEPRA). Section 20909 was amended to include subdivision (g), which reads: "This section shall apply only to an

¹ All further statutory references are to the Government Code unless otherwise indicated.

application to purchase additional retirement credit that was received by the system prior to January 1, 2013, that is subsequently approved by the system."

Discussion

5. In this case, respondent did not meet his burden of proving by a preponderance of the evidence that he is eligible to purchase five years of ARSC. Due to changes in the law, the option to purchase ARSC was eliminated as of January 1, 2013. Section 20909 now applies only to an application to purchase ARSC that was received by CalPERS prior to January 1, 2013, and subsequently approved. CalPERS received no such application from respondent as of January 1, 2013. Respondent's last application to purchase ARSC was made in January 2008 and the corresponding cost packet expired on July 19, 2008, with no action taken by respondent to complete the purchase.

6. Although the election to purchase ARSC was eliminated by changes in the law, respondent contends he should still be allowed to purchase ARSC. Respondent contends that he was in the process of purchasing five years of ARSC in May 2010, but his termination by the City in June 2010 interrupted him from completing the purchase. Respondent contends he had to wait until he was reinstated by the City in June 2014 before he could complete the purchase process. He was terminated by the City without just cause. As ordered by the arbitrator, the City has reinstated him with full back pay, seniority, pension credit, and other emoluments of employment. With his employment with the City fully restored, respondent contends he should now be allowed to complete his purchase of five years of ARSC.

7. Respondent's contention is without merit. First, the arbitration award that reinstated respondent's employment with the City does not override the requirements of section 20909 and PEPRA or excuse respondent from its provisions eliminating ARSC as a purchasable service credit type. CalPERS was not a party to the arbitration. Respondent's employment as a police sergeant City is a matter solely between him and the City. Second, respondent's contention is based on the incorrect factual premise that he was "in the process" of purchasing ARSC in May 2010. As noted above, respondent's last application to purchase ARSC was made in 2008. There was no application made in or about May 2010. Respondent's testimony that he made a request to purchase ARSC during a May 2010 telephone call with CalPERS staff is not sufficient; section 20909 required that an election to purchase ARSC had to be made in writing. Respondent was well-aware of that requirement, having made four separate requests for service credit cost information between 2005 and 2008.

8. Respondent has cited no legal authority that would allow him to purchase ARSC after changes in the law eliminated that purchase option as of January 1, 2013. There is no basis for CalPERS to allow the purchase of ARSC at this time as a correctable mistake pursuant to Government Code section 20160, subdivision (b),


which provides that CalPERS "shall correct all actions taken as a result of errors or omissions of . . . any contracting agency . . ." Respondent contends that the City was mistaken and negligent in terminating his employment in June 2010. However, there is no evidence of any action taken by CalPERS resulting from the City's wrongful termination of respondent's employment. Respondent did not have a pending or active application to purchase ARSC at the time of his termination that was acted upon by CalPERS. This case presents no correctable action by CalPERS resulting from errors or omissions by the City.

9. Respondent was eligible to purchase ARSC prior to his wrongful termination in June 2010, but he never did. ARSC purchases were invalidated by PEPRAs as of January 1, 2013. Although respondent submitted four applications to purchase ARSC, he never completely followed through on any of them. Allowing respondent the opportunity to purchase ARSC now, after January 1, 2013, would violate section 20909, subdivision (g). Based on the foregoing, respondent's appeal shall be denied.

ORDER

The appeal of respondent Christian Canales is denied.

DATED: August 16, 2016


ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings