ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal Regarding Overpayment Filed By:	Case No. 8971
KENNETH J. DECOU,	OAH No. 2015060391
Respondent.	

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on February 16, and 19, 2016, and April 28, 2016.

Rory Coffey, Senior Staff Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Kenneth Decou appeared and represented himself.

The parties' request to obtain the hearing transcripts and submit written closing arguments was granted and a briefing schedule established. CalPERS brief was marked and received as Exhibit 110. Mr. Decou's brief was marked and received as Exhibit 111. On September 8, 2016, the record closed and the matter was submitted.

ISSUES

1. Is CalPERS entitled to recover the alleged amount of overpayment made to Mr. Decou because his industrial disability retirement (IDR) allowance was subject to the Government Code section 21228 earnings limit?

2. If yes, what amount is CalPERS entitled to recover?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Oct 10 2016
C. Bodily

SUMMARY OF DECISION

Had this case been filed before the statute of limitations expired, CalPERS would be entitled to recover $13,580.85 in overpayment paid to Mr. Decou who sought re-employment before his IDR was approved. Mr. Decou's actions led to his health benefits being terminated. In order to restore those benefits, CalPERS "rolled back" his retirement date, thereby resulting in excess earnings, a fact he was advised of well before the issue arose. Mr. Decou's claims that he did not know about the "excess earning" was belied by the documents introduced at hearing. However, because the overpayments occurred more than three years ago, CalPERS is precluded from recovering the excess earnings paid to Mr. Decou.

FACTUAL FINDINGS

Timeline of Events

1. In July 2002, Mr. Decou began his employment with the Department of Forestry and Fire Protection (CalFIRE) as a Firefighter II/paramedic. By virtue of his employment, Mr. Decou was a state safety member of CalPERS subject to Government Code section 21151.

2. On August 14, 2002, Mr. Decou injured his right knee during a training exercise.

3. On January 8, 2003, CalFIRE advised Mr. Decou that he had been on modified duty since October 2, 2002, for his injury and that "modified duty is a temporary solution for injury/illness and cannot go on indefinitely." CalFIRE advised him that his "continued assignment did not meet Department guidelines covering modified duty." CalFIRE informed Mr. Decou that his options were (1) if he was permanently restricted from returning to his position, to provide a doctor statement identifying his prognosis, restrictions and possible reasonable accommodation, or (2) if permanently disabled, to file for industrial disability retirement with CalPERS.

4. On July 8, 2003, Mr. Decou filed a Disability Retirement Election Application with CalPERS because of his right knee injury. Mr. Decou wrote "pending" in the section of the application asking for his retirement date. He identified his injury, his limitations, his surgery, and how he was unable to perform his job duties because of his injury.

5. On July 11, 2003, CalPERS notified Mr. Decou that his application for disability retirement had been received and would be processed as quickly as possible.

6. On August 10, 2003, CalPERS advised Mr. Decou it received his application and job analysis and requested additional workers' compensation information.

7. In its pleadings, CalPERS asserted that on December 18, 2003, Mr. Decou called CalPERS to inquire about canceling his IDR application. Mr. Decou advised that he wanted to work for another CalPERS covered agency, and that on December 21, 2003, CalPERS advised Mr. Decou that he should check with personnel at his new job to determine whether his job was classified as state miscellaneous or state safety. Mr. Decou did not dispute those assertions at this hearing.

8. On January 7, 2004, Mr. Decou separated from CalFIRE.

9. On January 8, 2004, prior to being approved for IDR benefits, Mr. Decou began working for the County of Riverside as an emergency medical services specialist, a local miscellaneous position. Riverside is a local public agency that contracts with CalPERS to provide retirement benefits to its employees. Mr. Decou was a CalPERS member by virtue of his employment with Riverside.

10. On February 11, 2004, CalPERS advised the workers' compensation carrier that it needed Mr. Decou's medical reports.

11. In its pleadings, CalPERS asserted that on November 12, 2004, CalPERS advised Mr. Decou that he would need to separate from Riverside in order to receive IDR. CalPERS further advised Mr. Decou not to separate until he received the IDR letter from CalPERS. Mr. Decou did not dispute those assertions at this hearing.

12. On November 23, 2004, CalPERS notified Mr. Decou that it had approved his IDR application. CalPERS's letter stated:

> Your [IDR] will be effective immediately, unless you remain on the payroll to the extent of your unused sick leave. Subject to the regular requirements of the law and/or local rules or ordinances governing the use of sick leave, the effective date of your retirement cannot be earlier than the day following the last day of sick leave with compensation *or* earlier than the first day of the month in which the application is received. The retirement effective date would be either the day after the expiration of your sick leave credit *or* if the application is filed within nine months of the discontinuance of service, the application shall be deemed filed on the last day for which salary is payable. You may request an earlier retirement date if these circumstances do not apply.
>
> Since you separated employment from your safety position as a Firefighter II with [CalFIRE] on January 7, 2004[,] and are being approved for [IDR] from this position, you will need to cease employment immediately from your miscellaneous position with the County of Riverside. The County of Riverside

> will need to separate you from employment before CalPERS can begin processing your [IDR]. Please coordinate this matter with the County of Riverside Human Resources.
>
> You cannot be employed as an active member any longer in your former position without being reinstated from retirement. [Emphases in original.]

The letter and enclosed CalPERS Fact Sheets advised Mr. Decou that he may be subjected to periodic re-examinations to ensure he still qualified for IDR. The letter also advised that if Mr. Decou's agency contracts for health insurance through CalPERS and his retirement date was deferred on a non-pay status, it may result in the loss of health insurance or other benefits unless he made direct premium payments pending his retirement, and directed him to contact his employer for the appropriate forms.

13. In a second letter also dated November 23, 2004, CalPERS provided Mr. Decou with fact sheets regarding temporary employment as a retired annuitant, reemployment without reinstatement with a CalPERS-covered employer, general reinstatement and reinstatement from industrial disability retirement into a miscellaneous-classified position. The facts sheets provided the applicable Government Code sections. In its letter CalPERS advised:

> Temporary employment does not require CalPERS approval; however, it is very important that the limitations are not exceeded as there are substantial penalties for unlawful employment. Reemployment and reinstatement require prior approval from CalPERS. The enclosed fact sheets list the documents which must be submitted to CalPERS to request this approval.
>
> Retroactive approval for employment or reinstatement cannot be granted; the earliest effective date that can be approved is the date all of the required documents are received at CalPERS.
>
> If you decide to pursue employment or reinstatement, CalPERS will notify both you and your employer, in writing, when a determination has been made.

The fact sheets enclosed with the letter provided information regarding temporary employment under Government Code section 21224, reemployment under Government Code section 21228, general reinstatement, and reinstatement under Government Code section 21197. Of note, the temporary employment fact sheet advised Mr. Decou of the 960 hours per year limitation, exceptions thereto and advised: "to avoid an illegal employment situation, it is important that the retired member not exceed the employment limits specified in this Section." The reemployment fact sheet advised that a member approved for IDR may be reemployed in a non-safety position without reinstatement from IDR but stated in bold lettering that CalPERS's approval was needed before beginning this type of employment and that during reemployment under Section 21228, "no CalPERS retirement contributions are made by the member or employer, and the member does not earn service credit." The fact sheet further advised that, "Section 21228 carries an earnings limitation with the new job. If the total of the retiree's pension and earnings from the new job exceeds the earnings limit, then the pension portion of the retirement allowance is reduced dollar-for-dollar to achieve the earnings limit." The general reinstatement fact sheet cautioned the member to "carefully consider what effect reinstatement [with a different employer] may have upon the benefits that you are presently entitled to receive."

14. On December 13, 2004, Mr. Decou filled out a Request For Reemployment with CalPERS under Government Code section 21228, seeking employment as an EMS Specialist with Riverside. He identified his proposed hiring date as December 23, 2004. The Riverside Human Resources Director signed the request on December 16, 2004, and faxed it to CalPERS.

15. On December 13, 2004, Mr. Decou submitted a letter of resignation "due to CalPERS IDR requirements." He advised Riverside employer that he had received notification from CalPERS on December 11, 2004, that required him to separate from his miscellaneous position as an EMS specialist with the County of Riverside. He wrote, "It is my intention to apply for reinstatement."

16. On December 13, 2004, Mr. Decou separated from active service with Riverside. This allowed CalPERS to process his IDR application. Mr. Decou advised Riverside that he must separate from employment in order for CalPERS to process his IDR application.

17. On December 14, 2004, CalPERS placed Mr. Decou on IDR.

18. On December 21, 2004, CalPERS sent Mr. Decou a letter advising that in order to be eligible for continued health care coverage his retirement date must be no later than 120 days from the date of his separation from employment.

19. On December 21, 2004, CalPERS sent Mr. Decou a letter advising him that his "CalPERS sponsored health benefit plan has been automatically continued into retirement effective February 21, 2005." CalPERS further advised him that if he had "paid premiums directly to your health plan carrier pending your placement on the retirement role, the carrier will refund any excess premiums to you."

20. On December 21, 2004, CalPERS sent Mr. Decou a letter providing him with information concerning the taxability of the IDR benefit he received from CalPERS.

21. A CalPERS account detail information sheet identified Mr. Decou's two employers, noting that he had .898 years of service with Riverside and 1.616 years of service with CalFIRE.

22. On December 29, 2004, Mr. Decou sent a letter to CalPERS seeking clarification regarding his health benefits. He wrote that he was told that he was not entitled to lifetime medical benefits offered through CalFIRE because he had reinstated employment with a new CalPERS covered agency, Riverside. Mr. Decou claimed that on December 11, 2004, he received a letter from CalPERS stating, "you will need to cease employment immediately from your miscellaneous position with the County of Riverside," which resulted in him giving notice and separating his employment from Riverside. Mr. Decou outlined his employment history and the information he had received from CalPERS during the IDR process. He wrote that on December 22, 2004, he contacted CalPERS and was informed that his medical benefits would be provided by CalFIRE and would include the same coverage provided to him before his IDR.

Mr. Decou wrote that he received a letter from CalPERS on December 27, 2004, regarding health benefits and contacted them to seek clarification. He claimed that during that call he was told that CalPERS "is not responsible to provide medical benefits as a result of my medical retirement because I reinstated my position with the County of Riverside." He noted that CalPERS contacted him in November 2004 and apologized for the delay in processing his IDR, explaining that his paperwork was misplaced and that "CalPERS was slow to process my medical retirement benefits." Mr. Decou asserted that the numerous CalPERS errors delayed his IDR and resulted in his seeking employment with Riverside. Mr. Decou wrote, "It took CalPERS over a year and six months to process my medical retirement paperwork. I feel entitled to health benefits for me and my family as previously stated by [CalPERS]." He noted that he contacted CalPERS on several occasions prior to accepting employment with Riverside and "was never informed" that the county employment would cease his lifetime health benefits offered through CalFIRE. He also claimed that he requested information regarding the applicable retirement law and the CalPERS supervisor was unable to provide him that information.

Mr. Decou wrote that "CalPERS inappropriately misplaced my paperwork thus causing premature employment with the County of Riverside. This resulted in losing my lifetime medical benefits that was [sic] previously contracted by [CalFIRE.]" Mr. Decou wrote about the undue financial hardship placed on his family which has "pushed us into poverty" and stripped him of his health benefits. Mr. Decou requested that CalPERS reconsider its position, grant his health benefits and cited to *Maffei v. Sacramento County Employees Retirement System* (2002) 103 Cal.App.4th 993.[1] It was (is) unclear how that case supported his position

[1] *Maffei, supra,* addressed Government Code section 31840.8, which was added in 1999 to extend the reciprocity between county retirement systems and CalPERS to include State Teachers' Retirement System (STRS). At issue in that case was whether an employee who transferred from a county retirement system to STRS before 1999, when Section

23. On December 29, 2004, Mr. Decou contacted CalPERS asking why he lost health care coverage. CalPERS advised that it was because health care benefits are tied to his last employment (Riverside) and he lost his benefits because Riverside does not contract for health benefits and he was beyond the 120 day window from when he separated from CalFIRE. Mr. Decou was told that he was not entitled to medical benefits because he reinstated employment with Riverside, a CalPERS agency.

24. CalPERS asserted in its pleadings that on January 1, 2005, Mr. Decou was placed on the IDR roll. Mr. Decou did not dispute that assertion at hearing.

25. On January 19, 2005, CalPERS sent Mr. Decou a letter responding to his request to work for a CalPERS employer without reinstatement from IDR in a different member classification pursuant to Government Code section 21228. CalPERS advised that it had determined that Mr. Decou was able to perform the duties of an emergency medical services specialist with Riverside and may enter employment on or after January 19, 2005. CalPERS advised Mr. Decou that the new employment was not reinstatement from IDR and did not qualify him for reentry to membership in CalPERS. CalPERS advised that the "County of Riverside should not report payroll information or retirement contributions to CalPERS for this employment." Further, Mr. Decou acquired "no rights that usually arise from CalPERS membership" but that he may be eligible for health insurance and he was instructed to contact the health benefits division. Social Security coverage would be determined by his new employer. CalPERS advised in bold letters that changing employment required CalPERS's advance approval, without exceptions.

Finally, CalPERS advised that Mr. Decou's employment was subject to the Government Code section 21228 earnings limitation, "which is calculated by subtracting the pension portion of your retirement allowance from the present maximum salary of the position from which you were disability retired. We will provide forms to you for reporting your income each month." Mr. Decou was further advised that he would receive his "entire monthly allowance from CalPERS unless your income exceeds your earnings limit. If your earnings are greater than your limit, then we must reduce accordingly the pension part of your disability retirement benefit for that month. Of course, whenever there is the adjustment in the pay status of your current or former employment, we will recalculate your earnings limit."

26. On January 26, 2005, Mr. Decou appealed the loss of his health care coverage.

27. On February 1, 2005, CalPERS advised Mr. Decou that retirement law "permits a person retired for industrial disability to earn an amount which, when added to the employer's portion of the retirement allowance, does not exceed the maximum salary payable in the position held at retirement. The law requires a reduction in a person's disability pension equal to the amount of monthly earnings in excess of this limit." CalPERS

31840.8 was added, was entitled to the benefit of reciprocity between those two retirement systems. The court of appeal held that the employee was entitled to that reciprocity benefit.

advised Mr. Decou that the maximum salary now payable was $3,943.33; the portion of his allowance provided by his employer was $1,844.18; with the amount he was permitted to earn without having his IDR allowance adjusted being $2,099.15.

28. A February 9, 2005, CalPERS Customer Touch Point Report (CTP) documented a telephone call with Mr. Decou in which CalPERS advised that "based upon his current position with a CalPERS covered agency and his earnings of over $4,000 and his earnings limit $2,099.15, he will not receive any of the IDR allowance." CalPERS sent Mr. Decou the fact sheet on Government Code section 21197 "as he may want to consider this option working for this miscellaneous agency."

29. A March 7, 2005, Notice of Personnel Action identified January 7, 2004, as Mr. Decou's separation date from CalFIRE. The separation type was listed as "retirement." The Notice stated that "the regular salary payment for the pay period of separation is based on: 005 days 0000.0 hours. Payment of accumulated leave credits is based on vacation 00 days 002.0 hours, extra hours 02 days 004.0 hours, sick leave 000 days 000.0 hours."

30 On March 7, 2005, CalPERS sent Mr. Decou a letter acknowledging receipt of his January 6, 2005, and January 31, 2005, letters requesting an administrative review of the denial of his health coverage. The letter advised: "Requests for Administrative Review are processed on a first-come first-served basis. We will work as quickly as we can to process your request but it could take up to 30 days to begin your case review."

31. On March 29, 2005, Mr. Decou sent a letter to CalPERS advising that he submitted an appeal of the denial of his health benefits on January 26, 2005, and was told by phone that his appeal was denied. He requested CalPERS provide him with a written decision citing the applicable law.

32. On April 15, 2005, Mr. Decou submitted a Disability Retiree's Report of Earnings Outside Employment identifying Riverside as his employer. He reported no earnings in January 2005, earnings of $3,836.73 in February 2005, and earnings of $4,197.91 in March 2005

33. In his June 23, 2005, letter to CalPERS, Mr. Decou wrote, "This is a formal request for CalPERS to change my retirement date and restore my health benefits. I was informed that my health benefits were denied because my retirement date and my separation from employment is [sic] greater than 120 days." Mr. Decou outlined the factual history of his CalFIRE retirement and Riverside employment, noting that at CalPERS's request he separated from Riverside on December 13, 2004, and his retirement date was December 14, 2004. Mr. Decou also documented his discussions with CalPERS about these matters.

34. On July 6, 2005, CalPERS sent Mr. Decou a letter confirming the information it provided to him in an April 14, 2005, telephone conversation. In that letter, CalPERS explained how his employment with Riverside made him ineligible for continued enrollment

in a CalPERS health plan since Riverside no longer contracts with CalPERS for health coverage and he was more than 120 days beyond his separation date from CalFIRE.

35. On July 15, 2005, Mr. Decou submitted a Disability Retiree's Report of Earnings Outside Employment identifying Riverside as his employer. He reported earnings of $3,766.29 for April 2005, earnings of $2,973.46 for May 2005, and earnings of $3034.14 for June 2005.

36. On July 28, 2005, Mr. Decou sent a letter to CalPERS stating that this was his formal request that CalPERS provide health benefits to him and his family. He wrote that the law requires the retirement date to be determined by the date of his IDR application, July 8, 2003.[2] He acknowledged that he accepted a position with Riverside "based on the fact that CalPERS has [sic] not reached a decision for [sic] my IDR application."

37. On August 5, 2005, Mr. Decou sent a letter to CalPERS noting that his application for IDR was filed on July 8, 2003, approved in November 2004, and that since then, CalPERS continued to deny him health coverage. He noted, however, that he had also received a letter from CalPERS approving his health benefits only to find out later from CalPERS that the letter was sent in error. Mr. Decou wrote that he was told in a telephone message that "everything looks good for approving your health benefits, only to receive a denial letter." He advised that he suffered financial hardship including having to withdraw money from his 401(k), and did as CalPERS instructed, resigning from his position at Riverside which caused them to be unable to work for six weeks and have to pay health benefits out of pocket. Mr. Decou again asserted that his retirement date should be determined by the date of his application, a practice he claimed was consistent with state law.

38. On August 9, 2005, CalPERS sent Mr. Decou a letter regarding his earnings limit and how it affects his monthly allowances. CalPERS advised that there would be a reduction of $1,450.81 from his pay warrant due to his excessive earnings being deducted pursuant to Government Code section 21432. CalPERS further advised that Mr. Decou's current earnings limit was $2,099.15 and enclosed a copy of the February 1, 2005, letter sent to him regarding that limit.

39. On August 15, 2005, Mr. Decou sent a letter to CalPERS advising that he had resigned from Riverside with his last day of employment being September 7, 2005. Further, he would no longer have health benefits with Riverside as of October 1, 2005.

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[2] This assertion is not accurate because Government Code section 21252 provides that if the retirement application is submitted to CalPERS within nine months after the member discontinued state service and, for an IDR, if the member was incapacitated to perform his duties from the date the member discontinued state service to the time the application was submitted to CalPERS, the effective date of the retirement application shall be deemed to have been submitted on the last day for which salary was payable. Here, Mr. Decou's last day for which his CalFIRE salary was payable was January 7, 2004.

40. On August 23, 2005, Mr. Decou sent a second letter to CalPERS noting that he was appealing CalPERS's determination denying his claim for health care coverage. He wrote that he did as CalPERS requested and resigned his position with Riverside effective August 31, 2005. Mr. Decou also pointed out the many CalPERS computer-generated letters he had received in error and/or that conflicted with each other, and the apology he had received from CalPERS for the confusion their letters caused. Mr. Decou described the financial hardship he incurred because of CalPERS's delay, including having to withdraw funds from his 401(k).

41. On September 8, 2005, Mr. Decou sent a formal request to CalPERS for an administrative hearing regarding CalPERS's decision to deny his health benefits. He identified his attorneys and the basis for his appeal.

42. On September 15, 2005, Mr. Decou submitted a Disability Retiree's Report of Earnings Outside Employment identifying Riverside as his employer. He reported earnings of $2,722.27 for July 2005, earnings of $3,073.62 for August 2005, and no earnings for September 2005, because his termination date was August 31, 2005.

43. On September 20, 2005, CalPERS sent a letter to CalFIRE regarding Mr. Decou's request to change his retirement date in order to be considered for restoration of his health benefits. On the same day, CalPERS also sent a similar letter to Riverside.

44. A September 26, 2005, CTP calculated Mr. Decou's earnings between June and October 2005, explaining why his October 2005 warrant would still be reduced, even though he did not work in September 2005, because his earnings had exceeded his earnings limit. The CTP note indicated that Mr. Decou's earnings limit would be removed and his November 2005 warrant would be restored to his full warrant of $1,877.72.

45. An October 4, 2005, CTP documented a call with Mr. Decou where CalPERS reviewed the overpayment calculations with him, explained why his October 2005 warrant was reduced and advised that his November 2005 warrant would be his full warrant.

46. In its pleading, CalPERS asserted that on November 4, 2005, Mr. Decou called CalPERS and was told that his earlier effective date of retirement had been approved, and Riverside would be backing out his salary so his health benefits could start. Mr. Decou did not dispute those assertions at this hearing.

47. On November 4, 2005, CalPERS sent Mr. Decou a letter advising that his file had "been carefully reviewed in conjunction with your request for an earlier retirement date of January 8, 2004[,] in order to allow your health coverage to be restored following denial of health coverage by [CalPERS.] Citing Government Code section 20160, CalPERS concluded that the effective date of Mr. Decou's IDR would be changed to January 8, 2004. His file was referred to the Retirement Calculation Unit "for any adjustment required to his monthly [IDR] allowance resulting from the change in effective date from December 14,

2004, back to January 8, 2004," and to the Office of Employer and Member Health Services for restoration of his health coverage.

48. On January 1, 2006, Mr. Decou submitted a Disability Retiree's Report of Earnings Outside Employment identifying Riverside as his employer. He reported earnings of zero dollars for October, November, and December 2005.

49. On January 18, 2006, Mr. Decou's retroactive IDR check was processed without taking his Riverside salary and his IDR earnings limit into account.

50. On January 19, 2006, Donna Lum, then CalPERS's Chief, Benefit Services Division, sent Mr. Decou a letter advising that Fred Buenrostro, CalPERS chief executive officer, had asked her to "thank you for and respond to your inquiry dated December 15, 2005[,] regarding your [IDR] and your eligibility for continued health insurance coverage." Chief Lum wrote:

> I am happy to report that the adjustment to change your effective date of [IDR] to January 8, 2004, the day following your last day on the [CalFIRE] payroll, has been completed and will be reflected on your February 1, 2006[,] benefit payment. Riverside County is reversing all payroll reported to us for the period January 8, 2004[,] through December 13, 2004. This time period will be considered as time you worked as a retired annuitant under Government Code section 21228.

Chief Lum apologized for the "length of time required to obtain all necessary medical information and approve your [IDR]." Chief Lum acknowledged Mr. Decou's "need to provide for your family during the time your [IDR] application was being processed." but stated that his Riverside employment "prevented the continuation of your health insurance through [CalFIRE]. The problem has now been rectified and your eligibility for State-sponsored health benefits has been restored." Chief Lum cited to applicable laws to explain CalPERS's position and explained how the health insurance benefits and COBRA reimbursement would work.

51. On January 19, 2006, CalPERS sent Mr. Decou a letter advising that a health benefit enrollment action had been processed and his health coverage would take effect on January 1, 2006, for him, his wife and his daughter.

52. On January 20, 2006, Mr. Decou contacted CalPERS requesting that his COBRA payments be reimbursed. He also wanted to be reimbursed for the retroactive IDR payment. CalPERS advised that he was not entitled to the full amount of reimbursement because he was subject to the Government Code section 21228 earnings limits. The CTP noted that Mr. Decou was informed of the amount overpaid, that he stated "that's reasonable," and also that he stated he will "set some money aside for that purpose and reimburse us when we notify him."

53. On March 17, 2006, CalPERS sent Mr. Decou a letter proposing a settlement to him of $2,527.56 to cover his COBRA premium expenses paid from October through December 2006. Mr. Decou agreed and executed a settlement agreement and release.

54. On March 10, 2008,[3] CalPERS notified Mr. Decou of the results of its audit of his retirement account following the change of his retirement date from December 14, 2004, to January 8, 2004, made at his request in order to establish eligibility for health benefits. The letter noted that the retirement date change was done with the understanding that his Riverside employment would be considered retired annuitant employment. CalPERS advised that Mr. Decou's Riverside employment was subject to an earnings limit that "permits a person retired for disability to earn an amount which, when added to the employer's portion of the retirement allowance, does not exceed the maximum salary payable in the portion that person held at retirement. The law requires a reduction in a person's disability pension equal to the amount of monthly earnings in excess of this limit."

CalPERS stated that its audit indicated that Mr. Decou's Riverside income exceeded his earnings limit amount, creating an overpayment of $8,844.03 for the period from January 19, 2005, through October 31, 2005. A worksheet explaining those calculations was attached. CalPERS advised that because the retirement date change adjustment had not occurred when Mr. Decou was approved to work for Riverside, the earnings limit information in CalPERS's February 1, 2005, letter was incorrect because his retirement calculation still contained service from Riverside. CalPERS apologized for the overpayment and inconvenience and enclosed a repayment option form for Mr. Decou to complete. The form gave Mr. Decou three choices for repayment: Withholding the overpayment from his pay warrant; allowing him to pay off the amount with a personal check or money order; or allowing him to make monthly deductions from his pay warrant. Mr. Decou executed a repayment form allowing CalPERS to deduct $200 per month from his pay warrant.

55. On March 25, 2008, Mr. Decou sent his request for an administrative hearing challenging CalPERS's audit. In his request, Mr. Decou stated that CalPERS was not entitled to receive the overpayment because (1) the money paid was based on a settlement with CalPERS; (2) his actual retirement date must be based on the date of his application after exhausting his leave credits (July 8, 2003); Mr. Decou was not aware of the alleged error (Government Code section 20163); and CalPERS had never paid him back the temporary disability allowance (Government Code section 19253.5). Mr. Decou requested an administrative hearing based on the following circumstances:

> I received a letter dated January 19, 2006[,] from Fred Buenrostro, CalPERS Chief Executive Officer stating "Your employment with the County of Riverside has been reversed and your retirement date changed to January 8, 2004[,] based on your state service. This action restored your eligibility for

[3] The statement of issues erroneously identified the date as March 10, 2006.

health benefits under the CalPERS health program as an annuitant."

Mr. Decou provided excerpts from Government Code sections 19253.5, subdivision (3), and 20163, subdivision (b) in support of his position.

56. On April 4, 2008, CalPERS received Mr. Decou's signed repayment option form, wherein he selected the monthly deduction option.

57. On June 12, 2008 CalPERS sent Mr. Decou a letter acknowledging receipt of his March 25, 2008, letter requesting an administrative hearing appealing reimbursement of the excess earnings overpayment of retirement allowance for his Government Code section 21228 employment with Riverside from January 19, 2005, through October 31, 2005.

58. On June 12, 2008, CalPERS sent Mr. Decou a letter informing him "of the excess earnings overpayment of retirement allowance which resulted from the change of your [IDR] effective date from December 14, 2004[,] to January 8, 2004, the day following your last day on payroll with [CalFIRE]. The amount of this overpayment is $17,181.92." CalPERS noted that its January 19, 2006, letter advised him that Riverside had agreed to reverse its payroll for his employment for the period from January 8, 2004, through December 13, 2004, to allow his retirement from CalFIRE on January 8, 2004, thereby restoring his eligibility for retiree health benefits.

CalPERS further noted that its January 19, 2006, letter had also advised him that the new retirement date required that his employment with Riverside be retroactively approved as employment after retirement pursuant to Government Code section 21228. CalPERS further referenced a January 20, 2006, telephone conversation with CalPERS staff. During that call, Mr. Decou was told that the full amount of the retroactive retirement allowance payment for the period from January 8, 2004, through December 13, 2004, would be issued to him in his February 1, 2006, retirement warrant. However, he was also told that he was not entitled to that full amount since his allowance was subject to the Government Code section 21228 earnings limit. CalPERS advised that it would contact him with the amount of overpayment for reimbursement. CalPERS wrote that its records indicated that Mr. Decou replied that this was reasonable and he would set money aside for that purpose and reimburse CalPERS when he was notified of the amount owed.

The CalPERS letter further advised that Mr. Decou's February 1, 2006, retirement warrant totaled $21,471.54 of which $19,651.32 was the retroactive allowance amount. Because of the timing of the allowance adjustment, CalPERS was unable to deduct the overpayment of $17,181.92 before his February 1, 2006, warrant was paid to him. The letter provided calculations demonstrating how CalPERS had arrived at the amount owed. CalPERS acknowledged Mr. Decou's previous request for an administrative hearing to appeal the 2005 excess earnings overpayment of $8,844.03 for the period of employment with Riverside from January 19, 2005, through October 31, 2005. CalPERS concluded its letter by noting that Mr. Decou was entitled to appeal this new overpayment determination, as well. A spreadsheet demonstrating how the figures were derived, as well as a repayment option form and his appeal rights were enclosed.

59. On June 22, 2008, Mr. Decou submitted a request for an administrative hearing. He claimed that CalPERS was not entitled to the overpayment because (1) his actual retirement date must be based on the date of application after he exhausted his leave credits (July 8, 2003); the alleged error was not known to him (Government Code section 20163); CalPERS had never repaid the Temporary Disability Allowance (Government Code section 19253.5); *Harvey H. Henderson v. CalPERS* OAH No. L-1997120250[4]; and Government Code section 20164: Statute of Limitations is three years.

60. On August 21, 2008, CalPERS sent Mr. Decou a letter acknowledging receipt of his appeal and advising him his matter would be assigned to an attorney and the matter would be set for hearing.

61. On May 4, 2015, Mr. Suine filed the statement of issues in his official capacity. The statement of issues asserted that the total amount overpaid was $26,025.95. However, at hearing CalPERS asserted that it had recalculated its figures and the overpayment amount it is currently seeking is $13,580.85. It was unclear why it took seven years for a statement of issues to be filed.

Documentary Evidence Presented at Hearing

62. A 2005 Riverside County Employee Earnings Record outlined Mr. Decou's earnings when employed at Riverside. CalPERS used that information in its calculations.

63. CalPERS submitted numerous allowance adjustments, benefit disbursement, final compensation worksheets and other financial records outlining Mr. Decou's earnings, deductions taken, raises received, increases in cost-of-living, increases in benefits and other information that it relied upon in support of its position.

64. CalPERS introduced a worksheet indicating how the earnings limit is calculated. First, one must determine the <u>maximum compensation earnable</u> by a person holding the position that the retiree held at the time of their disability retirement. Second, one must determine the <u>pension portion</u> of the retirement allowance. Next, the pension portion is subtracted from the maximum compensation earnable to determine the <u>earnings limit</u>.

[4] Mr. Decou correctly asserted that *Harvey*, supra, was precedential but incorrectly contended that it stood for the proposition that CalPERS forgave the overpayment. That case stands for the proposition that even though CalPERS made an error calculating the retiree's benefits, and the retiree relied upon that mistake to his detriment, that to allow the retiree to receive a retirement greater than that to which he was entitled, would harm the entire CalPERS system. The decision rejected the member's equitable estoppel argument.

65. CalPERS introduced a worksheet indicating how the excess earnings is calculated. If the Government Code section 21232 employment earnings received exceeds the earnings limit, the retirement pension is reduced dollar for dollar by the amount of excess earnings. The compensation received is subtracted from the earnings limit to determine the excess earnings.

Witness Testimony

66. Margret Gelardi, CalPERS Retirement Program Specialist II, prepared an illustrative chart explaining CalPERS's calculations and testified about the earnings limit and overpayment issues in this case. Her testimony was consistent with the documents introduced. She explained that IDR employees may return to work in a permanent position without having to reinstate from retirement but that there are limits on the income they can receive in their new positions. Ms. Gelardi explained that Mr. Decou returned to employment (with Riverside) before his IDR was approved. Riverside is a CalPERS-contracted agency and began reporting his earnings to CalPERS.

Ms. Gelardi testified that Mr. Decou's Riverside employment, before his IDR was approved, prevented the continuation of his health insurance through CalFIRE. And, because Mr. Decou's original retirement date from CalFIRE was December 14, 2004, 120 days beyond his January 7, 2004, separation date from CalFIRE, he was ineligible to receive health insurance through CalFIRE. Therefore, in order to provide Mr. Decou with health insurance, Riverside had to reverse all payroll reported to CalPERS for the period of January 8, 2004, through December 13, 2004, and CalPERS adjusted the effective date of his IDR to January 8, 2004, because his last day of employment at CalFIRE, after all leave credits and other benefits were considered, was January 7, 2004. In order to make that adjustment, CalPERS considered the time Mr. Decou worked for Riverside (January 8, 2004, through December 13, 2004) as work as a retired annuitant pursuant to Government Code section 21228 and this led to Mr. Decou having an overpayment because of his excess earnings.

Ms. Gelardi also explained that the CalPERS system is such that the warrants are set to be paid on certain dates so that even though CalPERS was aware in January 2006 that Mr. Decou was going to be overpaid in his February 2006 pay warrant, it could not stop the warrant that was being processed. Instead CalPERS relied on him to reimburse the overpayment as he promised to do during his January 2006 telephone call with CalPERS.

Ms. Gelardi testified that CalPERS originally calculated the overpayments to Mr. Decou as being $8,844.03 and $17,181.92. Mr. Decou repaid some of the overpayment. Prior to hearing, she reviewed all the records and re-evaluated the overpayment calculations to factor in CalFIRE adjustments in pay and other deductions owed to Mr. Decou. Based upon those her new calculations, CalPERS now contends that the overpayment owed by Mr. Decou is $13,580.85. Ms. Gelardi provided demonstrative and supporting documentation illustrating the new calculation and explained in detail at hearing how that figure was derived. Her testimony was credible and supported by the evidence.

67. Donna Lum, now a CalPERS Deputy Executive Officer for Customer Support, who was then the Chief, Benefits Services Division, testified consistent with the letter she authored and the documents introduced.

68. Mr. Decou's testimony is summarized as follows: He does not feel he should reimburse CalPERS; CalPERS issued him a check in February 2006, so he was entitled to keep it; CalPERS should not have issued an overpayment to him in February 2006; CalPERS cannot have it both ways: They cannot backdate his retirement and also expect him to reimburse for overpayment; any mistakes made were due to CalPERS's delay in processing his IDR and/or providing him with inaccurate information such that he should not have to reimburse CalPERS for any alleged overpayment.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54).

2. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Applicable Statutes

3. Government Code section 20160 authorizes CalPERS to correct errors subject to certain conditions. The request to correct the error must be made within six months, the error must be the result of mistake, inadvertence, surprise, or excusable neglect, as those terms are used in Code of Civil Procedure section 473, and the correction does not give the individual a status, right or obligation not otherwise available. Section 20160 provides that the one seeking correction bears the burden of proof.

4. Government Code section 20163 authorizes CalPERS to make adjustments to correct contribution amounts.

5. Government Code section 20164, subdivision (a), provides that the obligations of CalPERS to its members last throughout the members' lifetimes and the obligations of members to CalPERS last throughout the membership. Subdivision (b) outlines the statute of limitations for erroneous payments out of the retirement fund. Subdivision (b)(1) provides that where the system makes an erroneous payment to a member, the "system's right to collect shall expire three years from the date of payment."

6. Government Code section 21197 permits an individual to be reinstated from IDR following an application to CalPERS for reinstatement, CALPERS's determination that

the individual is not incapacitated for the duties to be assigned, and notification to the former employer.

7. Government Code section 21224 permits an individual on IDR to be employed without reinstatement from retirement.

8. Government Code section 21228, the earnings limit section, outlines the conditions and effect on allowance for employment after IDR.

9. Government Code section 21432 outlines the requirements for earnings while receiving IDR benefits.

Evaluation

10. While Mr. Decou's frustration with the time it took to process his IDR was understandable, it was incumbent upon him to follow the law. If he chose to seek reemployment after filing his IDR, before CalPERS approved that reemployment, he ran the risk that doing so would result in consequences he did not intend. He cannot have it both ways: He cannot have his retirement date backdated so that he can receive health benefits but then argue he should not have to reimburse CalPERS the overpayments that resulted when his retirement date was backdated to accommodate the problem he created when he sought re-employment before his IDR was approved. The entire issue arose because of Mr. Decou's inability or unwillingness to wait until his IDR was approved and his seeking employment with a CalPERS-contracted agency that did not provide health insurance. Any fault in this matter lies with Mr. Decou. CalPERS acted in his best interests when it backdated his employment so that he could maintain his health insurance. The evidence established that CalPERS repeatedly advised Mr. Decou of the applicable law, especially the laws regarding overpayment and excess earnings, and it was through no fault of CalPERS that he was overpaid. Mr. Decou's argument that he was not aware of the errors is belied by the documents CalPERS sent him clearly informing him of his rights and obligations.

However, that does not end the analysis. Mr. Decou was overpaid between 2004 and 2006, dates more than three years ago. He requested a hearing several times in 2005 and again in 2008. Although CalPERS acknowledged receipt of his appeals, the statement of issues was not filed until 2015. There was no explanation for the delay offered. Had this appeal been heard timely, the result would have been far different and Mr. Decou would have been ordered to reimburse CalPERS the $13,580.85 overpayment he received. However, the clear and unambiguous language of Government Code section 20164 provides that CalPERS's right to collect that overpayment "shall expire three years from the date of payment." Since the overpayments were made more than three years ago, CalPERS no longer has a right to collect them.

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Cause Exists to Grant Mr. Decou's Appeal

11. Although Mr. Decou was clearly overpaid and should be ordered to repay CalPERS, the statute of limitations has expired. As such, cause exists to grant Mr. Decou's appeal and deny CalPERS's request to be reimbursed the $13,580.85 overpayment that Mr. Decou received.

ORDER

Mr. Decou's appeal is granted. The statute of limitations has expired and CalPERS cannot collect the $13,580.85 overpayment Mr. Decou received.

DATED: October 7, 2016

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings