

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

DEC 15 2016

CalPERS Legal Office

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

In the Matter of the Refund of Contributions to:

AUDRA F. DEMPSEY-NICHOLSON,

Respondent.

Case No. 2015-0595

OAH No. 2016040639

**PROPOSED DECISION**

This matter was heard before Heather M. Rowan, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on November 15, 2016, in Sacramento, California.

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

Audra F. Dempsey-Nicholson (respondent) represented herself.

Evidence was received and the matter was submitted on November 15, 2016.

**ISSUE**

Must CalPERS reissue a refund of contributions and interest to respondent even though the refund was issued on September 27, 1976, and not returned to CalPERS?

**FACTUAL FINDINGS**

1. Respondent was employed by Contra Costa County Community College District (the County) from July 23, 1974, through September 24, 1976. During that time, respondent made contributions to her CalPERS retirement account. On September 24, 1976, respondent separated from the County.

2. On January 29, 2013, respondent sent CalPERS a letter inquiring about the status of her retirement account and requesting documentation of her service credit and contributions. CalPERS did not respond. Respondent reiterated her request in November of

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RETIREMENT SYSTEM

FILED Dec 15 2016  
*Heather M. Rowan*

2014. On December 9, 2014, CalPERS informed respondent that a refund of her contributions was processed in the amount of \$1,107.70 and mailed on September 24, 1976. CalPERS's letter stated that because the contributions were returned to respondent, respondent's CalPERS membership was terminated. On December 15, 2014, respondent sent CalPERS a letter stating that she did not receive the refund and asked to what address it had been sent. On March 17, 2015, respondent requested either proof that the check had been cashed or a refund in the amount of \$1,107.70 plus appropriate interest. CalPERS denied respondent's request. Respondent filed a timely appeal.

*Testimony of Janet Perry*

3. Janet Perry is CalPERS's Manager of the Health Deduction and Refund Unit. She oversees processing of refund applications. Ms. Perry is the subject-matter expert for CalPERS's record system called MyCalPERS, which is an integrated record system that launched in 2011 and replaced CalPERS's 49 former record-keeping systems. Ms. Perry testified regarding CalPERS's standard operating procedures in issuing member refunds. She also explained the difficulty in locating information for a record that is over 40 years old.

4. Ms. Perry explained that prior to MyCalPERS, member records were kept in the "Member and Employer System." CalPERS had 49 separate systems for record keeping. "Legacy" was a system that contained member information prior to 1998. This information was converted from its prior iteration called "SmartDesk," which was in use in the early 1990's. The systems all contained the same information, and the information was converted as CalPERS upgraded its information systems over the years. CalPERS also maintained microfilm and microfiche that contain refund information from 1971 to 1976.<sup>1</sup>

5. In 1976, CalPERS's process was to automatically process retirement contribution amounts if the member separated from service with less than five years of service. The member's employer would request that CalPERS issue a refund and would provide the member's address of record. CalPERS would send the request for a check to the state controller's officer, which would physically issue the check.

6. As part of her research regarding respondent's request, Ms. Perry inquired of the State Controller regarding the process in issuing refund checks at CalPERS's request. The State Controller received the request from CalPERS and issued a check to the member at the address of record as provided by CalPERS. If a check was returned, the state controller's practice was to mail the check to CalPERS. CalPERS's practice was to then deposit that check into a non-interest bearing account for unclaimed funds. The State Controller does not have records prior to 1978.

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<sup>1</sup> Ms. Perry testified that CalPERS's records on microfilm are not legible when printed and the screen does not appear if one attempts to photograph it.

7. When CalPERS received respondent's request for a refund in 2014, Ms. Perry looked throughout CalPERS's systems to locate respondent's record. She first looked at the information that had been converted to MyCalPERS and found a note regarding a "frozen file." The file did not offer information regarding respondent's employment, but did state that respondent terminated with CalPERS on September 24, 1976. Ms. Perry then searched through CalPERS's microfilm and microfiche. In the microfilm, she found a record connected to respondent that showed respondent's contribution, balance, and refund amounts. Based on CalPERS's standard practice, Ms. Perry testified that, because September 24, 1976, was a Friday, CalPERS would have sent the request to the controller's office and the warrant would have issued to the member's address of record on September 27, 1976. CalPERS has no record to show that the check was returned uncashed.

### *Respondent's Testimony*

8. Respondent testified that she worked for the County for approximately two years and then left to attend college at the University of California, Santa Barbara. Respondent did not produce evidence regarding the terms of her separation agreement with the County. In September of 1976, she left her address of record and stayed with a friend who lived in Santa Barbara. She did not give her employer, the County, a forwarding address. She did not have an official change of address until she moved into her own apartment in Santa Barbara in January of 1977. At hearing, she provided proof of her address change to a Santa Barbara address as of January, 1977. She also stated that she often used her mother's address as a "permanent address" when she had no other address.

9. Because respondent had already moved from her address of record that the County had on file for her, she testified that she never received the refund check. She did not know that she was due a refund of her member contributions to CalPERS. She testified that if she had known she was due a refund, she would have updated her address with the County. Between 1976 and 2013, she did not contact CalPERS regarding her contributions or refund. When she began considering retiring in 2013, she contacted CalPERS to inquire about her service credit and member contributions from her employment with the County.

### *Discussion*

10. When all the evidence is considered, respondent failed to provide evidence to satisfy her burden to prove that she did not receive and cash the check at issue. CalPERS established that its standard business practice was to issue a check when a member separated from service without five years of credit. Ms. Perry's testimony regarding the records search she performed was persuasive.

11. The burden was on respondent to offer sufficient evidence at hearing to support her request for a refund. She failed to do so.

## LEGAL CONCLUSIONS

1. CalPERS is governed by the California Public Employees' Retirement Law (PERL), which provides that CalPERS's Executive Officer is authorized to act on any application for a refund of contributions. (Cal. Code Regs., tit. 2, § 555.) The PERL also states that a person ceases to be a member of CalPERS if she is refunded her contributions. (Gov. Code, § 20340, subd. (a).) For purposes of this definition, "deposit in the United States mail of a warrant drawn in favor of a member, addressed to the latest address of the member on file in the office of this system ... constitutes payment to the person of the amount for which the warrant is drawn or electronically transferred." (*Id.* at § 20340, subd. (c).)

2. The PERL further requires that if a warrant is drawn, but returned to CalPERS for any reason, the warrant "shall be redeposited in the retirement fund and held for the [member] without further accumulation of interest..." (Gov. Code, § 21500, subd. (c).) If the proceeds are not claimed within four years after the date of redeposit, "they shall revert to and become a part of the reserve established pursuant to Section 20174."

3. As of September 24, 1976, respondent ceased to be a member of CalPERS when the County requested a refund of her contributions on her behalf, and CalPERS issued a warrant. Based on evidence regarding CalPERS's standard business practices, CalPERS requested that the State Controller issue respondent a refund on September 24, 1976, which would have been issued the following Monday, September 27, 1976. (Factual Findings 5 through 7.) Mailing the check constituted payment to the member under the Government Code. (Legal Conclusion 1.) If the check had been returned to CalPERS, it would have been "redeposited in the retirement fund and held for the [member] without further accumulation of interest." (Legal Conclusion 2; Gov. Code, § 21500, subd. (c).) Respondent then would have had four years to claim the check.

4. When respondent left her position with the County in 1976, she did not provide a forwarding address to either her employer or CalPERS. (Factual Finding 8.) Respondent did not inquire about the refund of contributions until 2013, 37 years after she left the County. (Factual Finding 9.) She testified that she did not know that she was owed a refund, but also did not provide information regarding her separation agreement with the County and whether it informed her of her right to a refund. (Factual Finding 8.)

5. 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. (*Greator v. Board of Administration* (1979) 91 Cal.App.3d 54, 57.) Thus, respondent had the burden of proof to establish that she was entitled to a refund of her CalPERS retirement contributions. Based on the Factual Findings and Legal Conclusions as a whole, respondent did not meet that burden. Consequently, her appeal must be denied.

ORDER

The appeal of respondent Audra F. Dempsey-Nicholson for a refund of contributions is DENIED.

DATED: December 14, 2016

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*Heather M. Rowan*  
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HEATHER M. ROWAN  
Administrative Law Judge  
Office of Administrative Hearings