

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:

LETICIA LOZANO,

Respondent.

Case No. 2016-0462

OAH No. 2016090287

PROPOSED DECISION

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on January 26, 2017.

Terri Popkes, Senior Staff Attorney, represented Petitioner Carene Carolan, Chief, Member Account Management Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Leticia Lozano (Respondent) represented herself.

Respondent filed a request to purchase Additional Retirement Service Credit (ARSC) on May 24, 2011. On August 3, 2011, CalPERS mailed a cost estimate to Respondent, which required a response by September 2, 2011. Respondent did not receive the estimate, and was unable to submit a response by the deadline. Respondent made several inquiries about the status of her request to purchase ARSC, but received incorrect information about the status from CalPERS staff. CalPERS ultimately agreed to process Respondent's request, but made its actuarial cost calculations based on the date of September 8, 2011, the first date Respondent inquired about the status of her request. Respondent seeks to have the cost to purchase the ARSC based on the date of the original application, as she should not be punished for the failure of the United States Postal Service to deliver her mail. Use of the earlier date would result in a cost savings of \$4,023.25. CalPERS counters that it mailed the document to Respondent, and that it is under no obligation to make further accommodations to Respondent. For the reasons set forth below, the appeal is sustained.

Oral and documentary evidence was received at the hearing, and the matter was submitted for decision on January 26, 2017.

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CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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FACTUAL FINDINGS

1. Petitioner filed the Statement of Issues in her official capacity.
2. Respondent was employed by the Employment Development Department as a Senior Tax Compliance Representative (Specialist). By virtue of her employment, Respondent is a State Miscellaneous member of CalPERS.
3. On May 23, 2011, Respondent signed a "Request for Service Credit Cost Information - Additional Retirement Service Credit" (Request), which was received on May 24, 2011. Respondent did not select the number of years she wanted to purchase, as she wanted cost information for purchasing one through five years.
4. Records regularly maintained by CalPERS, a Customer Touch Point Report dated August 3, 2011, and a file copy of the documents, establish that on August 3, 2011, CalPERS mailed to Respondent, by regular mail to her correct address, an ARSC cost and confirmation of intent packet (confirmation of intent packet). The confirmation of intent packet contained information about the cost of ARSC and options to purchase it for up to five years. The cost to purchase five years of service credit set forth in the August 3, 2011 letter was \$74,430.75. The packet also contained the following instructions: "[I]f you are interested in pursuing the service credit purchase, complete, sign and return the attached Confirmation of Intent to Purchase Service Credit form within 30 days from the mailing date of this letter. . . . (Exh. 5, at p. 4.) The packet contained the referenced "Confirmation of Intent to Purchase ARSC."
5. Respondent did not receive the confirmation packet described in factual finding number 4.
6. On September 8, 2011, Respondent called CalPERS and was informed, incorrectly, that her request was still being processed. She was asked to be patient, as CalPERS was switching computer systems.
7. On October 6, 2011, Respondent went to the CalPERS San Bernardino Regional Office member service counter to inquire about the status of her application. The CalPERS service representative who helped her looked in the computer and told Respondent that the application had not been processed yet.
8. On March 26, 2012, Respondent called CalPERS and was again informed that her request to purchase ARSC was still being processed.
9. During an in-person meeting about her retirement benefits with a retirement counselor on August 13, 2012, Respondent again inquired about the request to purchase ARSC. The counselor verified that the request had been received but stated that it had not been processed.

10. On November 19, 2012, Respondent called CalPERS. She reported that friends who had submitted requests to purchase ARSC had already purchased the credit. After again being informed that her request was still being processed, Respondent demanded to speak to a supervisor. Respondent was told that a supervisor would call her back.

11. A supervisor, Melissa Viscuso (Viscuso), called Respondent on February 7, 2013. Viscuso explained that a response to her request to purchase ARSC had been mailed to her on August 3, 2011, that no response had been received, and that the matter had been closed for lack of response. Respondent demanded to speak to Viscuso's supervisor.

12. On March 26, 2013, Matt Eubanks (Eubanks) called Respondent. Respondent explained her situation, and Eubanks agreed to send her a new confirmation of intent packet. CalPERS thereafter prepared a new cost estimate, using the March 26, 2012 date as the basis of the estimate, which date was that of the first call documented on the Customer Touch Point Report.

13. The new confirmation of intent packet was sent to Respondent on April 30, 2013. On May 24, 2013, Respondent completed a "Confirmation of Intent to Purchase Service Credit" form, opting to purchase five years for \$81,048.79. She wrote the following on the document: "Note: I am disputing the pay rate used to compute the cost of my Additional Retirement Credit (ARSC) – my request was submitted 5/25/2011. Thanks. Leticia." (Exh. 7; emphasis in original.)

14. On June 19, 2013, Respondent filed an appeal requesting the date of May 24, 2011 as the basis for calculating the cost to purchase ARSC.

15. a. On August 14, 2013, Debra Pietrowski (Pietrowski), Customer Account Service Division, denied Respondent's appeal. In her letter, Pietrowski stated that the request to purchase ARSC had been received on May 24, 2011, and that a Confirmation of Intent Letter had been sent on August 3, 2011. The cost information on the letter was valid for 30 days, but CalPERS did not receive any response by the September 2, 2011 deadline.

b. The letter also stated: "[W]hen you spoke to Matt Eubanks on April 26, 2013, he acknowledged the misleading information that had been provided to you on 3/26/2012 and 8/13/2012. Based on these facts, he allowed a one-time opportunity to use the 3/26/2012 date (the first time you contacted CalPERS after the original mailing of your Confirmation of Intent Letter) as a new request date. The Confirmation of Intent Letter was mailed to you on 4/30/2013 using your pay rate as of 3/26/2012 and actuarial factors in effect as of 3/25/2012. (Attachment C). This document was valid for 30 days and required a response by 5/29/2013." (Exh. 9, at p. 2.)

16. In letters dated October 3 and 28, 2013, Respondent asked CalPERS to reconsider Pietrowski's August 14, 2013 decision. The request was denied on February 27, 2014 by Kelley Solari (Solari), Manager, Customer Account Services Division. However, CalPERS thereafter agreed to use the date of September 8, 2011, the first date Respondent

contacted CalPERS to inquire about the status of her application, as the date to calculate the cost to purchase five years of ARSC. The revised cost was \$78,454.

17. On September 20, 2015, Respondent filed the appeal that led to the instant proceedings.

LEGAL CONCLUSIONS

1. Government Code¹ section 20909 provides, in pertinent part: “(a) A 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. [¶] (b) A member may elect to receive this additional retirement service credit at any time prior to retirement by making the contributions as specified in Sections 21050 and 21052. . . . [¶] . . . [¶].”

2. Section 21052, in turn, provides: “A member or retired former employee who elects to receive service credit subject to this section shall contribute, in accordance with Section 21050, an amount equal to the increase in employer liability, **using the payrate and other factors affecting liability on the date of the request** for costing of the service credit. The methodology for calculating the amount of the contribution shall be determined by the chief actuary and approved by the board. A member or retired former employee electing to receive service credit for service subject to Section 21076, 21076.5, or 21077 shall pay the contributions as described.” (Emphasis added.)

3. Respondent’s qualification for the ARSC benefit is not disputed. Section 21052 requires that the contributions to pay for the ARSC be calculated “using the payrate and other factors affecting liability on the date of the request for costing the service credit.” As set forth in factual finding number 3, Respondent submitted her request for ARSC cost information on May 24, 2011. The cost was initially calculated as required by section 21052. The only reason Respondent was not permitted to make her contributions using rating factors as of May 24, 2011, was that she did not respond to the August 3, 2011 letter. However, she failed to respond to the letter because she did not receive it. Her diligent efforts from September 11, 2011 through November 19, 2012, clearly indicate her intent to follow through with the request for the ARSC.

4. Section 20160 permits correction of errors or omissions in certain circumstances. The statute provides:

“(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 All further statutory references are to the Government Code.

“(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.

5. Respondent established that she is entitled to relief pursuant to section 20160. Her failure to return the completed Confirmation of Intent to Purchase Service Credit form is

excused by the fact that she never received the confirmation of intent packet. She made diligent inquiries into the status of her request, and was provided with incorrect information. Soon after she learned that CalPERS had actually mailed the packet, Respondent requested the opportunity to correct her omission. Respondent is not seeking a benefit to which she is not entitled, but is simply seeking compliance with section 21052.

6. Petitioner argued at the hearing that CalPERS made sufficient accommodations for Respondent's failure to return the Confirmation of Intent to Purchase Service Credit form. This argument is unpersuasive. The accommodations did not go far enough. Section 21052 required CalPERS to calculate the cost to purchase the ARSC based on the date the request was made, and, once it was recognized that Respondent made an excusable omission, there is no logical or reasonable basis for choosing a different date than that dictated by section 21052.

7. In support of her position, Petitioner cites a proposed decision written by another administrative law judge in *The Matter of the Statement of Issues of Michael Fitzgerald (Fitzgerald)*, Case number 2013-0437, OAH number 2013060796. The *Fitzgerald* case is distinguishable and is not persuasive. In that case, the member actually received the confirmation of intent packet but failed to timely return the completed document.

8. Accordingly, the cost of Respondent's contributions for the ARSC shall be based on the payrate and other factors affecting liability on the date of the request for costing of the service credit, or May 24, 2011, by reason of factual finding numbers 1 through 17 and legal conclusion numbers 1 through 6.

ORDER

Respondent's appeal is sustained, and the cost of her contributions for the ARSC shall be based on the payrate and other factors affecting liability on May 24, 2011.

DATED: 2/27/17



SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings