

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Appeal of Calculation of
Retirement Benefits of:

ZOSIMA-SUSIE A. ANDRADA,

Respondent,

and

FRANCHISE TAX BOARD,

Respondent.

Case No. 2016-0747

OAH No. 2016100674

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on February 28 and June 12, 2017, in Sacramento, California.

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

Respondent Zosima-Susie Andrada was present at the hearing and represented herself.

There was no appearance by or on behalf of respondent Franchise Tax Board (FTB). FTB was duly served with the notices of hearing. The matter proceeded as a default against FTB pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on June 12, 2017.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED

6/20 2017

Debra Wooten

ISSUE

1. Did CalPERS correctly calculate respondent's disability retirement and health care benefits?
2. Did CalPERS correctly determine that respondent should reimburse CalPERS for an overpayment in the amount of \$559.11?

FACTUAL FINDINGS

1. Respondent was employed as an Office Technician by FTB. By virtue of her FTB employment, respondent was a state miscellaneous member of CalPERS. On December 15, 2010, respondent submitted to CalPERS an application for service pending industrial disability retirement (IDR application). In filing the IDR application, respondent claimed a disability on the basis of carpal tunnel syndrome (orthopedic condition). Respondent requested an effective retirement date of March 15, 2011. Respondent's service retirement was effective on March 15, 2011, and she began receiving her gross monthly service retirement benefit of \$741.62 as that date, through her May 1, 2011 pay warrant. Respondent had 10.814 years of service credit.

2. At hearing, Robin Owens, with the CalPERS Retirement and Benefit Support Unit, testified that as a state miscellaneous member respondent was not eligible for service pending industrial disability retirement. Respondent was only eligible to apply for service retirement if she met the service retirement age requirement, or disability retirement.

3. On March 28, 2011, respondent submitted to CalPERS an application for disability retirement (DR application) due to her orthopedic condition. She requested an effective retirement date of March 15, 2011.

4. At the time CalPERS initially calculated respondent's service retirement benefit, CalPERS did not have information from FTB that respondent had five days of unused sick leave. On April 25, 2011, after receiving information regarding respondent's unused sick leave, CalPERS processed respondent's sick leave adjustment, which increased her service credit to 10.834 years. The adjustment increased respondent's gross monthly service retirement benefit by \$1.35 for a total gross monthly retirement benefit of \$742.97. The adjustment created a one-time retroactive payment of \$2.09 that covered March 15 through April 30, 2011. Respondent received the retroactive payment in her June 1, 2011 service retirement pay warrant.

5. In May 2011, respondent informed CalPERS she did not want to continue her health coverage into retirement, however health insurance premiums were deducted from her May and June 2011 retirement warrants. In late May or early June 2011, respondent informed CalPERS she was having financial difficulties and requested an immediate refund of the health insurance premiums taken from her warrants. A Benefit Revolving Fund (BRF)

check for \$1,045.16 was issued to respondent on June 3, 2012, which she received and cashed.

6. On September 1, 2011, respondent's monthly retirement benefit was issued to her by CalPERS through direct deposit. On September 22, 2011, the warrant was returned and redeposited to CalPERS by respondent's bank. Respondent was notified of the issue with her bank. A BRF check was issued to respondent on October 20, 2011, to replace the returned September 1, 2011 warrant. Respondent continued to receive her regular service retirement benefit in the amount of \$742.97 through June 1, 2012.

7. On March 29, 2012, CalPERS approved respondent's DR application, based on her orthopedic condition. Her disability retirement was effective March 15, 2011. As a result of the approval of respondent's disability retirement, she request to be enrolled in health insurance effective on May 1, 2012. The health care premium of \$559.11 was deducted from respondent's May 1, 2012 retirement warrant. However, because respondent's disability retirement had been approved, respondent was considered to be "100 percent vested" for her health benefits and pays none of the cost of her health benefits. As a result, CalPERS was required to refund the entire health care premium she paid.

8. On May 15, 2012, respondent telephoned CalPERS and explained that she was experiencing a financial hardship. She requested a reimbursement of the \$559.11 health care deduction taken from her May 1, 2012 retirement warrant. CalPERS granted respondent's request and issued her a check for \$559.11, which she picked up on May 21, 2012.

9. On May 29, 2012, CalPERS sent respondent a letter confirming that her "retirement has been changed to Disability Retirement effective March 15, 2011." The letter further stated that as a result of the approval of her disability retirement, her new gross monthly retirement benefit was \$969.98. CalPERS informed respondent that her first regular warrant would be issued on or about July 1, 2012, and would cover the period of June 1 through 30, 2012. Respondent was also informed that a "retroactive warrant" would be issued on July 1, 2012, for monies owed to her from March 15, 2011, through June 30, 2012, due to the difference between her service retirement benefit and disability retirement benefit.

10. On July 1, 2012, CalPERS converted respondent's service retirement to disability retirement. On July 1, 2012, CalPERS also issued respondent a warrant totaling \$4,935.21, which included the new gross monthly disability retirement benefit of \$969.98 for June 2012, and a retroactive one-time payment of \$3,302.62, which equaled the difference between her gross monthly service retirement benefit and her gross monthly disability retirement benefit, from March 15, 2011, through May 31, 2012. The retroactive check also included reimbursement of \$124.80 for dental deductions respondent overpaid through July 2012, and a reimbursement for \$559.11 taken from her May 1, 2012 warrant for her health care benefit deduction.

11. Ms. Owens testified that CalPERS erroneously issued respondent two credits for the \$559.11 health care benefit deduction. The first credit occurred on or about May 18,

2012, when CalPERS issued respondent a BRF check for \$559.11, when she requested the money due to a financial hardship. The second credit for \$559.11 was issued in the July 1, 2012 warrant that contained the retroactive payment. The second credit should not have been issued.

12. On August 6, 2015, CalPERS informed respondent that, to ensure her health plan premiums were properly paid, the CalPERS customer service section completed a review of respondent's enrollment records concerning the contributions made by respondent and FTB. CalPERS determined that respondent owed CalPERS \$559.11, for the erroneous second health care benefit credit contained in the July 1, 2012 retroactive warrant. Respondent was given various options to pay back the money to CalPERS, including the option of deducting the money from her retirement warrant over a six-month period. Respondent was also given the option to submit evidence that CalPERS records were incorrect. Respondent was given 30 days to respond to CalPERS's request. CalPERS did not receive a response.

13. On October 5, 2015, and November 4, 2015, CalPERS sent respondent a "Past Due Notice" for the \$559.11 she owed to CalPERS. Respondent did not reimburse CalPERS. On December 4, 2015, CalPERS notified respondent by letter that the \$559.11 she owed CalPERS would be deducted from her retirement warrant. CalPERS also stated that if the amount owed was greater than 15 percent of the gross amount of her retirement warrant, monthly deductions would be set up until the balance was paid.

14. On or about December 10, 2015, respondent sent a letter Governor Jerry Brown, alleging that CalPERS "continues to harass [her] by sending notices to [her] home to pay for a health premium of \$599.11 that [she] did not owe." Respondent also alleged that CalPERS refused to issue her a check "to pay [her] retroactive retirement benefits in the amount of \$920.37." The Governor's Office sent respondent's complaint to CalPERS and asked for a response by January 16, 2016.

15. On January 8, 2016, CalPERS sent respondent a letter in response to the complaint she filed with the Governor. CalPERS set forth the history of respondent's retirement pay and a detailed accounting of all of respondent's retirement pay history, demonstrating that she received an overpayment of \$559.11 in the July 1, 2012 retroactive warrant, due to the second health care benefit credit. On February 1, 2016, respondent was advised of her right to appeal CalPERS determination that her disability retirement calculation was correct.

16. On February 27, 2016, respondent filed an appeal with CalPERS concerning the calculation of her disability retirement benefits. Respondent contended that she wanted her retirement benefit recalculated due to the "termination of [her] workers compensation benefits" and correction of accounting errors resulting from the transition of her service retirement to disability retirement. Respondent also contended that she had "[u]npaid claims" she submitted to the State Compensation Insurance Fund (SCIF).

17. On March 1, 2016, CalPERS began deducting \$46.59 per month from respondent's disability retirement benefit warrant. As of February 1, 2017, the \$559.11 CalPERS determined respondent owed was paid in full.

18. On March 30, 2016, CalPERS sent respondent a letter acknowledging her appeal. CalPERS directed respondent to SCIF regarding her workers compensation claim. CalPERS also informed respondent that the detailed accounting provided to her with the January 8, 2016, was accurate.

19. On October 7, 2016, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, made and thereafter filed the Statement of Issues.

Respondent's Evidence

20. Respondent testified that the accounting adjustments and changes CalPERS made to her retirement benefit have been confusing and upsetting. Respondent lives on a fixed income and feels that she was forced to retire early due to her disability. As a result, she struggles to live on the money she receives from CalPERS and Social Security. Respondent also contended that she was not informed by CalPERS that deductions would be made from her retirement benefit for the \$559.11 overpayment.

21. Respondent submitted at hearing information concerning her FTB termination, paystubs, vehicle repossession, and payday loans. The evidence respondent submitted did not substantiate her claim that CalPERS incorrectly calculated respondent's disability retirement and health benefits.

Discussion

22. When all the evidence is considered, CalPERS correctly calculated respondent's disability retirement and health benefits and was entitled to reimbursement of the overpayment of benefits erroneously paid to respondent in the amount of \$559.11. After respondent's disability retirement was approved, CalPERS recalculated respondent's retirement benefit and issued her a retroactive one-time payment which equaled the increased difference between her gross monthly service retirement benefit and her gross monthly disability retirement benefit she received from March 15, 2011, through May 31, 2012. The retroactive check also erroneously included reimbursement for \$559.11 taken from her May 1, 2012 warrant for her health care benefit deduction. Respondent had already received credit for the \$559.11 taken from her May 1, 2012 pay warrant, on May 18, 2012, when CalPERS issued respondent a BRF check for \$559.11, when she requested the money due to a financial hardship.

LEGAL CONCLUSIONS

1. CalPERS is governed by the Public Employees' Retirement Law (PERL). The purpose of the PERL is "to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits." (Gov. Code, § 20001.)

2. Government Code section 21423 provides the following concerning the calculation of final compensation for a disability retirement pension:

The disability retirement pension, other than an industrial disability retirement pension, for a member, other than a member who is subject to Section 21424 or 21427, shall be such an amount as with that portion of his or her annuity provided by his or her accumulated normal contributions, shall make his or her disability retirement allowance equal to one of the following:

(a) Ninety percent of one-fiftieth of his or her final compensation multiplied by the number of years of service credited to him or her.

(b) If the disability retirement allowance computed under subdivision (a) does not exceed one-third of his or her final compensation, 90 percent of one-fiftieth of his or her final compensation multiplied by the number of years of service that would be creditable to him or her if his or her service were to continue until attainment by him or her of the age of 60 years, but in that case the retirement allowance shall not exceed one-third of final compensation.

This subdivision is not applicable to members who are not entitled, at the time of retirement, to be credited with at least 10 years of state service.

(c) If qualified for service retirement, the member shall receive his or her service retirement allowance if that allowance is greater than the disability retirement allowance provided by this section.

3. Government Code section 20160, which requires CalPERS to correct the errors it makes, provides in relevant part:

(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.

4. Government Code section 20161 provides:

Notwithstanding any other provision of this part or of Section 13943.2 or 16302.1 to the contrary, the following shall apply:

(a) When there has been a payment of death benefits, a return of accumulated contributions, a contribution adjustment, or a deposit of contributions, this system may refrain from collecting an underpayment of accumulated contributions if the amount to be collected is two hundred fifty dollars (\$250) or less.

(b) When there has been a payment of death benefits, a return of accumulated contributions, a contribution adjustment, or a deposit of contributions, and there is a balance of fifty dollars (\$50) or less remaining posted to a member's individual account, or an overpayment of fifty dollars (\$50) or less was received, this system may dispense with a return of accumulated contributions.

(c) When there is a positive or negative balance of two hundred fifty dollars (\$250) or less remaining posted to a member's individual account, or the balance exceeds two hundred fifty dollars (\$250) but the difference to the monthly allowance unmodified by any optional settlement is less than five dollars (\$5), this system may dispense with any recalculation of, or other adjustment to, benefit payments.

(d) The dollar amounts specified in subdivisions (a) and (c) shall be adjusted in accordance with any changes in the dollar amounts specified in Section 13943.2.

5. Government Code section 20163 provides in pertinent part that:

(a) If more or less than the correct amount of contribution required of members, the state, or any contracting agency, is paid, proper adjustment shall be made in connection with subsequent payments, or the adjustments may be made by direct cash payments between the member, state, or contracting agency concerned and the board or by adjustment of the employer's rate of contribution. Adjustments to correct any other errors in payments to or by the board, including adjustments of contributions, with interest, that are found to be erroneous as the result of corrections of dates of birth, may be made in the same manner. Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled. Losses or gains resulting from error in amounts within the limits set by the Department of General Services for automatic

writeoff, and losses or gains in greater amounts specifically approved for writeoff by the Department of General Services, shall be debited or credited, as the case may be, to the reserve against deficiencies in interest earned in other years, losses under investments, and other contingencies.

(b) No adjustment shall be made because less than the correct amount of normal contributions was paid by a member if the board finds that the error was not known to the member and was not the result of erroneous information provided by him or her to this system or to his or her employer. The failure to adjust shall not preclude action under Section 20160 correcting the date upon which the person became a member.

6. As set forth in Factual Findings 1 through 15, and 22, CalPERS's calculation of respondent's disability retirement and health care benefits is accurate and there are no monies owing to respondent. Additionally, CalPERS's erroneous July 1, 2012 credit to respondent in the amount of \$559.11 for a health care benefit deduction respondent had already received on May 21, 2012, was the result of mistake, surprise, inadvertence, and inexcusable neglect as those terms are used in Code of Civil Procedure section 473. The correction did not provide CalPERS with a status, right, or obligation not otherwise available under the Public Employees' Retirement Law. Consequently, CalPERS properly made the correction under Government Code sections 20160, 20161 and 20163.

ORDER

The appeal of respondent Zosima-Susie Andrada is DENIED. The correction made by the California Public Employees' Retirement System to obtain reimbursement of the overpayment of benefits erroneously paid to respondent in the amount of \$559.11 is SUSTAINED.

DATED: June 16, 2017

DocuSigned by:

Marcie Larson

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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings