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 the Effective
Retirement Date of:

CAROL R. MORRISON,
Respondent.

Case No. 2016-0495
OAH No. 2016090797

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of
Administrative Hearings, State of California, on May 23, 2017, in Sacramento, California.

The California Public Employees Retirement System (CalPERS) was represented by
Cynthia A. Rodriguez, Senior Staff Attorney.

Carol R. Morrison (respondent) was present and was represented by Margo
Hasselman Greenough, Attorney at Law.

Evidence was received on May 23, 2017. The record remained open to allow
CalPERS to submit a written response to respondent's hearing brief, and for respondent to
submit a written reply to CalPERS's response. On June 8, 2017, CalPERS submitted its
response, which was marked as Exhibit 24. On June 15, 2017, respondent submitted her
reply, which was marked as Exhibit N. The record was closed and this matter was submitted
for decision on June 15, 2017.

ISSUES

The issues for determination in this matter are:

1. Whether respondent made an error, which was the result of inadvertence,
mistake, surprise or excusable neglect correctible under Government Code section 20160,
which would entitle her to the retroactive retirement date of January 3, 2008, her 63rd
birthday?
2. Whether CalPERS's denial of a correction under Government Code section 20160, on the facts established in this matter, creates an unlawful forfeiture of a vested pension benefit?1

FACTUAL FINDINGS

1. Respondent was employed by the County of Santa Clara (County) as a Medical Records Technician from February 1987 to February 1996. By virtue of her employment, respondent is a local miscellaneous member of CalPERS.

2. On February 13, 1996, respondent separated from her employment with the County. At separation, respondent was 51 years old and had accrued 5.451 years of service credit under the 2-percent-at-age-55 formula for local miscellaneous members. On August 28, 2014, respondent submitted an online application to CalPERS for service retirement. Respondent retired for service effective August 1, 2014, and has been receiving her retirement allowance from that date. Respondent seeks to have CalPERS make her effective date of retirement retroactive to January 3, 2008, her 63rd birthday.

Respondent's Correspondence with CalPERS Regarding Retirement

3. On March 6, 1996, CalPERS sent a letter to respondent. In the March 6, 1996 letter, CalPERS stated that it had been informed by respondent's employer that respondent had separated from CalPERS-covered employment. CalPERS asked respondent to advise "as to the disposition of your retirement contributions, including interest." The letter offered respondent the opportunity to choose from several options, including retiring for service at that time, requesting a refund of her contributions, or leaving her funds on deposit. With regard to leaving her funds on deposit, the letter, in bold print, stated, "As a vested member there are definite advantages if you choose to leave your funds in the System." The letter stated further:

- **Based on your age, you are eligible to receive a service retirement allowance at this time.** A retirement application is enclosed for your convenience.

- If you do not wish to retire at this time, you will remain a CalPERS member and retain your right to apply for retirement at a future date. (A retirement application may also be obtained from any of our area/field offices.)

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1 The first issue for determination was identified in the Statement of Issues. The second issue was identified by respondent at the hearing.
Your funds will continue to earn interest at the current rate of 6%.

(Underlining in original.)

The March 6, 1996 letter informed respondent that if she wished to leave her funds on deposit, she did not need to respond to the letter. The letter closed with, “If we can be of further assistance, please contact us at the above telephone number.” Respondent chose to leave her funds on deposit with CalPERS and did not respond to the March 6, 1996 letter.

4. On January 3, 2008, respondent turned 63. Respondent did not submit an application to CalPERS to service retire on or near her 63rd birthday.

5. By letter dated March 3, 2011, CalPERS notified respondent that its records indicated that she was an “inactive member of CalPERS who is approaching age 70” and that “[n]ewly enacted State law requires that once you reach the age of 70, you must either refund or retire, if eligible unless you are an active member of another publicly funded California retirement system.” CalPERS sent this information to her so that she could “make a decision about your CalPERS account before reaching age 70.” The letter stated further:

Since you are vested with at least 5 years of service credit with CalPERS, you may receive a monthly service retirement allowance. If you choose to retire, the amount of your retirement allowance will depend on your years of service and the average salary you received during your last 12 or 36 months of employment. You can go to our Web site at www.calpers.ca.gov or complete the enclosed Retirement Allowance Estimate Request form to obtain a retirement estimate.

The letter closed with, “Please see the attached additional tax information and carefully consider your options before making an election.”

6. On March 24, 2014, CalPERS sent respondent another letter, which was almost identical to the one sent on March 3, 2011. On May 1, 2014, CalPERS received a Retirement Allowance Estimate Request from respondent. The preprinted language on that request stated that it was not an application for retirement; it was a “request for an estimate of potential future retirement benefit amounts that will assist you with your financial planning.” On May 28, 2014, CalPERS notified respondent that it could not process her Retirement Allowance Estimate Request because she had not included a retirement date. On June 11, 2014, CalPERS received another Retirement Allowance Estimate Request from respondent, which designated her retirement date as July 3, 2015.

7. On July 14, 2014, CalPERS sent respondent an estimate of her service retirement benefits if she retired on July 3, 2015, at the age of 70.5. As set forth in the
estimate, if respondent elected to receive an unmodified allowance, her monthly retirement benefit would be approximately $403.94.

8. On August 26, 2014, respondent submitted the following inquiry to CalPERS:

I have been an inactive member of CalPERS since 1996. I was under the impression that the longer I waited to retire, up to age 70 1/2, the higher my retirement monthly allowance would be. I now realize that is not the case. If I had retired when I was 63, I would have received monthly retirement allowances for the past 6 years. Since I didn’t, is all that retirement money lost to me? Or can I retire retroactive on the date I was 63 and receive that money.

On August 28, 2014, CalPERS responded to respondent’s inquiry as follows:

Unfortunately, your earliest retirement date will be the 1st of the month in which your service retirement application is receive[d].


10. On February 18, 2015, CalPERS sent a letter to respondent, which in relevant part stated:

According to our records you were first eligible to retire on June 1, 1995, the date you became vested for retirement with the minimum five years of service credit. Your actual service retirement date was August 1, 2014 at age 69 ½.

Your CalPERS monthly benefit is based on a total of 5.451 years of service credit coordinated with Social Security for employment between the dates of February 10, 1987 and February 13, 1996.

Your monthly gross benefit as of February 1, 2015 is $403.94.

11. On November 12, 2015, respondent wrote a letter to CalPERS, which began as follows:

I never received a retroactive pension benefit or adjustment of my benefit for my late retirement. I am hereby requesting a
retroactive payment for the pension benefit that I should have received from the date I was eligible to retire, at age 63, to the date I began receiving my pension benefit.

In her November 12, 2015 letter, respondent stated:

Until I retired, I received from CalPERS annual statements of my pension account and information on my retirement plan, but these did not provide any explicit warning that I was foregoing any of my retirement benefit. In fact, these statements showed my account accruing interest, which led me to believe that my retirement pension benefit would increase the longer I waited to retire. Further, the California Code of Regulations state that accrued benefits are nonforfeitable, and not providing an adjustment for my late retirement appears to be a type of forfeiture.

12. On December 21, 2015, CalPERS responded to respondent’s November 12, 2015 letter. CalPERS explained:

The minimum service retirement age for most members is age 50. Your Annual Member Statements stated your eligibility to retire and that an age benefit factor based on your retirement formula, service credit and final compensation would be used to calculate your retirement benefit. Our records do not indicate we provided any information showing your retirement benefit would be based on your contribution and interest, nor that your benefit would increase indefinitely with age.

CalPERS does not inform members when to retire. We can only provide members with information of their eligibility for a retirement benefit. None of your accrued benefits have been forfeited. Your current retirement benefit is based on the retirement formula in place at the time you worked for Santa Clara Valley Medical Center and the years of service you accrued with them.

Government Code (GC) section 21252 states that a retirement application received more than nine months after the discontinuance of CalPERS-covered employment shall not be given a retirement date earlier than the first of the month in which the application was received. You separated from the County of Santa Clara on February 13, 1996. Your retirement application was received August 28, 2014, therefore we do not have authority to grant your request.
13. On January 12, 2016, respondent appealed CalPERS's decision not to grant her request for a retroactive retirement date.

14. On February 2, 2016, CalPERS wrote another letter to respondent. In its letter, CalPERS stated:

The law states that if a retirement application is submitted nine months or more after separation from employment, the retirement date cannot be earlier than the first of the month in which the application was received. Government Code section 20160 gives CalPERS the authority to correct certain types of errors or mistakes made by our members. These include "mistake of fact," a "mistake of law," or an error that is the result of inadvertence, surprise or excusable neglect, as defined in Code of Civil Procedure Section 473. Failure to make the "inquiry that would have been made by a person in like or similar circumstances," is not a correctible error or omission.

We reviewed your file history and conclude you did not make a correctible error. Prior to and after separating from CalPERS-covered employment in February 1996, your Annual Member Statements indicated when you were eligible to retire, yet you did not inquire about your retirement benefits until August 26, 2014. With information and resources about CalPERS retirement benefits available to you, it is not reasonable you would wait more than eight years to make the inquiry. We found no evidence you intended to retire on your 63rd birthday; therefore, we respectfully deny your request to provide you an effective retirement date of January 3, 2008.

(Italics in original.)

15. On February 18, 2016, respondent sent a letter to CalPERS regarding her appeal:

The basis of law for my appeal is as follows:

- The California Code of Regulations § 553.3 states that pension benefits are nonforfeitable.
- IRS Regulation (26 U.S.C. § 401(a)(14) states that a qualified pension plan like CalPERS must pay benefits at normal retirement age, unless the participant elects otherwise.
California Government Code 20160 gives CalPERS the authority to correct the error of a member as a result of mistake or excusable neglect.

Respondent explained the reasons for her appeal, in relevant part, as follows:

- I was misled by the annual statements that I received from CalPERS which showed accruing interest and an increasing balance in my pension account. I believed that my retirement pension would increase the longer I waited to retire. As a result, I did not apply for retirement until August 28, 2014, which I did then because I was approaching the calendar year in which I would reach the mandatory age of 70½ as specified by Federal law. It is not right that, because of this mistake, I should have to forfeit any of my pension benefit. This was a mistake of fact which should constitute excusable neglect, as covered by California Government Code 20160.

- I did not realize I was foregoing any of my pension benefit by waiting to retire because no explicit warning to that effect was provided on these statements or in any letters or other information I received from CalPERS, including a reply from CalPERS to an inquiry about my retirement benefits that I made a few years before I retired. If I had known this, I would have retired at age 63.

- The California Code of Regulations state that accrued benefits are nonforfeitable, and not providing an adjustment for my late retirement appears to be a type of forfeiture.

Annual Member Statements and CalPERS Publications Received by Respondent

16. At the hearing, the parties offered Annual Member Statements and other publications respondent received from CalPERS from 1992 to 2013. In 1992, respondent received a booklet from CalPERS entitled “Local Miscellaneous 2% at 55.” The first heading in the first column on page four of that booklet was, “Estimating Your Service Retirement Allowance,” which began, “There are three things you need to know to estimate your retirement allowance: service credit, benefit factor and final compensation.” (Bolding in original.) The first heading in the second column of that page was “Benefit Factor,” which began, “This is the percent of pay to which you are entitled for each year of service. It is determined by your age at retirement.” (Bolding in original.) It stated further that, “the benefit factor increases for each quarter year of attained age from 50 to 63.” A chart with
two columns was included under this section. The first column was entitled “Age at Retirement” and the second column was entitled “Percent Per Year of Service.” The chart includes ages from 50 to “63+.” As set forth in this chart, the benefit factor did not increase after age 63.

17. Respondent has received Annual Member Statements from CalPERS every year she has been a member. Respondent’s Annual Member Statement as of June 30, 1994, on the first page stated, in relevant part, “When combined with your member benefits booklet, this statement provides you a comprehensive view of your PERS coverage.” It stated further that, “With an increased awareness of your benefits, you will be in a better position to make decisions concerning your personal financial planning. We suggest that you review this statement carefully, discuss it with your family, and retain it for future reference.”

18. Respondent’s 2007 Annual Member Statement, sent to her approximately six months before she turned 63, on page two included a section entitled “Your Future Benefits,” which, in relevant part, stated:

Your future CalPERS monthly service retirement benefit will be based on your:
- service credit with each of your employers,
- benefit factor(s) of your retirement formula(s) for your retirement age,
- final compensation which is your average monthly pay rate for the last, or highest, 12 or 36 months.

Your benefit is calculated as follows:
Service Credit \times Benefit Factor \times Final Compensation = Unmodified Allowance (highest monthly pension)

You are eligible for a monthly pension. Federal law requires that you must receive a retirement allowance before April 1 of the year after you reach age 70 ½ (unless you are working under a reciprocal system).

To determine future retirement benefits, visit the Retirement Planning Calculator or submit a Retirement Allowance Estimate Request on our Web site.

(Bolding in original.)

Page three of the 2007 Annual Member Statement stated in relevant part:

Retiring Soon?
If you are considering retirement in the near future, please read our booklet *Planning Your Service Retirement.* If you have made the decision to retire, please review the booklet *Stepping Into Retirement: A Guide to Completing Your CalPERS Service Retirement Election Application.* This booklet includes the application for retirement, and detailed information and processing instructions for completing your application.

(Italics in original.)

Page four of the 2007 Annual Member Statement was entitled “Member Education.” It began with, “*CalPERS has a variety of services to keep you in-the-know! All available online.*” (Bolding in original.) It stated further that, “Our new CalPERS Education Center offers you quick access to all of the classes and instruction you need to be prepared and informed while making important decisions about your CalPERS benefits and your future,” and “Take advantage of the convenience of anytime, anywhere access to our educational resources. Be empowered with all the necessary and important information you need today.” The page explained how a member could access CalPERS online. It stated that, “Retirement planning classes are available, whether you are in the early stages of your career, just starting to plan your retirement, or getting ready to retire.” The page concluded with:

Need More Information?
- Contact us online at www.calpers.ca.gov.
- Call us toll-free at 888 CalPERS (or 888-225-7377).
- Use Telecommunications Device for the Deaf: (916) 795-3240.
- Visit your nearest regional office. Get the location nearest you on CalPERS On-Line.

19. Information about the availability of resources to help members plan for their retirement was included in the other Annual Member Statements respondent received each year from CalPERS.

*Respondent’s Testimony*

20. At hearing, respondent testified that she did not take her pension when she left County service because she had no urgency to receive the money. She “assumed” that her pension benefits would continue to increase the longer she delayed taking her pension. She did not apply for retirement in 2008 when she turned 63 because she was not aware that her monthly benefit would not increase after she reached that age. She asserted that she would have retired when she turned 63 if she were aware of this cutoff. She believed that CalPERS should have included in the Annual Member Statements a “simple statement” regarding the benefit factor and how it did not increase after a member turned 63.
21. Respondent admitted that she never called CalPERS to confirm her assumption that her monthly benefit would continue to increase the longer she delayed retiring. It was not until 2014 that she realized that her monthly benefit did not continue to increase after she turned 63.

Discussion

22. Respondent waited until she was 69 to apply for service retirement. By her appeal, she asks CalPERS to make her retirement retroactive to her 63rd birthday. Respondent argued that she “did not request commencement of her retirement benefits until she was over age 69, because she (incorrectly) believed that her monthly benefit would increase the longer she delayed drawing it.” Respondent asserted that CalPERS’s refusal to pay respondent pension benefits retroactive to 2008 “stems from a misreading” of Government Code section 21252, which governs the effective date of retirement. According to respondent, CalPERS’s reading of this statute is “overly restrictive” and causes her “to forfeit retirement benefits which were earned through her employment, vested and non-forfeitable by operation of statute and the California Constitution.” Respondent argued further that Government Code section 20160 “provides a solution that avoids an unconstitutional forfeiture,” by allowing her “to correct her omission by having CalPERS revise her retirement date to January 2008 and pay her pension retroactively.”

23. As explained to respondent in CalPERS’s letters, respondent’s appeal in this matter is without merit. CalPERS made available to all its members, including respondent, information to assist them in planning for their retirement. It was respondent’s responsibility to review the available information in a timely and thorough manner to plan for her retirement. Respondent failed to take adequate initiative to do so. By failing to review this readily available information timely and thoroughly, respondent made incorrect assumptions about the calculation of her retirement benefits.

24. Respondent did not establish that there was anything in CalPERS’s Annual Member Statements or other materials she received about her pension benefits that was misleading. If she had read these statements and materials, she would have known that, if she no longer worked for a CalPERS-covered agency, her retirement benefits would not increase after she reached the age of 63. Instead of reading these materials in detail and contacting CalPERS for information, she relied upon her incorrect assumptions. Respondent expected CalPERS to anticipate her incorrect assumptions about her retirement benefits without having brought them to CalPERS’s attention. Such an expectation is unreasonable. She did not establish that CalPERS played any role in causing her to harbor these incorrect assumptions. They were caused by her not undertaking the type of inquiry and review a reasonable person in her situation would have undertaken.

25. Citing Hittle v. Santa Barbara County Employees Retirement System (1995) 39 Cal.3d 374, respondent argued that CalPERS failed to provide her adequate information regarding the calculation of the benefit factor. Respondent’s reliance on Hittle is misplaced.
Every year CalPERS sent respondent Annual Member Statements, which encouraged her to review membership booklets, take advantage of online classes, and contact CalPERS customer representatives directly to learn about and prepare for retirement. There was no indication that respondent ever took advantage of the information, education and assistance that CalPERS made available to its members to prepare for her retirement.

26. CalPERS owes a fiduciary duty to all its members to ensure that it pays benefits to members only when the law provides for such payment, or they can establish an error or omission correctible under Government Code section 20160. As explained below, in accordance with the mandate set forth in Government Code section 21252, subdivision (a), CalPERS properly determined that the effective date of respondent's retirement application was August 1, 2014. Respondent did not establish that she made the type of inquiry a reasonable person in her position would have made. Consequently, she failed to establish that she made an error or omission correctible under Government Code section 20160. It would be contrary to the fiduciary duty CalPERS owes to all its members to make respondent's retirement date retroactive to January 3, 2008, her 63rd birthday, when she failed to establish a legal right to such a retroactive correction.

27. None of respondent's pension benefits were forfeited. Respondent always maintained her vested right to her pension. CalPERS did nothing to deny respondent this vested right. But a vested right to a pension does not mean that a member has a right to a specific retirement date or a specific benefit amount when the member has not timely applied for such retirement date and benefit. Respondent could have applied to receive her retirement benefits at any time after she left the County's employment. She chose to wait until August 2014 to submit a retirement application. Through her own failure to make the type of inquiry that would have been made by a reasonable person in like or similar circumstances, she failed to access her benefits at an earlier time. Because respondent failed to take reasonable initiative to timely access the information, education and assistance that CalPERS made available to its members, her appeal must be denied.

LEGAL CONCLUSIONS

1. Respondent has the burden of proof in this case to establish that she is entitled to the retroactive retirement benefits she seeks. (McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, fn. 5; See also, Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332; Gov. Code, § 11504.)

2. Government Code section 21252, subdivision (a), in relevant part, provides:

   ... The effective date of a written application for retirement submitted to the board more than nine months after the member's discontinuance of state service shall be the first day of the month in which the member's application is received at
an office of the board or by an employee of this system
designated by the board.

3. CalPERS received respondent's service retirement application on August 28, 2014, which was more than nine months after she ceased her employment with the County. In accordance with the mandate set forth in Government Code section 21252, subdivision (a), CalPERS properly determined that the effective date of respondent's application was August 1, 2014.

4. Government Code section 20160 grants the Board the discretion to correct errors or omissions made by CalPERS members, stating, in relevant part, as follows:

(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) 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.

[¶] ... [¶]

(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. As set forth in the Factual Findings, respondent failed to make the inquiry that would have been made by a reasonable person in like or similar circumstances. Consequently, pursuant to Government Code section 20160, subdivision (a)(3), her alleged mistake in this matter is not an error or omission that is subject to correction under Government Code section 20160.

6. Respondent argued that CalPERS, by refusing to make her retirement date retroactive to January 3, 2008, her 63rd birthday, caused her to forfeit vested pension benefits. Respondent’s argument is without merit. The refusal of CalPERS to make a correction under Government Code section 20160 does not create an unlawful forfeiture of vested pension benefits. Respondent could have applied to CalPERS for pension benefits any time after she stopped working for the County in 1996. She chose not to apply until August 2014. CalPERS is not responsible for any mistaken assumptions respondent may have harbored about when would have been the best time for her to begin her retirement. CalPERS made available to her sufficient information to make her own informed decision about when to apply. Her failure to apply earlier than she did was based solely on her own failure to make the type of inquiry a reasonable person in like or similar circumstances would
have made. Consequently, she failed to establish that there was a forfeiture of pension benefits. Her appeal must therefore be denied.

ORDER

The appeal of respondent Carol R. Morrison for a retroactive retirement date of January 3, 2008, is DENIED.

DATED: July 7, 2017

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings