ATTACHMENT A

THE PROPOSED DECISION
BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Request to Purchase Additional Retirement Service Credit of:

MICHAEL S. DONALDSON

Respondent.

Case No. 2016-0666
OAH No. 2016100988

PROPOSED DECISION

This matter was heard before Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, on March 22, 2017, in Oakland, California.

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

Zachery A. Lopes, Attorney at Law, represented respondent Michael S. Donaldson, who was present throughout the hearing.

The record was left open for submission of closing briefs. On June 9, 2017, CalPERS filed its closing brief (marked for identification as Exhibit 13) and respondent filed his closing brief (marked for identification as Exhibit D). Attached to its closing brief, CalPERS attached a document (marked for identification as Exhibit 15). An Order (marked for identification as Exhibit 14) was issued reopening the record to allow respondent to respond to the document. On June 30, 2017, respondent filed a written argument (marked for identification as Exhibit E). Exhibit 15 was admitted into evidence and the record was closed.

The matter was submitted on June 30, 2017.

ISSUES PRESENTED

1. Did CalPERS properly determine that respondent was ineligible to elect to purchase additional retirement service credit because he was not employed in state service on the date CalPERS received his application?
2. Whether respondent's application to purchase additional retirement service credit, as filed when he was no longer employed in state service, was the result of inadvertence, mistake, surprise or excusable neglect correctable by Government Code section 20160, which would render him eligible to elect to purchase additional retirement service credit?

3. Should CalPERS be estopped from determining that respondent is ineligible to elect to purchase additional retirement service credit?

FACTUAL FINDINGS

1. The California Public Employees' Retirement System is the government agency charged with administering the Public Employee Retirement Law (PERL), Government Code section 20000, et seq. On September 19, 2016, Carene Carolan, Chief, Member Account Management Division, signed the Statement of Issues on behalf of CalPERS in its official capacity.

2. Respondent Michael S. Donaldson was employed by the Peralta Community College District (District) and became a miscellaneous member of CalPERS in 1988.

3. On January 1, 2004, CalPERS began offering eligible members the ability to elect to purchase additional retirement service credit (ARSC). ARSC is a benefit governed by the PERL. Generally, ARSC allowed a qualifying member to purchase up to five years of additional service credit to include within his or her retirement benefits calculation. The cost of ARSC is entirely paid by the employee. Respondent initially contacted CalPERS in 2010, to inquire about the purchase of ARSC.

4. In Spring 2011, CalPERS was transitioning to a new computer system. A hold was placed on processing retirement benefit applications, including ARSC applications, until September 2011. During this hold period, CalPERS would accept for filing, but not process, any applications unless the member demonstrated an emergency, such as emergency retirement or imminent death. In its computer system, CalPERS has a Customer Touch Point Report (Touch Point) that documents communications/contacts with members and CalPERS representatives.

5. In May 2011, respondent went to CalPERS's Walnut Creek Office to make inquiries about service retirement and ARSC. Prior to this, respondent had obtained a preliminary estimate of the cost of purchasing five years of ARSC, which was approximately

1 ARSC was not available after January 1, 2013.

2 Touch Point has no record of respondent going into the office; however, in its closing brief, CalPERS appears to concede that respondent went to the Walnut Creek Office in May 2011.
Respondent had made financial arrangements to pay this amount through a certificate of deposit, a monetary gift from a relative, and from his checking account. Respondent also contacted CalPERS on May 4, 2011, regarding a separate request for calculation of “service prior to membership” with CalPERS which he had filed on November 29, 2010.

6. At some point, respondent became aware that his employer had an early retirement incentive program where he would receive a cash payment of approximately $7,000, if he retired on or before June 10, 2011. Respondent separated from his employment on June 9, 2011, which was his last day on the payroll for compensated employment with the District.

7. On June 10, 2011, respondent returned to the Walnut Creek Office to inquire about paying for ARSC, and he said that he wanted to retire on June 30, 2011. Respondent was informed that he could not make any payments toward ARSC until the payment calculation was completed and that the process was taking longer than usual due to the computer problems. However, he could still file his application despite the computer problems.

8. On June 20, 2011, respondent returned to the Walnut Creek Office to submit the ARSC application requesting five years of additional service credit. A CalPERS representative informed respondent that he might not be eligible to purchase the ARSC. According to respondent, CalPERS staff again told him that because of the computer system transition, he could “retire and then . . . go through the processing of the benefits.”

9. According to Touch Point, on June 27, 2011, respondent returned to the Walnut Creek Office to inquire about survivor benefits for his domestic partner. He was also concerned with his service prior to membership request.

10. On August 4, 2011, respondent submitted an application for service retirement to CalPERS requesting an effective date of June 10, 2011, which was ten days prior to the date respondent had applied for ARSC. According to respondent, he had delayed submitting his service retirement application to inquire about an additional benefit for his domestic partner.

11. On August 15, 2011, CalPERS sent a letter to respondent, as follows:

CalPERS is implementing a new computer system this fall which consolidates over 49 different systems into one new integrated system.

We are preparing now for the conversion process. While many conversion activities will take place September 2-18, 2011, some are beginning now and will impact you.
As of August 1, 2011, and during this transition period, we are not able to process service credit costs requests. These will be held temporarily and once the new system is implemented, we will begin processing the service credit cost requests in the order they were received.

For additional information, please visit our website at www.calpers.ca.gov. Beginning October 1, 2011, you will be able to obtain the latest status on service credit requests by selecting “Service Credit Purchase Options.” You can also visit the “Service Credit Cost Estimator” to generate a cost estimate for select service credit purchase types.

We apologize for any inconvenience this may cause you and appreciate your patience as we transition to our new system.

12. On October 25, 2012, CalPERS sent a letter to respondent indicating that CalPERS had reviewed respondent’s request to purchase ARSC and determined that he was not eligible to purchase ARSC because he submitted his request to purchase after his retirement date from a CalPERS-covered employer.

13. Respondent states that, upon receiving the October 25, 2012 letter, he was shocked and upset about the rejection of his application because of the time and effort he had spent and he had received assurances that he could retire prior to submitting his application for ARSC.

14. On October 6, 2015, CalPERS sent a letter to respondent affirming that the determination to deny his ARSC request remained unchanged because his last day on payroll with a CalPERS-covered employer was June 9, 2011, and his ARSC request was received on June 20, 2011.

15. On March 14, 2016, CalPERS notified respondent that the denial determination remained unchanged and advised him of his appeal rights. Respondent filed a timely appeal. This hearing followed.

**Respondent’s additional evidence and argument**

16. Respondent states that he had originally planned to retire in February or June of 2015, but he pushed forward his retirement because of personal and financial reasons. During his retirement planning, he decided to purchase ARSC, after consulting with three financial planners and weighing the costs and benefits. He insists that he had the money available to purchase ARSC, and visited the Walnut Creek Office with specific intent to apply for and pay for the benefit.
Respondent states that he followed the CalPERS representatives’ advice and worked until June 9, 2011, because he had been assured that he could retire and then submit his ARSC application because of the computer program transition. According to respondent, he “asked them if [he] could submit the application and pay for it,” and he “was told that [] because the computer system was, they were switching over the computer system at that time, and that the costing and processing modules of the system were not functioning, were not functional, they were being evaluated and tested, and therefore [he] couldn’t do that.” Respondent also testified that “Staff advised that “the best [he] could do was to wait until the system had been upgraded [so he] could then have [his] application processed.” Respondent was concerned and expressed this to CalPERS representatives. Respondent’s testimony was credible.

17. Respondent contends that he made every effort to purchase ARSC from CalPERS prior to his retirement while he was employed and only failed to do so because CalPERS’ computer system was not capable of completing the transaction. According to respondent, had he not been advised by CalPERS representatives that he could retire without forfeiting his right to purchase ARSC, he would have presented his application prior to his retirement even if it meant delaying his retirement and foregoing the retirement pay incentive from his employer. As a result of respondent’s detrimental reliance upon those representations, he contends that CalPERS must be estopped from denying his application for ARSC citing Crumpler v. Bd. of Administration (1973) 32 CalApp.3d 567. Respondent also appears to contend that CalPERS is at fault because it never affirmatively instructed regional office staff to continue accepting ARSC applications. Also, CalPERS never affirmatively instructed regional office staff to inform members that ARSC applications could be accepted during the hold period for the computer conversion process.

Ultimate factual finding

18. The evidence established that respondent submitted his ARSC application at the Walnut Creek Office on June 20, 2011; however, his last day on payroll with a CalPERS-covered employer was June 9, 2011 (10 days prior to his application) rendering him ineligible to elect to purchase ARSC. The evidence did not establish that CalPERS was not accepting applications during that time period, only that CalPERS was not processing applications and not accepting payments for ARSC. It appears that there may have been confusion on respondent’s part, especially since he was dealing with CalPERS regarding his request for service prior to membership and benefits for his domestic partner at the same time. It is also relevant that his last day of employment fell on the last day upon which he could benefit from his employer’s retirement incentive plan. In any event, while respondent’s frustration and disappointment concerning his reliance on the information he apparently misunderstood about his application for ARSC is compelling, as demonstrated below, he failed to establish the elements of equitable estoppel. Moreover, applying the doctrine of equitable estoppel would be contrary to a strong public policy. CalPERS has a fiduciary duty to protect the retirement fund for the benefit of all its beneficiaries. In addition, CalPERS cannot ignore a mistake that benefits one beneficiary in a manner that is inconsistent with the law or inequitable to its other beneficiaries.
LEGAL CONCLUSIONS

1. The California Public Employees' Retirement Law, Government Code section 20000, et seq., governs CalPERS and exclusively sets forth the eligibility requirements and limitations for purchasing ARSC.

2. Government Code section 20909 provides that:

(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. A member may not elect additional retirement service credit under this section more than once.

(c) For purposes of this section, "additional retirement service credit" means time that does not qualify as public service, military service, leave of absence, or any other time recognized for service credit by the retirement system.

(d) Additional retirement service credit elected pursuant to this section may not be counted to meet the minimum qualifications for service or disability retirement or for health care benefits, or any other benefits based upon years of service credited to the member.

(e) This section only applies to the following members:

(1) A member while he or she is employed in state service at the time of the additional retirement service credit election.

(2) A member of the system defined in Section 20324.

(f) For purposes of this section, "state service" means service as defined in Section 20069.

(g) This section shall apply only to an application to purchase additional retirement credit that was received by the system.
prior to January 1, 2013, that is subsequently approved by the system.

3. As set forth in Factual Findings 3 through 11, and 18, respondent did not establish that CalPERS improperly determined that respondent was ineligible to elect to purchase ARSC pursuant to Government Code section 20909. The evidence established that respondent submitted his ARSC application on June 20, 2011; however, his last day on payroll with a CalPERS-covered employer was June 9, 2011 (10 days prior to his application). Therefore he was not employed in “state service” when CalPERS received his application rendering him ineligible to elect to purchase ARSC.

Not a correctable error or omission

4. Government Code section 20160, provides that:

(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, participant 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 as 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. Code of Civil Procedure section 473, subdivision (b), reads, that:

(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.

6. There are many cases interpreting the language of Code of Civil Procedure section 473, in which relief is granted from adverse judgments that resulted from mistake, inadvertence, surprise or neglect. In the two most relevant decisions interpreting
Government Code section 20160’s language regarding the sort of errors or omissions that may be corrected, members were permitted to change the type of retirements they sought (service or disability) based on mistaken factual assumptions. In one case, the member did not appreciate that his chosen disability retirement would be reduced by his later receipt of federal Social Security benefits whereas a service retirement would not have been reduced. (*Rodie v. Bd. of Administration* (1981) 115 Cal.App.3d 559.) In the other case, neither the member nor CalPERS realized that the member was in fact disabled when he elected to take a less financially advantageous service retirement. (*Button v. Bd. of Administration of Public Emp. Retirement System* (1981) 122 Cal.App.3d 730.) The common theme in these cases was the judicial approval of changes that provided the maximum benefits to which the members were entitled from the retirement system.

7. The crux of respondent’s apparent claim of correctable error is that he failed to follow the requirements of the ARSC process, because CalPERS representatives misinformed him about how to timely apply for ARSC. If CalPERS representatives caused his “error or omission,” then respondent should be entitled to apply for and pay for five years of ARSC.

8. Respondent did not meet his burden of proof establishing a right of correction. (Gov. Code, § 20160, subd. (d).) In this matter, the CalPERS representatives’ communications with respondent do not appear to indicate that he was directly told not to file an application for ARSC. There is insufficient evidence to support a mistaken factual assumption by respondent other than his own misunderstanding. Respondent’s failure to file his application for ARSC before he retired, was not an omission resulting from mistake, inadvertence, surprise or excusable neglect pursuant to Government Code section 20160, which would render him eligible to elect to purchase ARSC.

**Estoppel**

9. Respondent contends that CalPERS is equitably estopped from determining that he is ineligible to elect to purchase ARSC.

10. Four elements must be present to invoke equitable estoppel: “(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of the facts; and (4) he must rely upon the conduct to his injury.” (*Crumpler, supra,* 32 Cal.App.3d 567, 581.) All four elements must be present to establish estoppel. (*Johnson v. Johnson* (1960) 179 Cal.App.2d 326, 330.) If any element is missing, no estoppel exists. (*Ibid.*) In addition, courts are reluctant to invoke the doctrine of equitable estoppel against a government agency, where to do so would defeat the operation of a policy intended to protect the public, such as zoning regulations. (*Petitt v. City of Fresno* (1973) 34 Cal.App.3d 813, 819-820.) But even if all four of these elements are proven, equitable estoppel “will not be applied against the government if to do so would effectively nullify ‘a strong rule of policy, adopted for the benefit of the public, . . .’” (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.) As
the court explained, "[t]he government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (Id., at pp. 496-497.)

11. Respondent has not established the elements necessary for application of the doctrine of equitable estoppel. Respondent did not prove that CalPERS either knew the true facts or that it engaged in "careless and culpable conduct resulting in the deception of the party entitled to claim the estoppel." (Banco Mercantil v. Sauls, Inc. (1956) 140 Cal.App.2d 316, 323.) There is insufficient evidence to establish that any CalPERS representative told respondent not to file the application for ARSC. Instead, it appears that he was only told that he could not make the payment for the ARSC benefit and he would have to wait for the application to be processed once the computer issues had been resolved. It seems that if anything there was a misunderstanding solely on respondent's part. Insofar as a key element of the doctrine of equitable estoppel was not established, respondent's claim of estoppel must fail.

12. Although equitable estoppel may be applied against the government, this principle has its limits. Even if respondent had established the elements necessary for the application of equitable estoppel, the Supreme Court has recognized that the application of equitable estoppel in cases involving public employee pensions is somewhat unique, emphasizing the unique importance of pension rights to an employee's well-being. (Longacre v. County of Ventura (1979) 25 Cal.3d 14, 28.) However, a court will not expressly invoke principles of estoppel in any factual setting to contravene directly any statutory or constitutional limitations. (Medina v. Bd. of Retirement (2003) 112 Cal.App.4th 864, 869). In this case, respondent made the decision to retire and stop working before he filed his application for ARSC. To allow respondent to contravene Government Code section 20909 and allow him to purchase ARSC even though he was not a qualifying member of CalPERS at the time, goes beyond the application of equitable estoppel.

13. As set forth above, respondent did not establish that CalPERS should be barred from determining that respondent is ineligible to elect to purchase ARSC pursuant to the doctrine of equitable estoppel.

14. All contentions made by CalPERS and respondent not specifically addressed herein were considered and are found to be without merit.
ORDER

The appeal of respondent Michael S. Donaldson is DENIED.

DATED: July 31, 2017

REGINA BROWN
Administrative Law Judge
Office of Administrative Hearings