ATTACHMENT A

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

In the Matter of the Request for an Earlier Effective Date of Retirement of:
CAROLYN TAFOYA,
Respondent.

Case No. 2017-1055
OAH No. 2018030851

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 16, 2018, in Fresno, California.

Kevin M. Kreutz, Senior Staff Attorney, represented the California Public Employees’ Retirement System (CalPERS).

Carolyn Tafoya (respondent) appeared on her own behalf.

Evidence was received, the record was closed, and the matter was submitted for decision on July 16, 2018.

ISSUE

This appeal is limited to the issue of whether respondent made a mistake which was the result of inadvertence, mistake, surprise or excusable neglect correctable by Government Code section 20160, which would have entitled her to an effective retirement date retroactive to October 21, 2006.

FACTUAL FINDINGS

1. Respondent is a CalPERS member in her own right. In addition, respondent has a nonmember account by virtue of a community property settlement. CalPERS notified respondent by letter dated May 21, 2004, that her nonmember account was established with one...
half of the contributions and service credit earned by her former spouse during the period of
April 16, 1994, through the date of marital separation, June 15, 2001. Respondent's
nonmember account was credited with 2.304 years of service credit and $20,430.94 in
contributions, with interest credited through June 30, 2003. The May 21, 2004 letter from
CalPERS notified respondent as follows:

As a nonmember, you may receive payment from this account by
either of the following methods

1. You may receive a monthly allowance, payable for your lifetime, anytime
after you become eligible, OR

2. You may refund or rollover your contributions and interest in one lump sum payment

[¶] . . . [¶]

If you do not refund or rollover your contributions, you will be
eligible to receive lifetime monthly allowance when both you and
your former spouse reach the minimum retirement age of 50. To
apply for a monthly allowance, you must complete a
NONMEMBER SERVICE RETIREMENT APPLICATION form
. . . and forward it to this office 90 days before the date you wish
to begin receipt of your allowance. (Emphasis in original.)

2. On March 14, 2003, before respondent's nonmember account was established,
CalPERS sent a letter to respondent in response to her request for information regarding her
former spouse's member account. CalPERS's letter to respondent, with copies to her former
spouse and attorneys, stated the amounts credited her former spouse's member account, and
stated the following:

EMPLOYER CONTRIBUTIONS ARE NOT SEPARATED
INTO INDIVIDUAL MEMBER ACCOUNTS AND ARE
NOT PAYABLE UPON TERMINATION OF
EMPLOYMENT. THEY ARE PAYABLE AT
RETIREMENT ONLY AND COMPRIZE THE PENSION
PORTION OF THE MEMBER'S MONTHLY
RETIREMENT ALLOWANCE. (Emphasis in original.)

3. On June 27, 2017, respondent filed a Nonmember Service Retirement Election
Application, stating a retirement date of June 1, 2017. On July 10, 2017, CalPERS sent a letter
to respondent notifying her that her retirement application had been processed, and that her
monthly benefit would be $595.15.
4. On July 17, 2017, respondent sent a letter to CalPERS stating that on June 23, 2017, she met with a CalPERS representative, who informed her that she was entitled to start collecting on her nonmember account many years ago. In her letter, respondent informed CalPERS that she has "...believed all these years that I would not be able to apply/receive any of my CalPERS monies from any account in my name until I retired and then I would need to retire from all available accounts [member and nonmember]... the same day..." Respondent quoted portions of the CalPERS letters (Factual Findings 1 and 2) as the reason for her belief that she would not be able to obtain a retirement annuity from her nonmember account until she retired from her employment by which she is a CalPERS member. Specifically, respondent noted that the March 14, 2003 CalPERS letter states that employer contributions are "PAYABLE AT RETIREMENT ONLY AND COMPREHEND THE PENSION PORTION OF THE MEMBER’S MONTHLY RETIREMENT ALLOWANCE." Respondent also noted that the May 21, 2004 CalPERS letter states that "you may receive a monthly allowance, payable for your lifetime, anytime after you become eligible...

5. On August 15, 2017, CalPERS replied to respondent’s July 17, 2017 letter. CalPERS stated that its May 21, 2004 letter to respondent informed her that "you are eligible to receive your nonmember monthly allowance when both you and your former spouse reached age 50." CalPERS’s letter also informed respondent that pursuant to Government Code section 21296, "a nonmember retirement application received more than nine months after the requested retirement date shall be effective no earlier than the first month in which the application was received." Moreover, given that respondent’s nonmember retirement application was received on June 23, 2017, CalPERS provided an effective retirement date of June 1, 2017, the earliest allowable date under the law.

6. On August 28, 2017, respondent sent a letter to CalPERS in which she argued that she had made an excusable error, and should be able to designate her effective retirement date as of her 50th birthday, which is October 12, 2006. On September 18, 2017, CalPERS replied to respondent, noting that Government Code section 20160 gives CalPERS the authority to correct certain types of errors by members due to inadvertence, surprise or excusable neglect. Based on the record of written communications, CalPERS did not find that respondent had made an error or omission which would be correctable under the terms of Government Code section 20160.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proving that she is entitled to it. (Greatorex v. Board of Administration (1979) 91 Cal.App.3d 54). In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)
Applicable Statutes

2. Government Code section 21296 provides that a nonmember’s “retirement allowance shall begin to accrue as of the date designated in the nonmember’s application as the effective date of retirement... If the retirement application is not received within nine months of the requested effective date, in no event shall the retirement become effective or the retirement allowance begin to accrue earlier than the first day of the month in which the nonmember’s application is received.”

3. Government Code section 20160 governs a request by a member or beneficiary to correct an error. It provides in pertinent part:

(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.

[(¶) ... [(¶)]

(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).
Discussion

4. Respondent contends that (1) she made an excusable error in her misunderstanding that she could retire from her nonmember account only at such time that she retired from her other employment through which she is a CalPERS member, and (2) that the effective date of her nonmember retirement should be back-dated to her 50th birthday, which is October 12, 2006. The evidence does not support respondent’s assertion that her misunderstanding was due to excusable neglect, mistake, inadvertence, or surprise, as referenced in Government Code section 20160. CalPERS’s May 21, 2004 letter to respondent clearly informed her that “you are eligible to receive your nonmember monthly allowance when both you and your former spouse reached age 50.” (Factual Finding 5.) This letter is clear. If respondent nonetheless thought she would not be eligible to retire on her nonmember account until a later date, she should have made inquiry with CalPERS. Based on respondent’s failure to make such a reasonable inquiry, her error is not correctable under the terms of Government Code section 20160, subdivision (a).

5. For each of the reasons stated herein, respondent failed to present evidence establishing the right to correction of her error pursuant to Government Code section 20160, subdivision (d). Similarly, respondent failed to establish by a preponderance of evidence that she is entitled to have the effective date of her nonmember retirement back-dated to her 50th birthday.

ORDER

Respondent Carolyn Tafoya’s application for an earlier effective date of nonmember retirement is denied.

DATED: August 13, 2018

TIMOTHY J. ASPINWALL  
Administrative Law Judge  
Office of Administrative Hearings