ATTACHMENT A

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

In the Matter of the Statement of Issues
Against: DANIEL L. MOYER,
Respondent.

Agency Case No. 2018-0603
OAH No. 2018101182

PROPOSED DECISION

This matter was heard by David Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 30, 2019, in Los Angeles. Austa Wakily, Senior Attorney, represented Anthony Suine (complainant). Daniel Moyer (respondent) was present and represented himself.

Evidence and argument were offered. The record was closed and the matter was deemed submitted for decision on May 30, 2019.

During the hearing, a protective order was issued to redact personal or confidential information contained in the exhibits.

SUMMARY

Respondent retired for disability and began receiving a retirement allowance in December 1990. Starting in March 2014 respondent began working for the Saugus Union School District (Saugus USD) as a substitute custodian. As of June 2016, he exceeded the 960-hour limit for work by a retired annuitant and, as a result, was subject to mandatory reinstatement as an active member of the California Public Employees’ Retirement System (CalPERS). Respondent was therefore no longer entitled to his retirement allowance. Respondent received overpayment of his retirement allowance. CalPERS contends that respondent must reimburse it for the overpayments. Respondent contends that the Saugus USD was responsible for assigning work to him beyond the 960-hour limit, and that he should repay only the salary he received for the hours he worked that were beyond that limit. CalPERS established that respondent is liable and should repay the overpayments.
FACTUAL FINDINGS

Parties and Jurisdiction

1. The Statement of Issues was filed by complainant in his official capacity as the Chief of the Benefit Services Division of CalPERS.

2. On August 17, 1981, respondent first became employed by the Los Angeles Unified School District (LAUSD) as a custodian. By virtue of this employment, respondent became a member of CalPERS. On November 29, 1990, respondent applied for disability retirement, which was approved by LAUSD on February 15, 1991. His disability retirement was effective as of December 19, 1990. Since that date, respondent has received a disability retirement allowance.

3. Starting in March 2014 respondent began working for the Saugus USD as a substitute custodian. He exceeded the 960-hour limit for work by a retired annuitant, as described in more detail below. Respondent was reinstated as an active member CalPERS, but received an overpayment of his disability allowance.

4. On December 2, 2016, CalPERS sent a letter to respondent requesting payment of the overpayment, in the amount of $8,806.71.

5. By letter dated January 22, 2017, respondent filed a timely appeal of CalPERS’ determination to reinstate him to active membership and to seek payment. Respondent requested an administrative hearing.

6. Complainant alleges that, by letter dated March 9, 2017, CalPERS notified respondent that it determined there was an increase in the amount of overpayment of $440 due to federal taxes and $88.93 in state taxes, for a total of $9,335.64. However, no evidence was submitted in support of this allegation.

7. In May 2018, respondent notified CalPERS that he was no longer appealing his reinstatement to active membership; however, he was still appealing the issue of overpayment.

CalPERS Retirement Benefits

8. CalPERS is a defined benefit plan. Benefits for its members are funded by employee and employer contributions, as well as by interest and other earnings on those contributions. Under the California Public Employees’ Retirement Law (the PERL) (Gov. Code, § 20000 et seq.)¹, a person receiving a retirement allowance is entitled to receive only that amount allowed by law.

¹ All statutory references are to the Government Code.
As discussed in more detail below, a person receiving a retirement allowance from CalPERS may be employed later by an employer who also contributes to CalPERS as long as that employment does not exceed 960 hours in a fiscal year. The retiree will not acquire additional service credit for such work. If the 960-hour limit is exceeded, the employee is reinstated as a member of CalPERS, and any overpayment of retirement benefits may be recouped by CalPERS.

Respondent's Reinstatement and the Effect on his Retirement Allowance; Parties Contentions and Relevant Evidence

10. On June 26, 2015, Respondent exceeded the 960-hour limit for a retired annuitant in fiscal year 2014-2015. As a result, Respondent is subject to mandatory reinstatement as a member of CalPERS, retroactive to June 26, 2015.

11. On November 21, 2016, CalPERS sent a letter to respondent reinstating him to active membership and informing him of overpayment of benefits. The letter informed respondent that his monthly retirement allowance would cease, and that his service credit at the time of retirement would be restored to his active account. However, since CalPERS had not yet processed respondent’s reinstatement, respondent continued to receive his monthly retirement allowance, which resulted in an overpayment. The CalPERS Retirement Calculation and Adjustment Section was expected to compute the amount of overpayment and to notify respondent of the amount due once the adjustment from retirement to active membership occurred. According to the testimony of Emily Sandoval, Manager in the CalPERS Disability Retirement Section, the delay in notifying respondent was likely due to late reporting of payment and benefit information by Saugus USD to CalPERS. CalPERS has no control over when its contracting agencies report such information.

12. The overpayment was calculated to be $8,806.71, which CalPERS requested in a letter dated December 2, 2016. Complainant alleged that CalPERS notified respondent by letter dated March 9, 2017, that the amount was increased to $9,335.64, due to overpayment of federal and state taxes (Statement of Issues, paragraph XIV). No evidence was submitted in support of this allegation. Similarly, complainant alleged that CalPERS sent notices to respondent of payment due of $9,335.64 on March 21, April 20, and May 22, 2017 (Statement of Issues, paragraph XV). No evidence was submitted in support of this allegation.

13. Respondent provided information in writing (exhibits 4 and 9) and in testimony at the hearing. Respondent wanted to supplement his retirement allowance and started working part-time for Saugus USD as a substitute custodian. At that time, he believed he was limited to working no more than 20 hours per week. In May or June 2014 respondent supervisor at Saugus USD informed him that he was close to the 960-hour limit. The supervisor did not provide an exact number of hours to respondent. Respondent assumed that Saugus USD would monitor the hours and not give him assignments if he exceeded the limit. Respondent testified that, at that time, he did not seek further
information from Saugus USD about the number of hours he had worked, and did not monitor his additional work hours when he was given further assignments.

14. In a letter dated August 2, 2016, Saugus USD informed CalPERS that its payroll technician notified respondent’s supervisor in May 2015 that respondent would be exceeding 1000 hours, and that the supervisor advised respondent to not accept assignments that would put him over the limit. The letter noted that respondent “told his supervisor not to worry about it, that it was his (Daniel’s) problem and he wanted to go work full time again. Before his supervisor could suspend any additional jobs, Daniel L. Moyer accepted additional jobs knowing he would be exceeding his hours.” (Exhibit 6.)

15. Respondent acknowledged that he interviewed for a full time position and was waiting for the Saugus USD’s decision.

16. Respondent believed the Saugus USD would stop sending him assignments that would place him over the 960-hour limit. He explained that when he previously worked for LAUSD, that district monitored hours and notified employees before they exceeded the limit. Respondent did not monitor his hours as he worked at Saugus USD. After he was contacted by CalPERS, respondent obtained payroll information that included his hours, and he was able to determine when he reached 960 hours. Respondent calculated that he worked 1,011.5 hours; that is, 51.5 hours over the limit. Respondent contends that he should be required to pay back the salary he earned for those extra hours, and not the overpayment of his retirement allowance as claimed by CalPERS.

17. Respondent referred to a CalPERS Circular Letter from January 14, 2014 (exhibit C), which notified employers of new statutes relating to retirees who were later employed, and which reminded employers of the 960-hour limit and that exceeding the limit, means the employee is out of compliance and subject to reinstatement. The Circular Letter includes that “it is the responsibility of both the retiree and the employer to ensure compliance with all applicable statutes.” (Exhibit C, p. 1.)

18. CalPERS records reveal that, in December 2014, respondent called and inquired whether working for another school district would affect his retirement benefits, and he was referred to the publication about Employment After Retirement. However, there was no evidence of the coverage of the 960-hour limit in this publication. On May 5, 2015, respondent contacted CalPERS to inquire about immediate reinstatement, and included that he had only 32 hours left in his work as a retired annuitant (exhibit 13, p. 25). From this evidence it is inferred that respondent was aware of the work hours limit and that he had not exceeded the limit as of May 5, 2015.

19. CalPERS sent letters to respondent and Saugus USD dated June 27, 2016 (exhibits 3 and 5), inquiring about the circumstances of respondent’s work over the hours limit. From the information gathered, CalPERS determined there had been no mistake requiring a correction.
20. Complainant alleges in the Statement of Issues (paragraphs VIII and IX) that respondent submitted an application for service retirement for his employment at Los Angeles County Schools on or about December 13, 2017, and that, on March 14, 2018, pursuant to respondent’s request, CalPERS cancelled that application. During the administrative hearing, complainant submitted exhibits 12, 13, and 14, and testimony from Sandoval, to the effect that the cancellation created an overpayment of $1,688.21. There are no allegations in the Statement of Issues seeking repayment of the alleged overpayment of $1,688.21.

21. CalPERS contends, correctly, that respondent is entitled to no more for his retirement allowance than is required by law. Therefore, it had to stop respondent’s retirement allowance when he exceeded the work hours limit, reinstate him to active membership, and seek to recoup the overpayment.

22. Respondent raises many contentions, some of which are discussed below. If not discussed, the contention was without merit as lacking in evidentiary support or legal support or both.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Respondent has the burden of proof in this matter. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (Coffin v. Department of Alcoholic Beverage Control (2006) 139 Cal.App.4th 471, 476.)

2. In McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, and footnote 5, the court generally considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found “the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence.”

3. “Preponderance of the evidence” means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that one is unable to say that the evidence on either side of an issue preponderates, the finding on that issue must be against the party who had the burden of proving it. (People v. Mabini (2000) 92 Cal.App.4th 654, 663.)

4. Based on the above, respondent has the burden of establishing by a preponderance of the evidence that he is entitled to retain the retirement allowance overpayments he received after he exceeded the 960-hour work limit.
5. CalPERS' interpretation of the PERL and its accompanying regulations is generally entitled to deference, because CalPERS is the agency charged with enforcing the law. (*City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 539.)

6. A retiree receiving a retirement allowance from CalPERS is able to work up to 960 hours in a fiscal year without it affecting the retirement allowance. Under Code section 7522.56, retired persons shall not be employed by a public employer without reinstatement from retirement (subd. (b)); however, their work shall not exceed 960 hours and they shall not acquire service credit or retirement rights if they work under that limit. Similarly, under Code section 21229, subdivision (a), the appointment of a retired person shall not exceed 960 hours.

7. Code section 21220 allows employment under the work hours limit but, if the work exceeds the limit, the employee must be reinstated from retirement to active membership in CalPERS. The same result is mandated under Code section 21202.

8. If CalPERS makes an overpayment of a retirement allowance, under Code section 20163, subdivision (a), it may make an adjustment to seek repayment.

9. The governing law, particularly Code sections 20160 and 20163, dictates that respondent is only entitled to the benefits and status which the law allows. Respondent is entitled only to the benefits that he is allowed under law, and is not entitled to any overpayment.

10. CalPERS is a creation of statutes, codified in the Government Code, which grant it certain powers. CalPERS has no authority other than that granted by those statutes. It has the authority to pay benefits to a member only when the statutes authorize it and then only in the amount authorized. (See *Hudson v. Posey* (1967) 255 Cal.App.2d 89.)

**Correction of Errors**

11. Under Code section 20160, corrections can be made to a member's account under various conditions. Of significance, subdivision (a)(3) provides, in pertinent part:

   "The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part."

   Under subdivision (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)."
Subdivision (e) provides, in pertinent part: “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.”

12. Corrections are also governed by Code section 20163, which provides, in relevant part: “Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person . . . will receive the actuarial equivalent of the allowance to which the member is entitled.”

Respondent’s Service Retirement in 2017 and Cancellation in 2018

13. Allegations were made, and evidence was submitted, of respondent’s service retirement in December 2017 and his cancellation of that application in March 2018 (see Factual Finding 20). Evidence of a separate overpayment of benefits due to these events was submitted. However, the Statement of Issues did not request an order for repayment of this amount.

14. Under Code section 11504, a Statement of Issues must apprise the respondent of the issues to be determined. Here, the Statement of Issues did not provide notice to respondent that complainant sought an order to recover any overpayment resulting from the grant, and later cancellation, of his 2017 application for service retirement. It would deny due process to respondent to make any order under these circumstances.

Outcome

15. There was no evidence to support the allegation that the overpayment due to exceeding the 960-hour limit was increased, due to state and federal taxes, from $8,806.71 to $9,335.64. It would be a denial of due process to respondent to order recovery of any amount over $8,806.71.

16. Respondent worked beyond the 960-hour limit and, as a result, he was mandatorily reinstated to active membership in CalPERS and no longer allowed to receive a retirement allowance. Respondent continued to receive an allowance, most likely because of delays in reporting by Saugus USD to CalPERS. When CalPERS became aware of the circumstances, it ceased paying the retirement allowance, calculated to overpayment, and sought repayment from respondent.

17. Respondent was aware he was approaching the 960-hour limit and made no effort to stop working before he exceeded that limit. His contention that Saugus USD was responsible is not supported by the facts. Respondent ignored his responsibility to be aware of the limit, and will bear the consequence of exceeding it.
18. Respondent’s request to repay only the salary he received due to his extra 51.5 hours of work is not supported by the law. To do as respondent requests would enlarge the authority of CalPERS regarding the granting of a beneficiary’s allowance to an amount in excess of the amount authorized by statute. It would be detrimental to the public policy behind the creation of CalPERS. CalPERS may pay respondent only that which it is statutorily authorized to pay.

19. There were no factual circumstances proven by respondent that would justify a correction of his error by working in excess of 960 hours.

20. The Board owes a fiduciary duty of a trustee to a trust and its beneficiaries. Here, the Board has a primary obligation to protect the retirement fund for the benefit of all its beneficiaries and to minimize the employers’ costs of providing benefits. To allow respondent to retain retirement allowances paid when he was no longer entitled would result in an unfunded liability. This would be a windfall to respondent or, in equivalent legal terms, unjust enrichment.

ORDER

1. The appeal of respondent Daniel L. Moyer is denied.

2. CalPERS shall recoup $8,806.71 from respondent.

DATED: June 21, 2019

[Signature]
David B. Rosenman
Administrative Law Judge
Office of Administrative Hearings