

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Appeal to Purchase Community Property
Redeposit of Withdrawn Contributions of:**

GAIL A. OVERHOUSE, Respondent

CalPERS No. 2019-0252

OAH No. 2019061232

PROPOSED DECISION

Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on July 22, 2019, in Sacramento, CA.

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

Steven Kaiser, Attorney at Law, Messing Adam & Jasmine LLP, represented respondent Gail A. Overhouse.

Oral and documentary evidence was received. The record was held open for the submission of written closing briefs. On July 25, 2019, respondent filed a Closing Brief, marked Exhibit A. On August 2, 2019, CalPERS filed a Closing Brief, marked Exhibit 19.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED Sept. 5 2019



On August 9, 2019, respondent filed a Reply Brief, marked Exhibit B. The matter was submitted for decision on August 9, 2019.

ISSUE

Is respondent eligible to purchase community property redeposit of withdrawn contributions?

FACTUAL FINDINGS

1. Respondent is currently employed by the State of California. More specifically, respondent works for the Employment Development Department (EDD) as Deputy Director, Information Technology Branch. She has worked in State service for approximately 41 years.

2. On October 5, 1985, respondent married Rodney A. Overhouse. Respondent and R. Overhouse had two children, Darby and Derek. On January 5, 2008, respondent and R. Overhouse separated. In the Stipulated Domestic Relations Order Re: Division of California Public Employees' Retirement System Benefits, dated April 10, 2012, R. Overhouse was awarded 50 percent of respondent's accumulated retirement contributions and service credit, from October 5, 1985, through January 5, 2008.

3. On or about September 5, 2012, CalPERS sent respondent a letter, notifying her: a nonmember account for R. Overhouse was created, crediting 10.549 service credit years and \$75,936.99 in contributions (as of October 5, 1985), and interest (as of September 5, 2012); and

If the nonmember receives a lump sum distribution by either a refund (or rollover) of the contributions and interest credited to the nonmember account, you will have the right to redeposit those contributions plus interest and restore the service credit to your account. Should Rodney Overhouse elect to receive a refund (or rollover) of their nonmember account, you may contact CalPERS to request instructions on how to purchase the service credit that was transferred to their nonmember account. Please keep in mind to be eligible for a Community Property Redeposit the law specifically requires both the nonmember refund (or rollover) and your request to purchase the contributions and service be completed prior to your effective date of retirement.

4. On October 3, 2012, R. Overhouse died without electing to receive a refund or rollover. On April 22, 2013, CalPERS received an Application for Active-Member/Non-Member Survivor Benefits (Application for Survivor Benefits) from Leonard (Van) E. Overhouse, non-beneficiary, executor, estate of R. Overhouse. As requested, CalPERS sent Applications for Survivor Benefits to Darby and Derek Overhouse. Derek Overhouse returned his Application for Survivor's Benefits on or about May 11, 2013, and Darby Overhouse returned her Application for Survivor's Benefits on or about May 12, 2013. On or about July 15, 2013, CalPERS paid Derek Overhouse \$39,506.27 and Darby Overhouse \$39,506.27, for a total of \$79,012.54; or \$75,936.99 in contributions (October 5, 1985, through January 5, 2008-separation), and \$3,075.55 in interest (September 5, 2012-divorce, through July 15, 2013).

5. On May 20, 2014, CalPERS received a Request for Service Credit Cost Information – Redeposit of Withdrawn Contributions from respondent. Respondent sought to redeposit \$75,936.99 in contributions and 10.549 years of service credit into her CalPERS member account. On June 9, 2014, CalPERS sent respondent a letter, notifying her she was ineligible to purchase community property redeposit service credit because:

The Public Employee's Retirement Law (PERL) allows a member, who has had a separation of accounts due to Community Property, the opportunity to purchase and restore the member's service credit, if the nonmember has received a refund of the nonmember funds.

[In this case, t]he nonmember has not elected to receive a refund of the contributions and interest credited to the account. Even though the nonmember has been awarded a distinct and separate account reflecting specific credit service and accumulated contributions; this does not constitute the nonmember has withdrawn their funds.

6. On August 22, 2018, CalPERS sent respondent a letter, again denying her eligibility to purchase community property redeposit service credit, and advising her of her appeal rights. On October 15, 2018, respondent timely appealed and requested an administrative hearing.

7. On June 7, 2019, Don Martinez, Chief, Member Account Management Division, CalPERS, in his official capacity, made and filed the Statement of Issues in this matter.

Applicable PERL Provisions

8. Government Code¹ section 21290 governs the distribution of community property (i.e., accumulated contributions and service credit attributable to periods of service during the marriage) upon legal separation or dissolution. (subd. (a).) Further, section 21290 states:

(b) If the community property is divided in accordance with paragraph (3) of subdivision (a) of Section 2610 of the Family Code, the court shall order that the accumulated contributions and service credit attributable to periods of service during the marriage be divided into two separate and distinct accounts in the name of the member and the nonmember, respectively. Any service credit or accumulated contributions that are not explicitly awarded by the judgment or court order shall be deemed the exclusive property of the member.

(c) The court shall address the rights of the nonmember to the following:

(1) The right to a retirement allowance, and the consequent right to elect an optional settlement and designate a beneficiary.

¹ All further references are to the Government Code unless otherwise specified.

(2) The right to a refund of accumulated contributions.

(3) The right to redeposit accumulated contributions that are eligible for redeposit by the member under Sections 20750 and 20752.

(4) The right to purchase service credit that is eligible for purchase by the member under Article 4 (commencing with Section 20990) and Article 5 (commencing with Section 21020) of Chapter 11.

(5) The right to designate a beneficiary to receive his or her accumulated contributions payable where death occurs prior to retirement.

(6) The right to designate a beneficiary for any unpaid allowance payable at the time of the nonmember's death.

9. A nonmember "means the spouse or former spouse of a member, who as a result of petitioning the court for the division of community property, has been awarded a distinct and separate account reflecting specific credited service and accumulated contributions." (§ 21291.) "If a nonmember, as defined in Section 21291, withdraws accumulated contributions in accordance with Section 21292, the member may redeposit those contributions pursuant to this article." (§ 20751.)

10. Section 21292 allows a nonmember to a refund of accumulated contributions, subject to the following provisions:

(b) The nonmember shall file an application on a form provided by this system to obtain the refund.

(c) The refund shall be effective when this system deposits in the United States mail an initial warrant drawn in favor of the nonmember and addressed to the latest address for the nonmember on file with this system.

(d) The nonmember is deemed to have permanently waived all rights in this system and all rights to any future retirement benefits pertaining to the service credit accumulated contributions, or both, when the refund becomes effective.

(e) The nonmember may not cancel a refund once it has become effective.

(f) The nonmember shall have no right to elect to redeposit the refunded accumulated contributions from the nonmember's account after the refund is effective, and shall have no right to redeposit under Section 20750 or 20752, or to purchase service credit under Article 4 (commencing with Section 20990) or Article 5 (commencing with Section 21020) of Chapter 11 after the refund becomes effective.

(g) If at the time of the marriage dissolution or legal separation, the member does not have the necessary minimum credited service to retire, the nonmember shall receive a refund of the accumulated contributions placed in the nonmember's account.

11. Following a nonmember refund of accumulated contributions, section 20750 permits a member to redeposit the same into the retirement fund, limited to:

(1) an amount equal to the accumulated contributions that he or she has withdrawn at one or more terminations of service, or for one withdrawal at a time, but in reverse chronological order in which they occurred, and (2) an amount equal to the interest that would have been credited to his or her account to the date of completion of payments had the contributions not been withdrawn, and (3) if he or she elects to redeposit in other than one sum, interest on the unpaid balance of the amount payable to the retirement fund, beginning on the date of the election to redeposit, as if the member interest crediting rate in effect on the date of the election to redeposit had been and continued to be in effect through the completion of the payments.

Discussion

12. On September 5, 2012, pursuant to a Stipulated Domestic Relations Order, CalPERS created an account for R. Overhouse, transferring 10.549 years of service credit and \$75,936.99 in contributions from respondent's member account, to R. Overhouse's nonmember account. On October 3, 2012, R. Overhouse died, without having applied for a refund of his nonmember account, pursuant to section 21292. On or about July 15, 2013, CalPERS paid survivor's benefits to Derek Overhouse, in the amount of \$39,506.27, and Darby Overhouse, in the amount of \$39,506.27, for a total of \$79,012.54; or \$75,936.99 in contributions (October 5, 1985, through January 5,

2008), and \$3,075.55 in interest (September 5, 2012, through July 15, 2013, with an average rate of 5.40 percent).

13. On May 20, 2014, respondent requested to redeposit the 10.549 years of service credit and \$75,936.99 in contributions taken from her member account in 2012, and paid to Derek and Darby in 2013. Respondent contends that the payment of survivor benefits from R. Overhouse's nonmember account was the functional equivalent of a refund paid pursuant to section 21292; and actuarially, the two are the same. Because R. Overhouse is dead, he can no longer take any action or make any claims relative to his CalPERS nonmember account. He cannot raise any rights, now or in the future, pertaining to the service credit accumulated contributions in his account (§ 21292, subd. (d)). He cannot cancel the payment of survivor benefits (§ 21292, subd.(e)), and he cannot elect to redeposit or to purchase service credit after the survivor's benefits are paid (§ 21292, subd. (f)). Given the above, CalPERS is protected from paying retirement funds twice, and CalPERS would not be harmed by allowing respondent to redeposit her service credit and contributions.

14. Respondent's claim fails for several reasons. First, a payout is different than a refund. A refund pays contributions only; whereas, survivor's benefits pay contributions and interest. Second, the surviving rights are different. If a refund is paid, the nonmember permanently waives all rights in the CalPERS system and all rights to any future retirement benefits pertaining to the service credit accumulated contributions, or both. If survivor's benefits are paid, the executor stands in the shoes of the deceased nonmember, allowing the executor to make a claim against CalPERS in the future, on behalf of the deceased nonmember.

15. Third, respondent's claim of commonality ignores the plain language of the law. Specifically, section 20751, requires a withdrawal of accumulated contributions

in accordance with Section 21292 (i.e., a refund), before a member can redeposit contributions into the retirement fund. In other words, a refund of a nonmember account is a condition precedent to the redeposit of community property taken from a member's account. Whether similarities exist between the payment of survivor's benefits and the payment of a refund is immaterial. The law is simple and clear, and must be followed.

16. Finally, respondent alleges a failure of notice and appeal. She claims she was "baffled [by] why she could not replace the funds." However, as early as September 5, 2012, CalPERS notified respondent that:

If the nonmember receives a lump sum distribution by either a refund (or rollover) of the contributions and interest credited to the nonmember account, you will have the right to redeposit those contributions plus interest and restore the service credit to your account. Should Rodney Overhouse elect to receive a refund (or rollover) of [his] nonmember account, you may contact CalPERS to request instructions on how to purchase the service credit that was transferred to their nonmember account. Please keep in mind to be eligible for a Community Property Redeposit the law specifically requires both the nonmember refund (or rollover) and your request to purchase the contributions and service be completed prior to your effective date of retirement.

In addition, on August 22, 2018, CalPERS sent respondent a letter, again denying her eligibility to purchase community property redeposit service credit, and advising her of

her appeal rights. On October 15, 2018, respondent timely appealed and requested an administrative hearing; and her standing in 2018 is no different than her standing in 2012. On July 22, 2019, an administrative hearing was conducted. Respondent's due process rights have been exercised.

17. All of respondent's arguments have been considered and rejected. Accordingly, cause does not exist to grant the appeal of respondent to redeposit contributions into her member account.

LEGAL CONCLUSIONS

1. CalPERS administers a "defined benefit" retirement plan within a statutory framework. (*Hudson v. Posey* (1967) 255 Cal.App.2d 89, 91.)
2. Respondent has the burden to prove that, by a preponderance of the evidence, she is entitled to redeposit contributions into the retirement plan. Based on the Factual Findings as a whole, respondent failed to do so.

ORDER

The appeal of respondent Gail A. Overhouse is DENIED. CalPERS properly denied respondent's request to redeposit contributions into the retirement fund.

DATE: September 4, 2019

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ERIN R. KOCH-GOODMAN

Administrative Law Judge

Office of Administrative Hearings