

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Request for an Earlier Effective
Retirement Date on Nonmember Account of Retirement of**

KATHRYN MATTSON, Respondent

Agency Case No. 2018-0595

OAH No. 2018110638

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 20, 2019, in Los Angeles, California.

Charles H. Glauberman, Senior Attorney, represented California Public Employees' Retirement System (CalPERS). No appearances were made by or on behalf of Kathryn Mattson (Respondent) at the administrative hearing.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on August 20, 2019.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Sept. 17, 2019
SMG

FACTUAL FINDINGS

1. Anthony Suine, Chief of the Benefit Services Division of CalPERS, filed the Amended Statement of Issues while acting in his official capacity.

2. Respondent timely filed an appeal and requested a hearing. On April 15, 2019, Respondent was properly served with notice of the instant hearing date, time, and place.

3. As indicated above, on the day of the hearing, no appearance was made by or on behalf of Respondent, despite the fact that she was served with timely and appropriate notice as required by Government Code section 11509. Therefore, this matter proceeded as a default prove-up pursuant to Government Code section 11520.

4. In 2013, as a part of Respondent's divorce from her former spouse (Spouse), Respondent and Spouse entered into a Stipulated Domestic Relations Order (SDRO), whereby one-half of the contributions and service credit earned by Spouse during the marriage period of June 25, 1976, through July 27, 2010, was awarded to Respondent as community property.

5. On July 29, 2013, CalPERS received a copy of the SDRO, which resulted in the creation of Respondent's nonmember account, a distinct and separate account reflecting specific credited service and accumulated contributions based on the division of community property between Respondent and Spouse. In accordance with the terms of the SDRO, Respondent's nonmember account was credited with 5.02 years of service credit and \$30,605.85 in contributions with interest.

6. By virtue of her employment with the Simi Valley Unified School District, Respondent is member of CalPERS in her own right. Respondent's member account

remains separate from the nonmember account awarded to her through the SDRO. This matter only concerns Respondent's nonmember account.

7. In a letter dated September 12, 2013, CalPERS notified Respondent of the establishment of her nonmember account. The letter informed Respondent of two options regarding her nonmember account: Respondent could either (1) receive a refund of her portion of Spouse's contributions to the nonmember account in one lump sum payment, or (2) retire on the nonmember account. (Ex. 2, p.1.) This letter was mailed to a Post Office Box (P.O. Box) in Simi Valley, which was the same mailing address that CalPERS had on file for Respondent at the time.

8. Included in the September 12, 2013 letter to Respondent was a CalPERS publication, "A Guide to Completing Your Nonmember Service Retirement Election Application," also known as Publication 44 (Publication 44). Beginning on page 13 of Publication 44 is a Nonmember Service Retirement Election Application (Nonmember Retirement Application). Additionally, Publication 44 explains the effective date of retirement for a nonmember account. Specifically, a note at the bottom of page 3 of Publication 44 states:

The effective date of your retirement is the date you designate on the application ... If, however, you submit your application more than nine months after your requested retirement date, the law says your retirement date will be the first day of the month on which CalPERS receives your application.

(Ex. 2, p.3.)

9. On October 2, 2013, CalPERS mailed to Respondent a blank copy of the Pre-Retired Non-Member Beneficiary Designation form and a blank copy of the Retirement Allowance Estimate Request form.

10. On October 21, 2013, CalPERS received from Respondent the following documents: (1) a completed copy of the Pre-Retired Non-Member Beneficiary Designation form for her nonmember account; (2) a completed copy of the Pre-Retirement Lump Sum Beneficiary Designation for her member account; (3) a completed copy of the Retirement Allowance Estimate Request form for her nonmember account; and (4) a completed copy of the Retirement Allowance Estimate Request form for her member account. The address provided by Respondent on all four forms was the same Simi Valley P.O. Box address on file at CalPERS as Respondent's mailing address.

11. In a letter dated November 21, 2013, CalPERS provided Respondent with retirement allowance estimates for her nonmember account, based on a service retirement date of May 30, 2014. In a separate letter dated December 12, 2013, CalPERS provided Respondent with retirement allowance estimates for her member account, also based on a service retirement date of May 30, 2014. Neither the November 21, 2013 letter nor the December 12, 2013 letter stated that Respondent must retire from her member and nonmember accounts at the same time.

12. On January 29, 2014, CalPERS sent Respondent a letter requesting that she re-submit her Pre-Retirement Lump Sum Beneficiary Designation form for her member account because the form previously received by CalPERS was incomplete. On February 10, 2014, CalPERS received Respondent's resubmission of her Pre-Retirement Lump Sum Beneficiary Designation for her member account. The address provided by

Respondent on this form again was the same Simi Valley P.O. Box mailing address that CalPERS had on file for Respondent at the time.

13. On February 23, 2018, CalPERS received from Respondent a completed Nonmember Retirement Application, in which Respondent requested an effective retirement date of October 1, 2013. Attached to Respondent's Nonmember Retirement Application was a hand-written letter dated February 22, 2018. In this letter, Respondent claimed that she was unaware of her eligibility for nonmember retirement because CalPERS may have mailed its correspondences to an incorrect address.

14. In a letter dated March 27, 2018, CalPERS listed the addresses to which it had sent its previous correspondences to Respondent and asked her if any of the addresses were incorrect. Additionally, CalPERS requested Respondent to explain her understanding of her rights in relation to her nonmember account.

15. In a letter dated April 16, 2018, Respondent claimed that she was not aware of her eligibility for nonmember retirement until February 22, 2018, when she personally visited CalPERS' Glendale Regional Office and received advice from a customer representative. Respondent further claimed that she did not receive any forms from CalPERS because she had moved in March 2013.

16. In a letter dated May 3, 2018, CalPERS notified Respondent that it had denied her request for a retirement date of October 1, 2013. CalPERS had determined that no correctable mistake had been made pursuant to Government Code 20160.

17. In an email dated May 23, 2018, Respondent appealed CalPERS' determination.

18. The issue on appeal is limited to whether Respondent's failure to submit her Nonmember Retirement Application within nine months of October 1, 2013 (her requested retirement date) is a correctable mistake made as a result of inadvertence, mistake, surprise, or excusable neglect under Government Code section 20160.

19. At the administrative hearing, Tara Hensch (Hensch), a CalPERS employee for eight years with extensive experience in the Community Property/Retirement Administration and Support Unit, reviewed Respondent's file and testified credibly regarding the events described above. Hensch asserted that Government Code section 20160, discussed in detail below, is not applicable in Respondent's case because Respondent failed to make inquiries about her nonmember account that would have been made by a reasonable person in like or similar circumstances.

20. CalPERS uses a database to record contacts with its members and other events relating to its members. A printout, known as a Customer Touch Point Report (CPTR), was received in evidence as Exhibit 18. The CPTR for Respondent's CalPERS nonmember account indicated that during the period starting September 12, 2013, when the nonmember account was first created, until February 23, 2018, when CalPERS received Respondent's Nonmember Retirement Application, Respondent had personally spoken with CalPERS staff members by telephone several times. However, during these conversations, Respondent did not inquire CalPERS staff members about her eligibility for retirement on her nonmember account, and she did not inform CalPERS staff members about any problems with her mailing address. A printout of Respondent's mailing address history maintained by CalPERS was also received into evidence as Exhibit 26. This printout showed that CalPERS did not receive any returned or undeliverable mail from Respondent during the period of September 12, 2013, to February 23, 2018.

LEGAL CONCLUSIONS

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including the both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, note 5.) Thus, in challenging CalPERS' determination, Respondent bears the burden of proof by a preponderance of the evidence to established that she made a correctable mistake, entitling her to an effective retirement date retroactive to October 1, 2013. As set forth in Factual Findings 1 through 20, and Legal Conclusions 1 through 12, that burden was not met.

2. Government Code section 21291 provides:

"Nonmember," as used in this article, 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.

3. Government Code section 21295 provides:

A nonmember shall be retired upon his or her written application to the board if all of the following conditions are met:

(a) The nonmember has attained the minimum age prescribed by the applicable service retirement formula of the member.

(b) On the date of marriage dissolution or legal separation, the member had sufficient credited service to retire for service.

(c) On the date of application, the member has attained minimum retirement age to receive a service retirement allowance.

4. Government Code section 21296 provides:

Retirement shall be effective and the retirement allowance shall begin to accrue as of the date designated in the nonmember's application as the effective date of retirement, or the day following the date of court order dividing the community property of the member and nonmember, if later. 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 at an office of the board or by an employee of this system designated by the board, or, if the nonmember has been incompetent to act on his or her own behalf continuously from the date of dissolution or legal separation, one year prior to the month in which an application by the guardian of his or her estate is so received. An application for retirement may only be filed by or for a nonmember who is living on the date the

application is actually received by this system. The effective date of a nonmember application for retirement received more than nine months after the requested effective date shall be determined in accordance with Section 20160.

5. Government Code section 20160 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)

6. Code of Civil Procedure section 473, cited in Government Code section 20160, subdivision (a)(2), allows a court to "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." (Code Civ. Proc., § 473, subd. (b).) The California Supreme Court has stated that Code of Civil Procedure section 473 should be "liberally construed" due to the public policy favoring determination of matters on the merits. (*Riskin v. Towers* (1944) 24 Cal.2d 274, 279; *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 256; *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.) However, the test for discretionary relief under Code of Civil Procedure section 473 requires the party seeking relief to show excusable error. (*Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1132.) For instance, "neglect" has been found to be "excusable if a reasonably prudent person under similar circumstances might have made the same error." (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 929.)

7. In this case, on February 22, 2018, Respondent submitted her Nonmember Retirement Application and requested a retroactive retirement date of October 1, 2013. Respondent submitted her Nonmember Retirement Application more than four years after the requested retirement date, falling well outside the nine-month deadline prescribed by Government Code section 21296. Because her submission of her Nonmember Retirement Application was untimely, Respondent's retirement on her nonmember account may not be effective on her requested date of October 1, 2013, unless the provisions of Government Code section 20160, allowing CalPERS to correct errors or omissions, are met.

8. Government Code section 20160 requires that the member's error or omission be the result of "mistake, inadvertence, surprise, or excusable neglect." However, under that same statute, failure by a member to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute a correctable error or omission. (Gov. Code, § 20160, subds. (a)(2) & (a)(3).)

9. Here, as soon as Respondent's nonmember account was established on September 12, 2013, CalPERS advised her that she was eligible to retire on that account. Included in this letter was Publication 44, which stated that if Respondent files her Nonmember Retirement Application more than nine months after her requested retirement date, the effective retirement date shall be the first day of the month on which CalPERS receives her application. Both the September 12, 2013 letter and Publication 44 were mailed to Respondent at the Simi Valley P.O. Box that CalPERS had on file as her mailing address. Despite Respondent's claims that CalPERS had the incorrect mailing address for her account, the evidence demonstrated that this Simi Valley P.O. Box was the same address that Respondent had provided on her Beneficiary Designation forms and Retirement Allowance Estimate Request forms in

2013. Respondent also responded to CalPERS correspondences sent to her at the same P.O. Box mailing address in 2014. Therefore, CalPERS provided Respondent with sufficient notice of her rights with respect to her nonmember account.

10. Respondent had many other opportunities between September 12, 2013, and February 23, 2018, to inquire about her eligibility to retire from her nonmember account. Indeed, in a letter dated November 21, 2013, CalPERS provided Respondent with retirement allowance estimates for her nonmember account, based on a service retirement date of May 30, 2014. Furthermore, the CTPR notes on Respondent's account reflect that between September 12, 2013, and February 23, 2018, Respondent had personally spoken with CalPERS staff members by telephone several times, but she never inquired about her eligibility to retire from her nonmember account.

11. A reasonably prudent person under similar circumstances would not have made the same error as Respondent. Respondent failed to make the inquiries about her eligibility to retire from her nonmember account that would have been made by a reasonable person in like or similar circumstances. Thus, it cannot be concluded that Respondent made a correctable mistake when she submitted her Nonmember Retirement Application more than four years after the requested retirement date of October 1, 2013.

12. In accordance with Government Code section 21296, because Respondent's Nonmember Retirement Application was not received within nine months of the requested effective retirement date of October 1, 2013, the effective date of retirement for Respondent's nonmember account is the first day of the month in which she submitted her Nonmember Retirement Application, or February 1, 2018.

ORDER

Respondent Kathryn Mattson's appeal is denied. CalPERS correctly determined that Respondent's failure to submit a Nonmember Service Retirement Election Application within nine months of the requested retirement date of October 1, 2013 was not an error correctable by Government Code section 20160.

DATE: September 17, 2019

DocuSigned by:
Ji-Lan Zang
JI-LAN ZANG

Administrative Law Judge
Office of Administrative Hearings