

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Appeal of Mandatory Contribution
Adjustment of:**

LARRY D. PEOPLES and

DEPARTMENT OF CONSUMER AFFAIRS, Respondents.

Case No. 2019-0698

OAH No. 2019110882

PROPOSED DECISION

Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on March 2, 2020, in Sacramento, California.

Austa Wakily, Senior Attorney, represented Renee Ostrander (complainant) in her official capacity as Chief, Employer Account Management Division, California Public Employees' Retirement System (CalPERS).

There was no appearance by or on behalf of Larry D. Peoples (respondent) or Department of Consumer Affairs (Department). CalPERS established that it properly served respondent and the Department with a Notice of Hearing. Consequently, this

**CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM**

FILED 3/11 2020
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matter proceeded as a default hearing against both respondents pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on March 2, 2020.

ISSUE

Does the law require CalPERS to make a Mandatory Contribution Adjustment to respondent's underfunded retirement account as a result of the Department erroneously enrolling respondent into an incorrect pension benefit tier?

STATEMENT OF THE CASE

1. State agencies enroll employees in CalPERS under a specific retirement benefit formula, depending on their date of hire, job classification, collective bargaining unit, and legislation. Retirement benefit formulas are set by statute, and the Public Employees' Retirement Law (PERL) governs CalPERS membership eligibility and pension benefits. The formulas govern a member's pension benefits, depending on the member's age, final compensation, and number of years of qualifying service.

2. The PERL allows state miscellaneous members to enroll in one of two options to determine their monthly contributions to their pensions and subsequent benefits. Under State First Tier retirement formula miscellaneous, 2 percent at age 55 (First Tier), a member contributes five percent of all earnings over \$513, which affords him a larger monthly pension. Under State Second Tier retirement formula

miscellaneous, 1.25 percent at age 65 (Second Tier), a member makes no monthly contributions during employment, and receives a smaller monthly pension.¹

3. In 2001, the Department erroneously assigned respondent, a state miscellaneous member of CalPERS, to Second Tier. When respondent retired, CalPERS paid him benefits under First Tier, though respondent never funded his retirement account for First Tier benefits. Several months after respondent retired, CalPERS discovered the mistake. CalPERS must now correct the mistake.

FACTUAL FINDINGS

4. Respondent worked for the California Department of Toxic Substances Control as a Staff Services Analyst from January 5, 1993, to April 18, 2001. He was a member of CalPERS enrolled in Second Tier. On October 24, 2001, respondent returned to state service as an Office Technician at the Department. When he was hired, the Department did not give respondent the option to choose a tier, and designated him as Second Tier, contrary to Government Code section 21070.5.² Respondent retired effective January 31, 2018. From 1993 to 2018, respondent was

¹ The two tiers are explained in detail in Government Code sections 21354.1 and 21076.

² Under Government Code section 21070.5, effective January 1, 2000, a state miscellaneous member of CalPERS who was first hired, or returned to state service after a break of more than 90 days, should automatically be enrolled in First Tier, unless the member opted into Second Tier within 180 days of employment. When the member retires, he receives pension benefits in accordance with the Tier he is in.

designated in Second Tier. Consequently, he made no contributions to his pension account.

5. When respondent retired, CalPERS's automated system reviewed respondent's October 2001 date of hire, determined there was no election on file, and calculated his retirement benefit amount under First Tier. In October 2001, First Tier was the default tier and Second Tier had to be affirmatively elected. CalPERS sent respondent a letter dated February 1, 2018, informing him that his monthly pension amount would be \$1,800.35 (less any authorized deductions).

6. CalPERS sent respondent a letter dated July 16, 2018, following a non-automated review of his retirement account. The letter informed respondent that his account was underfunded and CalPERS was overpaying his monthly pension amount. Respondent made no retirement contributions during state service, but his monthly pension amount was based on First Tier contributions.

7. CalPERS sent respondent an election form, which gave respondent options to correct the error. His retirement account was underfunded by \$37,123.58. Respondent could elect to stay in First Tier, and either pay the underfunded amount in a lump sum or make contributions of \$310.10 for 180 months.

8. Respondent responded by letter dated September 11, 2018. He stated he should not be made to reimburse CalPERS for the Department's mistake of designating him Second Tier, and CalPERS's mistake of paying him based on a First Tier calculation. He was never made aware of the error and could therefore not correct it. He believes the Department made the error and should pay the underfunded amount.

After receiving respondent's appeal, CalPERS conducted an investigation, including contacting the Department to determine if there was a Second Tier election on file, which there was not. On April 19, 2019, CalPERS sent respondent another letter reiterating that respondent was receiving the incorrect amount for his retirement benefit. The error created an overpayment to respondent of \$10,127.83, as of April 1, 2019. CalPERS acknowledged the Department erroneously enrolled respondent in Second Tier, and CalPERS paid respondent based on First Tier contributions, though CalPERS did not accept responsibility for that error.

9. CalPERS presented respondent with two options. The first was the same that had been offered in the July 18, 2018 letter. The second was to remain in Second Tier, accept the correlating benefit amount of \$1,126.61, and reimburse CalPERS for the overpayment of \$10,127.83 (as of April 2019). The over-payment can be paid in monthly installments subtracted from the benefit amount or in a lump sum. The letter also informed respondent of his appeal rights.

10. Respondent submitted a timely appeal. He reiterated his position that the mistakes requiring a reduction in his benefit amount or that he reimburse CalPERS for the overpayment were not his. The Department made the initial error, and CalPERS compounded it by paying respondent his First Tier amount. Additionally, he asserted his monthly deposit was \$1,776.36, not \$1,800.35. He submitted evidence of deposits into his bank account, but not monthly statements showing what deductions, if any, apply.

11. CalPERS sent respondent a letter dated June 13, 2019, which began: "We have processed your signed election for Contribution Agreement." CalPERS informed respondent \$310.09 would be deducted from his payments for 180 months, which would apply to respondent's underfunded amount of \$37,123.58. That is, CalPERS

would keep respondent in First Tier, and respondent would repay the underfunded amount, reducing his monthly payment to \$1,505.02. No Contribution Agreement was produced at hearing. At hearing, CalPERS Staff Services Analyst John Nyugen testified respondent has been receiving \$1,800.05 throughout the appeal process despite the June 13, 2019 letter.

12. On December 18, 2019, Renee Ostrander, Chief of the Employer Account Management Division, signed and thereafter filed the Statement of Issues in her official capacity. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

PRINCIPLES OF LAW

13. As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including 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). Further, Government Code section 20160, subdivision (b), states the party seeking correction of an error "has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b)." CalPERS bears the burden of proof in this matter, as it is CalPERS that asserts there was an error that must be corrected.³

³ CalPERS asserted at hearing that respondent bears the burden of proof to show CalPERS's determination that respondent must repay the underfunded amount

CalPERS Retirement Plans

14. CalPERS is governed by the provisions of the Public Employees' Retirement Law (PERL), Government Code section 20000, et seq. The PERL requires CalPERS members to make contributions toward their retirement in accordance with laws and regulations pertaining to their retirement plan. Member's retirement contributions are deducted from the member's compensation. (Gov. Code, § 20771.) The contribution amounts are set by statute. (See Gov. Code, §§ 20677.4-20683.91.) At issue in this matter are the First and Second Tier retirement formulas. The First Tier benefit formula is 2 percent at 55. (Gov. Code, § 21354.1.) The Second Tier benefit formula is 1.25 percent at 65. (Gov. Code, § 21076.)

15. Prior to January 1, 2000, new state hires were enrolled into Second Tier by default. This changed on January 1, 2000, the effective date of Government Code section 21070.5, subdivision (a), which provides:

First Tier for New Hires - January 1, 2000 or Later

Notwithstanding any other provision of this article, a person who, on or after January 1, 2000, becomes a state miscellaneous or state industrial member of the system because the person (1) is first employed by the state, (2) returns to employment with the state from a break in service of more than 90 days, or (3) returns to employment

was incorrect. CalPERS made that determination based on an error that it seeks to correct, which underlies respondent's appeal.

with the state after ceasing to be a member pursuant to Section 20340 or 21075, shall be subject to the benefits provided by Section 21354.1 [First Tier], unless the person elects within 180 days of membership as a state miscellaneous or state industrial member to be subject to the Second Tier benefits provided for in Section 21076 or 21076.5, as applicable. . . .

Correction of Errors and Adjustments

16. CalPERS is required, under Government Code section 20160, subdivision (b), to “correct all actions taken as a result of errors or omissions of . . . any state agency or department or [CalPERS].” Section 20163, subdivision (a), requires:

If more or less than the correct amount of contribution required of members, the state, or any contracting agency, is paid, proper adjustment shall be made in connection with subsequent payments, or the adjustments may be made by direct cash payments between the member, state, or contracting agency concerned and the board or by adjustment of the employer’s rate of contribution.⁴

⁴ While Government Code section 20163, subdivision (b), provides an exception to this rule, that exception does not apply to a situation such as this, where a member was misclassified. (*Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565, 570-71.)

If an account is underfunded, the member must contribute the amount he would have paid into to his retirement account, and interest that would have accrued had the contributions been deposited at the beginning. (Gov. Code, § 20151, subd. (a)(2).)

ANALYSIS

17. Under the PERL, CalPERS must correct the Department's error of enrolling respondent into Second Tier, and CalPERS's error in paying respondent's retirement benefit under First Tier. If CalPERS leaves respondent in the tier he should have been enrolled in, his retirement account is underfunded by \$37,123.58. If CalPERS moves respondent to the tier he was erroneously enrolled in, his benefit will decrease from \$1,800.05 to \$1,126.44, and respondent would be responsible for reimbursing CalPERS the overpayments he received since he retired in January 2018.

18. Respondent argued through his letters to CalPERS that he made no mistake and should not be made to pay for others' mistakes. What respondent's argument implies, however, is that he should continue to benefit from others' mistakes. He is receiving a pension benefit that he did not contribute to, and did not earn. He is, in effect, making withdrawals on a retirement account with a zero balance. There is no dispute that the mistakes that led to this result were not respondent's. But to allow him to continue to collect a benefit that he did not earn puts the burden of an underfunded retirement account on the CalPERS membership.

19. CalPERS must correct the error. It should process the Contribution Agreement that would correct the error by allowing respondent to fund his retirement account over a period of 180 months.

LEGAL CONCLUSION

20. Based on the foregoing, CalPERS established by a preponderance of the evidence that, under Government Code sections 20160 and 20163, CalPERS must make a Mandatory Contribution Adjustment to respondent's underfunded retirement account.

ORDER

Respondent Larry Peoples's appeal is DENIED.

DATE: March 11, 2020

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Heather M. Rowan
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HEATHER M. ROWAN

Administrative Law Judge

Office of Administrative Hearings