

ATTACHMENT A

THE PROPOSED DECISION

FACTUAL FINDINGS

In Respondent's Application for Retirement, She Misrepresented Her Age

1. In 1977 or 1978 respondent applied for a position as a floor nurse with Salinas Valley Memorial Healthcare. She was in her forties and feared that the nursing director would not hire someone her age. On respondent's application for employment, instead of writing her birth date as being in 1932, she wrote 1942. In 1998 respondent took a position as head nurse in the medical unit of the Salinas Valley Prison medical facility. Respondent's counsel represents that, "when [respondent's] work records were sent to Salinas Valley Prison, the date of birth was the same as it had been" on her application for employment at Salinas Valley Memorial Healthcare. On June 10, 1998, in connection with respondent's employment at Salinas Valley Prison, respondent became a member of CalPERS.

2. By an application dated May 3, 2004, respondent applied to CalPERS for industrial disability retirement. In respondent's application for retirement, she, again, misrepresented her date of birth; she wrote "3/1/42."

3. In a section of the application form entitled "Section E – Option Election," respondent checked the box for "option 1." A line was provided for naming a beneficiary. Instructions above that line read, "Beneficiary Information – Single Lifetime Beneficiary (*Complete for option 1, 2, 2W, 3, or 3W.*)" Respondent wrote her daughter's name, social security number, date of birth, and address.

4. CalPERS approved respondent's application and placed respondent on disability retirement effective May 16, 2004.

Respondent Admitted the Facts Complainant Alleges in the Statement of Issues

5. At the hearing, respondent's counsel submitted a trial brief entitled, "Respondent's Statement of Issues;" it was marked as Exhibit A for identification. Thus, respondent submitted two briefs, a trial brief and a closing brief. In paragraph 1, of the trial brief, respondent admitted the factual allegations in complainant's statement of issues. Complainant's statement of issues contains 22 paragraphs. Paragraphs 1, 17, and 20 contain nonfactual matters, and respondent did not admit those. Respondent admitted the allegations in the remaining paragraphs. Based on respondent's admission, the facts complainant alleges in the statement of issues are adopted as established facts.

CalPERS's Notice to Respondent and Adjustment of Respondent's Account

6. In 2017 CalPERS learned that respondent was born on March 1, 1932, ten years earlier than she had claimed in her application for retirement.

7. CalPERS sent respondent letters dated June 9, 2017, August 17, 2017, and September 28, 2017, informing her that the date of birth she specified on her application for disability retirement did not match the date of birth on file with the Social Security Administration. CalPERS requested a copy of respondent's birth certificate, passport, or driver's license.

8. CalPERS sent respondent's counsel a letter dated October 26, 2017, informing respondent that:

Ms. Palo's unmodified allowance was not based off her age or years of service credit at the time of retirement. However, Ms. Palo did not elect the unmodified allowance at retirement, she elected option 1. Option 1 reduces a member's unmodified allowance and is based off the member's age at retirement and the amount of contributions in the member's account.

9. On February 14, 2018, respondent's counsel sent CalPERS a copy of respondent's driver's license showing her correct birth date, March 1, 1932.

10. On the occasion of a member's death, CalPERS pays a lump-sum, death benefit to a beneficiary the member has designated. This has nothing to do with calculating a member's retirement allowance. The two matters are completely independent of each other. Respondent designated her daughter as the beneficiary of her lump-sum, death benefit.

11. During a member's employment, he or she must make regular contributions to his or her CalPERS retirement account. One's employer also must make contributions. At the time of one's retirement, CalPERS calculates the amount of the contributions the member has made over the years, the member contribution. When one retires, his or her monthly retirement allowance is paid out of the member contribution until the member contribution is depleted. After the member contribution is depleted, CalPERS continues to pay the monthly retirement allowance. Nevertheless, keeping track of the balance in a member's contribution can be important, depending on which retirement option the member elected.

12. One can choose among a few retirement options. One can elect an option that maximizes one's monthly retirement allowance, or one can elect among other options, all of which reduce the amount of one's monthly retirement allowance. One can elect an option that pays any unused member contribution to a designated beneficiary, i.e., if at the time of death, one's member contribution has not been depleted, the balance will be paid to a beneficiary or beneficiaries. One can elect an option that provides for continuing payments of the monthly retirement allowance to a designated beneficiary or beneficiaries. There are other choices available.

13. As noted above, one section of the application form is entitled "Section E – Option Election," and respondent checked the box for "option 1." One of the other options is "unmodified allowance." If a member wants to maximize his or her monthly retirement allowance and not make any provision for a survivor or survivors, the member should check the box for unmodified allowance. If one elects option 1, any unused member contribution in the account at the time of death will be paid in a lump sum to the member's designated lifetime beneficiary.¹ If one's member contribution has been depleted, there is no payment. As noted above, other options provide for other choices.

14. The "Section E – Option Election," section of the retirement application form provides very little explanation of the differences among the various options. However, CalPERS publishes a "Guide To Completing Your CalPERS Disability

¹ One's designated lifetime beneficiary can be the same as one's lump-sum, death benefit beneficiary, or it can be a different person or persons. Respondent named her daughter as both of those beneficiaries.

Retirement Election Application” that, at pages 21 through 23, explains the differences among the various options. Respondent’s counsel argues that respondent never saw a copy of that guide.

15. Because respondent retired with a disability retirement, her age or years of service would not have been a factor in calculating her monthly retirement allowance if she had elected “unmodified allowance,” and consequently, her misrepresentation of her birthdate would have been of no consequence. If respondent had elected the unmodified allowance option, the only benefit available to a survivor would have been the lump sum death benefit, which as noted above, has nothing to do with a member’s retirement allowance. Respondent would have received a slightly higher monthly retirement allowance, would not have had a reduction in her allowance, and would not have received an overpayment that she had to return.

16. However, because respondent elected option 1, her age at the time of retirement was a factor in calculating her monthly retirement allowance. In calculating a monthly retirement allowance under option 1, CalPERS’s uses an actuarial formula that takes into account the likelihood that CalPERS will have to pay out a lump sum from a member contribution. That is, the formula takes into account the likelihood that the member will die before depleting his or her member contribution account. If a member retires at a young age, it is unlikely that there will be a balance in the member contribution account at the time the member dies, and therefore, unlikely that CalPERS will have to pay out a lump sum from the member’s contribution account. If a member is older at the time of retirement, the possibility of his or her dying before depleting the member contribution account increases, and therefore, the possibility that CalPERS will have to pay out a lump sum from the member’s contribution account increases.

Therefore, if a member chooses option 1, the older the member is when he or she retires, the lower the monthly retirement allowance will be.

17. Assuming respondent had been born on March 1, 1942, the mathematical factor for calculating her monthly retirement allowance under option 1 would be 0.99531. Because she was born on March 1, 1932, the mathematical factor for calculating her monthly retirement allowance under option 1 was 0.98984. Because CalPERS relied on the birth date respondent provided, CalPERS calculated and paid a higher monthly retirement allowance than the one to which respondent was entitled.

18. CalPERS sent respondent a letter dated February 27, 2018, informing her that CalPERS had corrected her birthdate. CalPERS informed respondent that the correction resulted in a decrease of \$19.18 per month in her retirement allowance and, for May 16, 2004, through February 28, 2018, resulted in CalPERS having overpaid her \$2,803.58.

19. Respondent's counsel sent CalPERS a letter dated March 12, 2018, requesting that CalPERS reverse its determination. Respondent's counsel also requested a government claims form.

20. CalPERS sent respondent a letter dated March 28, 2018, informing her that deductions in the amount of \$346.96 per month would begin on May 1, 2018, and continue until the overpayment was recovered.

21. On April 3, 2018, respondent submitted a government claim form to the Department of General Services, Office of Risk and Insurance Management.

22. CalPERS reduced respondent's monthly retirement allowance by \$19.18 per month and also deducted \$327.78 per month until it recovered the \$2,803.58 overpayment.

23. Complainant filed the statement of issues, which is dated October 4, 2019.

The Inference that Respondent Demanded that a Mistake be Corrected

24. The evidence does not support a finding as to when respondent asserted that her election of option 1 was the result of a mistake. Also, the evidence does not support a finding that, before the hearing, respondent demanded that her election of option 1 be *corrected*. However, one can infer those things from respondent's counsel's briefs. At the hearing, respondent's counsel referred to his trial brief and argued that, because of respondent's right to correct a mistake, CalPERS should not decrease respondent's retirement allowance and should not recover an overpayment. In the context of this argument, respondent's counsel referred to the fact that CalPERS did not advise respondent of the difference between "signing a document for unmodified allowance or Option 1 Allowance." In the hearing, complainant presented complainant's case as though respondent had asserted that, in electing option 1, she made a mistake and as though respondent had demanded that her mistake be corrected. In the hearing, complainant's counsel represented that the first time respondent raised the issue of mistake was shortly before the hearing.

25. Both parties tried this case as though respondent asserted that her election of option 1 was the result of a mistake. And both parties tried this case as

though respondent had demanded that her mistake be corrected. In this decision, it is assumed that respondent asserted such a mistake and made such a demand.

Complainant's Contentions

COMPLAINANT CONTENDS THAT RESPONDENT'S ELECTION WAS NOT THE RESULT OF AN ERROR OR OMISSION

26. The evidence does not show that respondent's election was the result of an error, i.e., it, does not show that she made a mistake. No one who was competent to complete and file a disability retirement election application could have failed to understand that the selection of an option in "Section E – Option Election" was important and would have an effect on his or her benefits, and there was no evidence that respondent was not competent. The introduction to "Section E – Option Election" read:

I elect the following retirement payment option. (Please check one only). I understand that my election option is irrevocable and that by electing option 2W, 3W, or 4, I forfeit my right to an increase in my allowance based on the conditions described on page 21 and 22 of this booklet.

27. The sentence that begins with "I understand," admonishes the member to understand discrete things: One is that *the election is irrevocable*. The other is that, if one chooses option 2W, 3W, or 4, one forfeits a right to an increase in one's allowance based on certain conditions. Thus, the admonition that an election is irrevocable applies to all of the options. Also noteworthy is the reference to "page 21 and 22 of this booklet." Anyone who read that would have understood that, if he or she had a question about the application form, he or she needed to have something

more than the six-page form. However, there is no evidence that respondent asked for a copy of the booklet. Indeed, respondent's counsel argues that respondent never saw the booklet.

28. The evidence does not support a finding that respondent made a mistake. Respondent, without understanding the differences among the various options, simply chose one.

COMPLAINANT CONTENDS THAT RESPONDENT FAILED TO MAKE THE INQUIRY THAT A REASONABLE PERSON WOULD MAKE

29. Complainant alleges that respondent, in choosing among the various options, failed to make the inquiry that would be made by a reasonable person in like or similar circumstances. Government Code section 20160, subdivision (a)(3), provides, in 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.

30. Because the Legislature expressed this as an exclusion from the definition of an error or omission, this is a subset of complainant's first contention.

31. A reasonable person, who did not know the differences among the various options, would have inquired about the differences and how each option would affect his or her retirement benefits. Thus, within the terms of Government Code section 20160, subdivision (a)(3), respondent's election, by definition, did not constitute an error.

COMPLAINANT CONTENDS THAT RESPONDENT'S REQUEST TO CORRECT AN ERROR WAS UNTIMELY

32. Government Code section 20160, subdivision (a)(1), provides that a request, claim, or demand to correct an error or omission must be made "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*." (Italics added.)

33. The language of this subdivision is problematic. First, it assumes a right to make a correction, so literally, it never would come into play in a circumstance in which a member asserted a right to make a correction but, as in the present case, did not have such a right. Second, one might expect a period of limitation in such cases to run from the time a member discovered the *need* to make a correction, but that clearly is not the language of the subdivision.

34. Complainant contends the six-month absolute limitation of Government Code section 20160, subdivision (a)(3), began to run when respondent's counsel received CalPERS's October 26, 2017, letter informing respondent that option 1 reduces a member's unmodified allowance and is based on age and the amount of a member's contributions. But there is no evidence that, on that occasion, respondent made a "discovery of the right to make the correction." Indeed, no evidence was offered as to when respondent discovered her, so called, "right to make the correction." Complainant failed to prove when the limitation period began to run and, therefore, failed to prove that respondent's demand for a correction was untimely.

Respondent Offered No Evidence

35. Respondent offered no evidence – no exhibits and no testimony. Respondent's trial brief has a subtitle: "AGREED TESTIMONY OF RITA PALO ADOPTING

THE STATEMENTS IN HER *VERIFIED* STATEMENT OF ISSUES.” (Italics added.) As noted above, respondent’s statement of issues was offered as a trial brief. Counsel for respondent offered no evidence that CalPERS agreed that respondent’s trial brief could be received as respondent’s testimony. It also is noted that, in spite of the subtitle, respondent’s trial brief is not verified.

Respondent’s Counsel’s Arguments

RESPONDENT’S CHARACTERIZATION OF THE ISSUE

36. At page 10, line 14, of respondent’s trial brief, counsel says, “[T]his hearing is simply to determine whether or not Respondent is entitled to the refund of her money which she claims was wrongfully seized by CalPERS.” This is a reference to the \$2,803.58 overpayment that CalPERS recovered through a temporary reduction in respondent’s monthly retirement allowance.

CALPERS DID NOT ADVISE RESPONDENT

37. At page 6, line 14, of respondent’s trial brief, counsel says:

Respondent was never advised of the difference between signing a document for unmodified allowance or Option 1 Allowance, and was acting on the assumption that her employer and CalPERS had vastly superior knowledge to that of the Respondent vis-à-vis the difference that would be incurred by such action.

38. It was respondent’s responsibility to ask for explanations and information if she needed them. A member is responsible for making the inquiry a reasonable person would make. As noted above, Government Code section 20160, subdivision

(a)(3), provides that the failure of a member to make the inquiry that would be made by a reasonable person does not constitute a correctable "error or omission." A reasonable person who did not know the differences among the various options would have inquired. If respondent had asked, CalPERS would have set an appointment for her to meet with a counsellor. CalPERS would have provided her with a copy of the "Guide to Completing Your CalPERS Disability Retirement Election Application," which, at pages 21 and 22, explains the differences among the various options.

MUTUAL MISTAKE

39. At page 7, line 6, of respondent's trial brief, counsel has a heading for one section of the brief: "CalPERS SHOULD, IN EQUITY, CORRECT THE *MUTUAL MISTAKE* OF THE PARTIES AND READJUST RESPONDENT'S OPTION ELECTION." (Italics added.)

40. In respondents trial brief, respondent's counsel refers to "respondent's error." Counsel says: "Respondent's error is correctable and pursuant to Government Code §20180 the Board has the discretion to correct errors upon any terms it deems just."

41. Counsel recites a maxim of jurisprudence: "When the reason for a rule ceases, so should the rule itself, Cal. Civ. Code §3510." It is not obvious that this maxim is apt.

42. Respondent's counsel quotes from a few appellate cases. One is *Campbell v. Bd. of Administration of the Public Employees' Retirement System* (1980) 103 Cal.App3d 565. In that case, the court refers to and discusses an earlier, superior court case concerning Ms. Campbell, the first Campbell case. The first Campbell case concerned reclassification of Campbell's membership in CalPERS. There is no citation

for the first Campbell case and no indication that it was appealed. Campbell worked as a court bailiff for the County of Santa Clara and was a member of CalPERS. The county classified Campbell as a miscellaneous member rather than as a safety member. The retirement benefits for safety members are higher than those for miscellaneous members, and members of the safety category contribute a greater portion of their wages to the CalPERS fund. Campbell, claiming that bailiffs had been mistakenly classified, sought retirement coverage as a safety member. CalPERS denied the request. Campbell filed suit, contending that her classification resulted from a mistake and asking for a writ of mandate directing the board to reclassify her; Campbell prevailed. Thus, the first Campbell case concerns the correction of a mistake.

43. *Campbell*, 103 Cal.App3d 565, the second Campbell case, concerned a related but different matter. After the decision in the first Campbell case, CalPERS retroactively reclassified 20 bailiffs. CalPERS also assessed each bailiff the difference between the safety-employee, wage contribution (9 percent) and the miscellaneous-employee, wage contribution (7 percent). The assessments ranged from approximately \$1,400 to \$6,000. The bailiffs petitioned the superior court for a writ of administrative mandamus to compel the board to reverse its decision imposing the assessment. The petition was denied. The bailiffs appealed. It is this appeal that is the subject of *Campbell*, 103 Cal.App3d 565.

44. In the second Campbell case, the court of appeal discussed an adjustment of contributions to the retirement fund due to errors. Government Code section 20163,² provides, in part:

(a) 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.

[¶] . . . [¶]

(b) No adjustment shall be made because less than the correct amount of *normal contributions* was paid by a member if the board finds that the error was not known to the member and was not the result of erroneous information provided by him or her to this system or to his or her employer. (Italics added.)

45. In *Campbell*, 103 Cal.App3d 565, the court of appeal said that section 20163 contemplates that, generally, overpayments or underpayments shall be adjusted so that either the employee gets back the overpayment or pays the underpayment.

² At the time of the decision in *Campbell*, this Government Code section was 20165. In 1995 the Legislature reorganized the Public Employees' Retirement Law, and section 20165 was renumbered as 20163.

However, an exception is provided to the effect that, where there is an underpayment of the "normal contributions" by the member, the retirement system will, under certain conditions, absorb the underpayment. CalPERS contended that the exception to the general rule applies only to a clerical or mechanical error made in calculating the "normal contribution" for a given person in a given classification. CalPERS contended that the exception to the general rule does not apply to an error in classification, i.e., that the exception does not apply to mistakenly classifying an employee as a miscellaneous member rather than as a safety member. The court agreed. The court followed the principle that exceptions in a statute are to be strictly construed. The bailiffs were required to pay the underpayments. Thus, while the first Campbell case is relevant to respondent's contention, it does not support her contention. And the second Campbell case is not even relevant to respondent's contention.

46. Respondent quotes from *Rodie v. Bd. of Administration of the Public Employees' Retirement System* (1981) 115 Cal.App3d 559. Rodie was employed by the City of Reedley as chief of police and was a member of CalPERS. On March 20, 1973, he underwent open heart surgery and did not return to work. He applied for disability retirement, and on November 20, 1973, the city council found that he was disabled and that his disability was industrial. Rodie filed an election of retirement and beneficiary designation specifying industrial disability retirement rather than service retirement. Rodie also applied for federal disability benefits which were approved on June 27, 1974. His *state disability retirement* benefits were then reduced in the amount of the federal benefits. In 1977 Rodie discovered that federal benefits do not result in a reduction of state *service retirement* benefits. On January 12, 1974, the date of Rodie's retirement for disability, he was qualified to retire for either service or disability. He sought to have CalPERS change his disability retirement to service retirement. CalPERS denied Rodie's request. Rodie then filed a petition in superior court for administrative

mandamus to require the board to amend his retirement status from disability to service and to pay him the benefits accruing as a result. The superior court found that “[t]he only legitimate inference to be drawn from the evidence was that [Rodie] mistakenly selected Disability Retirement.” CalPERS appealed.

47. At the time of the Rodie case, Government Code section 20180 provided, in part:

Whenever, during the employment of any employee by the State, the University, or any contracting agency, or during the membership of a member in this system, or during the time this system remains under any obligation to or in respect to a retired member or his beneficiary, *the board finds that, because of inadvertence, oversight, mistake of fact, mistake of law, or other cause, any action required by this part to be taken or performed* by an employee, his public employer, a member or beneficiary, or this system *was not taken or performed* at the time it should have been taken or performed, the board shall take or perform such action, or shall order it to be taken or performed by the person whose duty it was to perform it.

48. Thus, literally, the statute provided for correction of a mistake only if the member had failed to act but not if a member had acted but made a mistake.

“Whenever . . . the board finds that, because of inadvertence, oversight, mistake of fact, mistake of law, or other cause, any action required to be taken or performed . . . was not taken or performed . . . the board shall take or perform such action or shall order it to be taken or performed” In *Rodie*, 115 Cal.App3d at pg. 565, the court

held that the provision to correct omissions was “intended by the Legislature to apply generally to errors as well as complete omissions to act.”³

49. The court of appeal noted that there was no evidence that Rodie or his attorney considered the possible effect of federal benefits on Rodie’s election. Rodie testified that disability retirement was “most on [his] mind.” The court of appeal affirmed the superior court’s finding that Rodie mistakenly selected disability retirement. He had no reason to know that, when one collects federal disability benefits, state disability benefits are reduced but state service benefits are not.

50. Within the terms of Government Code section 20160, subdivision (a)(3), Rodie did not “fail to make the inquiry that would be made by a reasonable person in like or similar circumstances.” The question is not whether someone might have thought of inquiring as to whether federal disability benefits reduce state disability benefits but do not reduce state service benefits. Indeed, someone might have thought of that. But the question is whether a failure to think of that was

³ In 1988 the Legislature acted to adopt the court’s holding that the Legislature intended the statute to apply to correcting errors as well as correcting omissions. The Legislature repealed the version in effect in 1988 and replaced it with a version that provides for correction of an *error or omission*. In the same revision, the Legislature modified the *inadvertence, oversight, mistake of fact, mistake of law, or other cause* language and divided the statute into subdivisions. The new version went into effect in 1989, and is the version currently in effect. However, in 1995, the Legislature reorganized the Public Employees’ Retirement Law, and section 20180 was renumbered as 20160.

unreasonable. It was not. Rodie's loss resulted from mistake, inadvertence, surprise, or excusable neglect.

51. Respondent also quotes from *Button v. Bd. of Administration of the Public Employees' Retirement System* (1981) 122 Cal.App3d 730. Button worked as an investigator for the Santa Clara County district attorney's office. At the time he retired, he did not feel well but did not think of himself as disabled. He applied for and obtained a service retirement. Following Button's retirement, he worked as a private investigator. He suffered a heart attack, was diagnosed as having coronary artery disease, and underwent a coronary bypass operation. Button applied for workers' compensation. The Workers' Compensation Appeals Board found that, although Button did not become compensably disabled until after he left government employment, his injury was cumulative and arose out of his employment with the county. Button sought to have his service retirement converted to a disability retirement. CalPERS denied his request. The court of appeal held that, if Button was disabled when he retired but did not know he was disabled, his choice of service retirement was a mistake, and he had a right to have the mistake corrected, i.e., he had a right to have his retirement changed to a disability retirement. The court remanded the case for a determination as to whether Button was disabled at the time he retired.

52. As noted above, respondent's counsel quotes from these various decisions. Counsel, however, does not discuss how they support respondent's demand for a *correction* of her election; counsel merely quotes from the decisions. In fact, none of the cases support a right to change an election that was not the result of error or omission. None of the cases support a right to change an election when the member made the election without making the inquiry that a reasonable person would make.

53. As noted above, the section of respondent's trial brief concerning mistake is entitled "CalPERS SHOULD, IN EQUITY, CORRECT THE *MUTUAL* MISTAKE OF THE PARTIES AND READJUST RESPONDENTS OPTION ELECTION." (Italics added.) This implies that CalPERS made some mistake. But in respondent's briefs, counsel does not mention any mistake that CalPERS made and does not discuss mutual mistake.

ESTOPPEL

54. Respondent's counsel argues that CalPERS should be estopped. Counsel does not specify what it is that CalPERS should be estopped from doing. In support of counsel's argument, he cites *Crumpler v. Bd. of Administration of the Public Employees' Retirement System* (1973) 32 Cal.App3d 567. The City of San Bernardino hired Crumpler and others as animal control officers. As city employees, they became contract members of CalPERS. They should have been classified as miscellaneous members, but the city mistakenly classified them as safety members. At the time of employment, each was informed he or she would be entitled to the same retirement benefits as police officers, and each accepted employment on the strength of that representation. Through the years, the animal control officers paid into the CalPERS fund at the rate a safety member must pay, which is higher than the rate a miscellaneous member pays. And they expected to receive a higher rate of retirement benefits when they retired. Years later, CalPERS determined that petitioners had been erroneously classified and reclassified them as miscellaneous members. Each was refunded the difference between the amount he or she contributed as a safety member and the lesser amount he or she would have contributed as a miscellaneous member. Petitioners appealed the reclassification.

55. In *Crumpler*, 32 Cal.App3d 567, the court found that all of the requisite elements of equitable estoppel were present. The city was apprised of the facts. At the

time the city erroneously advised the petitioners that they would be entitled to retirement benefits as local safety members, the city knew that they were being employed by the police department as animal control officers. The city intended its representations to be acted on, and petitioners had a right to believe the city so intended. Petitioners were ignorant of the fact that the city's advice was erroneous. Petitioners relied on the representations to their injury by relinquishing other employment to accept city employment and by paying the greater contributions required of safety members. The court of appeal held that the board was estopped from reclassifying petitioners *nunc pro tunc* as of the date they became members of the system but could reclassify them prospectively.

56. In *Lentz v. McMahon* (1989) 49 Cal.3d 393, the Supreme Court analyzed and discussed the doctrine of equitable estoppel and its application to public entities.

[E]quitable estoppel is a descendent of the ancient equity doctrine that "if a representation be made to another who deals upon the faith of it, the former must make the representation good if he knew or was bound to know it to be false." (Bigelow on Estoppel (6th ed. 1913) p. 603; see *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488-489 [91 Cal.Rptr. 23, 476 P.2d 423].) We have described the requirements for the application of equitable estoppel as follows: " 'Generally speaking, four elements must be present . . . : (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the

other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' " (*Mansell, supra*, 3 Cal.3d 462, 489, quoting *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305 [61 Cal.Rptr. 661, 431 P.2d 245].)

At common law, estoppel was unavailable against the government. (All footnotes are omitted.) We have long held, however, that estoppel may be asserted against the government "where justice and right require it" (*City of Los Angeles v. Cohn* (1894) 101 Cal. 373, 377 [35 P. 1002]), and we have applied the doctrine against government entities in a variety of contexts. At the same time, our cases recognize the correlative principle that estoppel will not be applied against the government if to do so would effectively nullify "a strong rule of policy, adopted for the benefit of the public." (*County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 829-830 [186 P.2d 124, 175 A.L.R. 747].) In *Mansell, supra*, 3 Cal.3d 462, we adopted a balancing approach to accommodate these concerns: "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an

estoppel." (*Mansell, supra*, 3 Cal.3d 462, 496-497.) Applying this test in *Mansell*, we approved the application of estoppel to prevent a local government from asserting paramount title to land pursuant to a claimed constitutional right. (*Id.*, at pp. 499-500.) We have also considered application of estoppel to a variety of governmental actions. (See, e.g., *Driscoll v. City of Los Angeles, supra*, 67 Cal.2d 297, 310 [city estopped from asserting statute of limitations regarding pension benefits]; *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 27-29 [157 Cal.Rptr. 706, 598 P.2d 866] [application of estoppel denied to county employee who sought cash compensation for unused overtime credits].) (*Lentz v. McMahon* (1989) 49 Cal.3d at pp. 398-400.)

57. Thus, before a governmental entity can be bound by an equitable estoppel, the elements requisite to such an estoppel against a private party must be present, and additionally, there must be a balancing between the interest of the party asserting an estoppel and public interest or policy.

58. In respondent's case, there is no reason to reach the additional, balancing element because the standard elements of an estoppel are not present. Respondent's counsel does not identify what it is that CalPERS should be estopped from doing; one must guess. But CalPERS did not make any representation concerning respondent's choice between one option rather than another. CalPERS did not engage in any conduct that it intended respondent to act on. Respondent could not have

relied on CalPERS's conduct because CalPERS did not engage in any conduct concerning respondent's election of option 1.

STATUTE OF LIMITATION

59. Government Code section 20164, subdivision (b), provides, in part:

For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years

60. Government Code section 20164, subdivision (d), provides:

Notwithstanding subdivision (b), where any payment has been made as a result of fraudulent reports for compensation made, or caused to be made, by a member for his or her own benefit, the period of limitation shall be 10 years and that period shall commence either from the date of payment or upon discovery of the fraudulent reporting, whichever date is later.

61. Respondent's false representation on her retirement application that she was born on March 1, 1942, was a fraudulent report by respondent for her benefit. Therefore, the period of limitation is 10 years from the date of discovery of the fraudulent reporting. As noted above, it was in 2017 that CalPERS discovered that respondent had falsified her birthdate. Thus, the period of limitation for CalPERS recovering the overpayment will not run until 2027.

Specific Findings

62. Respondent's election of option 1 was not the result of an error.
63. Respondent did not know what the consequences of electing option 1 would be; she elected it without making the inquiry a reasonable person would have made.
64. In the absence of respondent's seeking advice, it was not CalPERS's responsibility to advise her of the consequences of electing option 1.
65. There was no evidence of a *mutual* mistake of fact.
66. There was no evidence that CalPERS made a representation concerning the consequences of electing option 1.
67. The period of limitation on CalPER's right to make corrections and recover overpayments will not expire until 2027.
68. Complainant failed to prove when respondent discovered the, so called, right to make a correction.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) Government Code section 20160, subdivision (d), provides that the party seeking correction of an error pursuant to

Government Code section 20160, "has the burden of presenting documentation or other evidence to the board establishing the right to correction" "'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.)

2. The standard of proof is proof by a preponderance of the evidence. (Evid. Code, § 115.)

3. By virtue of respondent's admission of the truth of the facts alleged in complainant's statement of issues, complainant has proven those facts and met its burden of proof regarding those facts.

4. Respondent has the burden of proving that her election of option 1 was the result of an error. Respondent has the burden of proving that she made the inquiry that a reasonable person would have made. Respondent has the burden of proving that it was CalPERS's responsibility to advise her. Respondent has the burden of proving that there was a mutual mistake of fact. Respondent has the burden of proving that CalPERS made a false representation. Respondent has the burden of proving that CalPER's action to recover the overpayment was untimely.

5. Complainant has the burden to prove that respondent's demand for a correction was untimely.

Applicable Law

6. Code section 20160, subdivision (a) provides for correction of errors. That subdivision provides, in part:

[T]he 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. (Italics added.)

7. In *Lentz v. McMahon* (1989) 49 Cal.3d 393, 398-399, the Supreme Court analyzed and discussed the doctrine of equitable estoppel and its application to public entities. The court said:

We have described the requirements for the application of equitable estoppel as follows: " 'Generally speaking, four elements must be present . . . : (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' " (*Mansell, supra*, 3 Cal.3d 462, 489, quoting *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305 [61 Cal.Rptr. 661, 431 P.2d 245].)

8. Government Code section 20164, subdivision (b), provides, in part:

For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years

9. Government Code section 20164, subdivision (d), provides:

Notwithstanding subdivision (b), where any payment has been made as a result of fraudulent reports for compensation made, or caused to be made, by a member for his or her own benefit, the period of limitation shall be 10 years and that period shall commence either from the date of payment or upon discovery of the fraudulent reporting, whichever date is later.

Analysis

10. It was respondent's responsibility to ask for explanations and information if she needed them at the time she completed her application for retirement. A member is responsible for making the inquiry a reasonable person would make. Absent respondent's making an inquiry, it was not CalPERS's responsibility to advise her.

11. Respondent's election of option 1 was not the result of mistake, inadvertence, surprise, or excusable neglect. Respondent, without understanding the differences among the various options, simply chose one. A reasonable person who did not know the differences among the various options would have inquired about the differences and how each option would affect his or her retirement benefits. Within the terms of Government Code section 20160, subdivision (a)(3), respondent failed to make the inquiry that would be made by a reasonable person in like or similar circumstances, and her failure to do that does not constitute an error or omission correctable under Government Code section 20160.

12. The cases respondent's counsel quotes from do not support respondent's claim that she has a right to have her election changed to unmodified allowance. The second Campbell case is not relevant to the issue. In all of the other cases, there was an error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect. In the first Campbell case, the court held that, when a member is mistakenly classified in a category that provides a lower benefit than the benefit to which the member is entitled, he or she has a right to be reclassified. The case does not have precedential value, but the important point is that a correction was warranted because of a mistake. In *Rodie*, 115 Cal.App3d 559, Rodie had no reason to know that, when one collects federal disability benefits, state disability benefits are

reduced but state service benefits are not. Rodie did not “fail to make the inquiry that would be made by a reasonable person in like or similar circumstances.” Rodie’s election of disability retirement was the result of mistake, inadvertence, surprise, or excusable neglect. In *Button*, 122 Cal.App.3d 730, the court held that, if Button was disabled when he retired but did not know he was disabled, his choice of service retirement was the result of mistake, inadvertence, surprise, or excusable neglect.

13. Complainant failed to prove that, within the terms of Government Code section 20160, subdivision (a)(1), respondent did not make a demand to correct her error within six months after discovery of the right to make the correction.

14. Respondent failed to prove that there were grounds for imposing an estoppel against CalPERS.

15. Pursuant to Government Code section 20164, subdivision (d), the period of limitation for CalPERS recovering the overpayment is 10 years from the date when CalPERS discovered that respondent falsified her date of birth. CalPERS discovered that in 2017; the period of limitation will expire in 2027.

ORDER

Respondent’s appeal from CalPERS decreasing her retirement allowance and recovering an overpayment of \$2,803.58 is denied.

DATE: April 13, 2020

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings