

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 Additional
Retirement Service Credit of:**

TERRY C. MONDAY, Respondent.

Case No. 2022-0510

OAH No. 2022110137

PROPOSED DECISION

Timothy J. Aspinwall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on March 16 and 30, and July 12, 2023, from Sacramento, California.

Noelle Lamprecht, Senior Staff Attorney, represented complainant Donald Martinez, Chief, Member Account Services Division, California Public Employees' Retirement System (CalPERS).

Terry C. Monday (Respondent or Mr. Monday) was present throughout the hearing and represented himself, with the assistance of his spouse, Joanne Monday (Ms. Monday).

Evidence was received, and the record was held open for submission of written closing arguments. Arguments were timely submitted, and the record was closed, and the matter submitted for decision August 28, 2023.

On August 7, 2023, complainant filed a request for official notice of a CalPERS precedential decision, *In the Matter of the Appeal of Decreased Level of Retirement Allowance of Harvey H. Henderson, respondent*, dated June 11, 1998. The precedential decision was not identified by case number, nor was it attached to the request for official notice. (Gov. Code, § 11515.) The request for official notice is therefore denied.

ISSUE

Is Respondent eligible to purchase Additional Retirement Service Credit (ARSC)?

FACTUAL FINDINGS

Jurisdictional Matters

1. On November 1, 2022, complainant filed the Statement of Issues in his official capacity. The Statement of Issues alleges that CalPERS is unable to grant Mr. Monday's request to purchase three years of ARSC because he failed to timely submit a completed election package.

2. Mr. Monday established membership with CalPERS as a local miscellaneous member by virtue of his employment with Vallejo Flood and Wastewater District (May 13, 1996, through September 7, 1996); Rancho Murietta Community Services District (December 28, 1998, through April 19, 2003); and Fairfield-Suisun Unified School District (November 26, 2007, through December 31,

2018). Mr. Monday retired from service effective December 31, 2018, and has been receiving his retirement allowance since January 7, 2019.

Additional Retirement Service Credit

3. Under Government Code section 20909, eligible CalPERS members could purchase ARSC that could be applied in calculating retirement benefits. ARSC became available to eligible employees as a service credit purchase option in January 2004. As a result of the Public Employees' Pension Reform Act of 2013, ARSC was eliminated as a service credit purchase option effective January 1, 2013.

Mr. Monday's Inquiries and Request to Purchase ARSC

4. In April 2003, Mr. Monday elected to purchase Military Service Credit. He and Ms. Monday also asked a CalPERS representative about the possibility of purchasing ARSC. Mr. and Ms. Monday recall that the CalPERS representative told them ARSC was "too expensive" and that it would be "going away" after the first of the year. However, ARSC was not available as a service credit purchase option until January 2004.

5. On May 23, 2011, Mr. Monday went in person to CalPERS and submitted a Request for Service Credit Cost Information - ARSC. By letter dated August 26, 2011, CalPERS notified Mr. Monday that CalPERS was implementing a new computer system that would result in delays in processing ARSC requests.

6. On March 21, 2012, CalPERS sent Mr. Monday via U.S. mail an ARSC Confirmation of Intent Election packet, providing information including the cost to purchase ARSC. The enclosed letter advised Mr. Monday in bold lettering as follows: "Should you wish to pursue this purchase, you must complete and return the attached

Confirmation of Intent to Purchase Service Credit form within 30 days . . .” Mr. Monday did not submit the form required to complete the application process.

7. Neither Mr. Monday nor Ms. Monday recall receiving the 2012 packet. CalPERS has no record of the packet coming back as undeliverable. A notation in the CalPERS participant contact records (touchpoint) dated June 7, 2021, states that the ARSC Confirmation of Intent Election packet was “undeliverable.” This refers only to the fact that the packet letter could not be sent electronically because CalPERS had electronically redacted identifying information. CalPERS instead sent the packet manually via U.S. mail. Ms. Monday complained to the U.S. Postal Service sometime between 2007 and 2012, that the Postal Service was not delivering all the Monday’s mail.

8. On July 30, 2013, Mr. and Ms. Monday came to CalPERS and discussed service retirement options with a CalPERS representative. Neither inquired about the status of his ARSC request during this meeting.

9. On August 31, 2015, respondent’s spouse, Ms. Monday, called CalPERS to request information about Mr. Monday’s retirement. She did not inquire about the status of Mr. Monday’s ARSC request during this telephone call.

10. On August 26, 2016, Mr. and Ms. Monday called CalPERS to discuss his retirement benefit options. They did not inquire about the status of Mr. Monday’s ARSC request during this telephone call.

11. On August 15, 2017, Mr. Monday submitted a power of attorney form designating Ms. Monday as his attorney-in-fact.

12. On April 5, 2018, Ms. Monday contacted CalPERS and inquired about service credit options. A CalPERS team member informed Ms. Monday that ARSC had been eliminated as an option in 2013.

13. On September 3, 2020, Ms. Monday contacted CalPERS and asked about Mr. Monday's Request for Service Credit Cost Information - ARSC submitted to CalPERS on May 23, 2011. A CalPERS representative told Ms. Monday that the request for ARSC was never completed because CalPERS did not receive a Confirmation of Intent to Purchase Service Credit from Respondent.

14. On June 7, 2021, Ms. Monday contacted CalPERS and asked a representative whether CalPERS would process an ARSC request from 2003, and stated that a CalPERS representative had told them not to purchase ARSC in 2003. Ms. Monday stated they should be able to purchase ARSC at the cost in 2003. The CalPERS representative told Ms. Monday that an ARSC request must be received by CalPERS prior to the member's retirement date.

15. By letter dated October 11, 2021, CalPERS informed Mr. Monday that he is not eligible to purchase ARSC because CalPERS had not received an election for purchase, and ARSC was eliminated as a service credit purchase option in 2013.

Respondent's Mental Health

16. Amy Fuglei, MD, one of Mr. Monday's treating psychiatrist's, testified regarding his mental health. She first saw Mr. Monday in her office in October 2018, at which time she diagnosed him with a psychotic disorder. Mr. Monday refused medication at that time. He stated that he does not think there is anything wrong with him, but came to the medical appointment because his wife wanted him to do so.

17. Dr. Fuglei saw Mr. Monday again in June 2019, at which time she diagnosed him with schizophrenia spectrum and other psychotic disorder. Mr. Monday's wife attended the appointment and expressed concern about his ongoing bizarre thoughts, hallucinations, paranoia and intermittent agitation. During this appointment, Mr. Monday agreed to try treatment with low-dose Haldol.

18. On November 2, 2021, Dr. Fuglei electronically signed a letter to whom it may concern, confirming that Mr. Monday has a diagnosis of schizophrenia with symptoms of limited insight and judgment, decreased concentration, auditory and visual hallucinations, and delusions. His condition was then stable, and managed with Zyprexa and Prozac.

19. In Dr. Fuglei's opinion, Mr. Monday's mental health condition significantly compromised his ability to function at work for many years prior to 2018. His mental health condition could also have a negative impact in Mr. Monday's ability to complete CalPERS paperwork. Dr. Fuglei cannot comment with medical certainty regarding Mr. Monday's ability to complete paperwork as far back as 2012. However, she feels it is "less likely" that he could complete CalPERS paperwork in 2012, due to "poor insight" and "poor judgment" attributable to hallucinations and delusions symptomatic of Mr. Monday's psychosis.

20. Mr. Monday testified he has "heard voices" and "seen images" for many years, and that this interfered with his thinking. He does not recall receiving any letters or packets from CalPERS in 2012.

21. A physician certification for disability insurance benefits signed by Mr. Monday's treating psychiatrist during 1998 to 2003, corroborates Mr. Monday and Dr. Fuglei. Specifically, the physician certification dated March 2003 includes a diagnosis

of chronic schizophrenia with symptoms including diminished concentration and fatigue.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54). In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Applicable Statutes

2. Government Code section 20909 provides in part:
 - (a) A member who has at least five years of credited state service, may elect, by written notice filed with the board, to make contributions pursuant to this section and receive not less than one year, nor more than five years, in one-year increments, of additional retirement service credit in the retirement system.

[¶] . . . [¶]
 - (g) This section shall apply only to an application to purchase additional retirement credit that was received by the system prior to January 1, 2013, that is subsequently approved by the system.

3. Government Code section 20160 provides in 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 . . . member . . . 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).

Analysis

4. Government Code section 20160, subdivision (a)(2), references Code of Civil Procedure (CCP) section 473, which is generally used to grant civil relief when a judgment or some other action has been taken against someone due to that person's mistake, inadvertence, surprise, or excusable neglect. "Excusable neglect" under CCP section 473 may be the result of disability. (*In re Marriage of Kerry* (1984) 158 Cal.App.3d 456, 465.). "The existence of some degree of mental confusion or illness of the party moving to set aside an order supports granting the motion, and the court may infer the existence of such problems from the whole record before it." (*Id.*, p. 466.)

5. Relief under CCP section 473 is conditioned on the party seeking relief within a reasonable time, and relief may be denied when there is an unreasonable delay. (*Mercantile Collection Bureau v. Pinheiro* (1948) 84 Cal.App.2d 606.) Similarly, Government Code section 20160, subdivision (a), requires a member to "make the inquiry that would be made by a reasonable person in like or similar circumstances."

6. Mr. Monday was not diligent in following up on his 2011 inquiry about ARSC. Even granting that he did not see the ARSC Confirmation of Intent Election packet sent to him by CalPERS on March 21, 2012, and that he suffered from poor judgment and diminished concentration related to schizophrenia, it was not reasonable to wait beyond January 1, 2013 (when ARSC was eliminated as service credit purchase option) before following-up with CalPERS about ARSC. In fact, Mr.

Monday did not follow-up until 2018. Under these circumstances, Mr. Monday's failure to make an "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. (Gov. Code § 20160, subd. (a)(3).) For these reasons, Mr. Monday may not avail himself of the benefits of section 20160.

7. Mr. Monday also argued that he should be permitted to purchase ARSC because, as he and Ms. Monday testified, a CalPERS representative told them in April 2003 that ARSC was "too expensive" and would be "going away" after the first of the year. Even assuming the Monday's accurately recall what the CalPERS representative told them, this would not provide a legal basis to grant them an opportunity to purchase ARSC. Specifically, the doctrine of equitable estoppel is available in certain circumstances to those who detrimentally rely on representations made by another.

8. In order for equitable estoppel to apply in this matter, Mr. Monday would need to show, among other things, that he detrimentally relied on the 2003 statement made by the CalPERS representative regarding the excessive cost and time-limited availability of ARSC. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Though Mr. Monday chose not to look further at ARSC in 2003, this was a matter of personal choice, and not in itself detrimental. In 2011, Mr. Monday chose to again inquire about ARSC, at a time when he was still eligible to exercise that service credit purchase option. The evidence did not establish that Mr. Monday relied to his detriment on the statements he recalls a CalPERS representative making in 2003. For the foregoing reasons, the doctrine of collateral estoppel does not provide Mr. Monday a basis for relief.

9. Based on the Factual Findings and Legal Conclusions as a whole, Mr. Monday is not eligible to make an election to purchase ARSC.

ORDER

Respondent Terry C. Monday is not eligible to purchase Additional Retirement Service Credit, and his appeal is therefore DENIED.

DATE: September 22, 2023

Timothy Aspinwall

TIMOTHY J. ASPINWALL

Administrative Law Judge

Office of Administrative Hearings