

ATTACHMENT A
PROPOSED DECISION

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

In the Matter of the Application to Purchase
Additional Retirement Service Credit by:

MELINDA A. TACKITT,

Respondent.

Case No. 2011-0750

OAH No. 2012060841

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on January 24, 2013, in Sacramento, California.

Carol A. McConnell, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS). Mathew Eubanks, Section Manager for the Staff Services Unit of CalPERS, also appeared on behalf of CalPERS.

Respondent Melinda A. Tackitt represented herself and was accompanied by her husband, John Tackitt.

Evidence was received, the record was closed, and the matter was submitted for decision on January 24, 2013.

SUMMARY

Ms. Tackitt appeals CalPERS' denial of her application to purchase Additional Retirement Service Credit (ARSC). The evidence established that Ms. Tackitt's last day on payroll with the County of Butte was March 9, 2010. Therefore, she was not in compensated employment when she submitted her application to purchase ARSC on August 18, 2010. Furthermore, Ms. Tackitt did not prove by clear and convincing evidence the existence of grounds for estopping CalPERS from denying her application. Therefore, CalPERS properly determined that Ms. Tackitt was not eligible to purchase ARSC, and her appeal is denied.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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FACTUAL FINDINGS

1. The Statement of Issues was filed September 13, 2012, by Renee Ostrander, Assistant Division Chief, Retirement Account Services, CalPERS, in her official capacity.

Ms. Tackitt's Employment History

2. On November 2, 1994, Ms. Tackitt accepted employment with the County of Sutter. Through such employment, she became a Miscellaneous Member of CalPERS. Her employment with the County of Sutter ended effective February 25, 1999, and she accepted employment with the County of Butte effective March 8, 1999. Ms. Tackitt's status as a Miscellaneous Member of CalPERS continued throughout her employment with the County of Butte, which ended effective August 31, 2010, when she retired for service. As of her date of retirement, she had accrued a total of 15.105 years of service credits as a CalPERS member.

3. In August 2009, Ms. Tackitt began a leave of absence for medical reasons from her position with the County of Butte. Due to accrued vacation and sick leave, as well as donations of vacation leave by co-workers, Ms. Tackitt received her full salary through the pay period covering March 6 through 19, 2010. After that, she received state disability insurance benefits.

Application to Purchase ARSC

4. By August 2010, Ms. Tackitt's medical condition had not improved, and she made the decision to retire. But because she was retiring at a much younger age than she had originally anticipated, she began to explore the possibility of purchasing ARSC. She spoke with Kim Lewis, an employee with Butte County's Human Resources Department. Ms. Lewis explained that Ms. Tackitt needed to submit an application to purchase ARSC prior to retiring and suggested that Ms. Tackitt speak with a CalPERS representative. Ms. Tackitt spoke with at least two different CalPERS representatives by telephone and discussed the differences between disability and service retirement, as well as the possibility of purchasing ARSC. Ms. Tackitt ultimately made the decision to retire for service.

5. On August 17, 2010, Ms. Tackitt brought her retirement application to the Butte County Human Resources Department, and Ms. Lewis completed the employer certification section. Ms. Lewis wrote that Ms. Tackitt's last day on payroll was March 9, 2010.

6. On August 18, 2010, Ms. Tackitt and her husband met with JeanAnn Kirkpatrick, a representative for CalPERS. Ms. Kirkpatrick reviewed Ms. Tackitt's retirement application and suggested that since Ms. Tackitt's last day on payroll was March 9, 2010, she (Ms. Tackitt) change her retirement date from August 31, 2010, to March 9, 2010, so she could receive retirement benefits earlier. Ms. Tackitt agreed, and Ms. Kirkpatrick changed the retirement date on the application. Ms. Tackitt then showed Ms.

Kirkpatrick the application to purchase ARSC and asked about Ms. Lewis' previous instructions that the application had to be submitted prior to retiring. After conferring with a colleague, Ms. Kirkpatrick confirmed the accuracy of Ms. Lewis' instructions. Ms. Tackitt confirmed her desire to purchase ARSC, and Ms. Kirkpatrick changed the retirement date on the retirement application back to August 31, 2010.

CalPERS' Receipt of Applications for Retirement and to Purchase ARSC

7. Ms. Kirkpatrick accepted Ms. Tackitt's completed Service Retirement Election Application. She also accepted Ms. Tackitt's completed Request for Service Credit Cost Information – Additional Retirement Service Credit, the form CalPERS uses to allow members to apply to purchase ARSC.

8. On November 22, 2010, CalPERS sent Ms. Tackitt correspondence acknowledging receipt of her Request for Service Credit Cost Information – Additional Retirement Service Credit and advising her that she did not qualify for the purchase of ARSC. CalPERS provided the following reason for her not being qualified:

Our records indicate that your last day on payroll with Butte County was March 9, 2010, as certified by your employer on your application for retirement. Since you were not in compensated employment with a CalPERS covered employer on the date your Request was received, you are not eligible to purchase this type of additional service credit.

Hearing Testimony

9. Mathew Eubanks, Section Manager for the Staff Services Unit of CalPERS, testified at hearing and explained that two prerequisites to the purchase of ARSC are that the member must be "in compensated employment" and must be an "active member" of CalPERS at the time of application. He defined "compensated employment" as being paid with funds controlled by the member's employer. Because the County of Butte reported Ms. Tackitt's last day of compensated employment as having been March 9, 2010, and she did not submit her application to purchase ARSC until August 18, 2010, Mr. Eubanks explained Ms. Tackitt's application was denied.

10. Ms. Tackitt also testified at hearing. She explained that she was paid during her entire one-year leave of absence. When asked to explain the source of such payment, she explained that she used her accrued vacation and sick leave, as well as vacation leave donated by co-workers, for about the first six months. Afterward, she began receiving state disability insurance benefits. Ms. Tackitt also explained that while she was not paid any part of her salary after March 9, 2010, she continued to receive "earnings" because the County of Butte continued to pay its portion of her health insurance benefits until she retired. She said she received a "Direct Deposit Voucher" similar to that which was admitted as Exhibit 14 every two weeks from March 20, 2010, until she retired.

11. Ms. Tackitt also explained that during each of her conversations with a CalPERS representative, both over the telephone and in person with Ms. Kirkpatrick, she always told the representative that her last day on payroll was March 9, 2010. No one ever told her she was ineligible to purchase ARSC. And while she admitted to reading information that explained she had to be in compensated employment when she applied to purchase ARSC, she explained that she could not obtain a clear definition of that phrase anywhere or from anyone. Ms. Tackitt explained that while she did not believe any of the representatives intentionally tried to mislead her, she said she could have requested additional donations of leave time from co-workers or tried to return to work on a part-time basis had she been told she was not eligible.¹

Evaluation of the Evidence

12. Witness credibility is not an issue in this matter, and all three witnesses who testified at hearing were credible. Ms. Tackitt's testimony that she believed she continued to receive "earnings" throughout her leave of absence was persuasive. However, she candidly admitted that she received a "Direct Deposit Voucher" similar to that which is Exhibit 14 after she stopped receiving her "salary." Exhibit 14 has a column entitled "Earnings" which lists the following types of earnings: regular wages, non-compensation, sick leave, compensated time off, holiday pay, vacation, and disability adjustment. There also is a column entitled "Amount," which itemizes the amount paid for each type of earnings. That column shows that no amount was paid for any type of earnings. Therefore, the persuasive evidence established that Ms. Tackitt received no earnings paid by the County of Butte after March 9, 2010.

13. Ms. Tackitt's testimony about her confusion over the meaning of compensated employment and that she would have attempted to take steps to become eligible to purchase ARSC had she been told that she was ineligible was also believable. However, Ms. Tackitt admitted that she did not believe any of the CalPERS representatives intentionally tried to mislead her. Furthermore, she chose her August 31, 2010 retirement date before she had met with Ms. Kirkpatrick. Additionally, Mr. Tackitt testified that Ms. Kirkpatrick did not say that his wife's application to purchase ARSC would be approved "because she doesn't make that decision." Therefore, the "intent" and "detrimental reliance" elements of a claim of estoppel are missing. (See, e.g., *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 585 [a claim of estoppel fails as a matter of law if any of its elements is missing].)

LEGAL CONCLUSIONS

Burden of Proof

¹ Mr. Tackitt's hearing testimony was substantially similar to his wife's.

1. Ms. Tackitt has the burden of proving she was eligible to purchase ARSC. (See, *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn. 5.)

Applicable Law

2. Government Code section 20909 provides the following regarding the purchase of ARSC:

(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.

(b) A member may elect to receive this additional retirement service credit at any time prior to retirement by making the contributions as specified in Sections 21050 and 21052. A member may not elect additional retirement service credit under this section more than once.

(c) For purposes of this section, "additional retirement service credit" means time that does not qualify as public service, military service, leave of absence, or any other time recognized for service credit by the retirement system.

(d) Additional retirement service credit elected pursuant to this section may not be counted to meet the minimum qualifications for service or disability retirement or for health care benefits, or any other benefits based upon years of service credited to the member.

(e) This section only applies to the following members:

(1) A member while he or she is employed in state service at the time of the additional retirement service credit election.

(2) A member of the system defined in Section 20324.

(f) For purposes of this section, "state service" means service as defined in Section 20069.

3. As is relevant here, Government Code section 20069, subdivision (a), defines "state service" as follows:

"State service" means service rendered as an employee or officer (employed, appointed, or elected) of the state, the California Institute for Regenerative Medicine and the officers and employees of its governing body, the university, a school employer, or a contracting agency, for compensation, and only while he or she is receiving compensation from that employer therefor, except as provided in Article 4 (commencing with Section 20990) of Chapter 11.

4. The following are the elements of a claim of estoppel against a governmental entity: 1) the government employee must be apprised of the true facts; 2) that employee must have intended or reasonably believed that her conduct would be relied upon; 3) the party asserting estoppel must be ignorant of the true facts; 4) that party must actually rely upon the government employee's conduct to her detriment; and 5) the injustice that would result from not applying estoppel outweighs any negative effect on public interest or policy that would result from applying estoppel. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 497.) And the party asserting estoppel has the burden of proving each of those elements by clear and convincing evidence. (*In re Marriage of Brinkman* (2003) 111 Cal.App.4th 1281, 1289.)

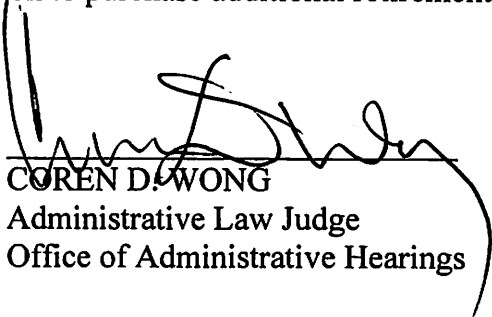
Conclusion

5. As discussed in Factual Finding 12, Ms. Tackitt stopped receiving "compensation" from the County of Butte on March 9, 2010. Therefore, she was not employed in state service when she applied to purchase ARSC on August 18, 2010. Furthermore, Ms. Tackitt did not prove the existence of grounds to estop CalPERS from denying her application. (Factual Finding 13.) CalPERS properly determined that she was ineligible to purchase ARSC. (Gov. Code, §§ 20069, subd. (a); 20909, subd. (e)(1).)

ORDER

The appeal of respondent Melinda A. Tackitt from the California Public Employees' Retirement System's denial of her application to purchase additional retirement service credit is DENIED.

DATED: February 12, 2013


COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings