

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Request to Purchase
Additional Retirement Service Credit of:

Case No. 4719-0563

MICHAEL J. SHIREY,

OAH No. 2014080407

Respondent,

and

CITY OF CHULA VISTA,

Respondent.

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 9, 2015, in San Diego, California.

Wesley E. Kennedy, Senior Staff Attorney, represented complainant, Renee Ostrander, Acting Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS).

Michael J. Shirey, Esq., respondent, represented himself.

There was no appearance by the City of Chula Vista.

The record remained open until April 1, 2015, to allow the parties to file written closing statements. Complainant's closing statement was received and marked for identification as Exhibit 17. Respondent's closing statement was received and marked for identification as Exhibit B.

The record was closed and the matter was submitted on April 1, 2015.

ISSUE

May Mr. Shirey purchase three years of Additional Retirement Service Credit (ARSC)?

FACTUAL FINDINGS

Jurisdiction

1. On August 8, 2014, complainant filed the statement of issues in her official capacity. The statement of issues alleged that CalPERS was unable to grant Mr. Shirey's request to purchase three years of ARSC because he failed to timely submit a completed election package within the 60-day time frame.

2. Mr. Shirey is employed by the City of Chula Vista. By virtue of his employment, Mr. Shirey is a local miscellaneous member of CalPERS, subject to Government Code section 20909.

Additional Retirement Service Credit

3. Under Government Code section 20909, eligible CalPERS members could purchase ARSC that could be applied in calculating retirement benefits. The ARSC program was intended to be "cost neutral" to employers, which meant the member's contribution covered the cost to fund future benefits obtained under the ARSC program.

4. 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. Shirey's Request to Purchase ARSC

5. On November 19, 2012, Mr. Shirey signed a form entitled: "Request for Service Credit Cost Information Additional Retirement Service Credit." CalPERS received this form on November 26, 2012. In the form, Mr. Shirey requested the opportunity to purchase three years of ARSC.

6. On December 4, 2012, Mr. Shirey called CalPERS to inquire about the processing of his ARSC request. He was told that there was currently no processing time frame for ARSC purchases.

7. On January 31, 2013, CalPERS sent Mr. Shirey a confirmation of his request to purchase ARSC. CalPERS's letter stated that due to the elimination of ARSC effective January 1, 2013, CalPERS had received a high volume of member requests to purchase ARSC. The letter informed Mr. Shirey that CalPERS would respond to requests about ARSC in the order the requests were received. The letter stated that Mr. Shirey would be given a one-time opportunity to purchase ARSC provided he satisfied the eligibility requirements. The letter stated, "[a]t this time, we are projecting ALL ARSC requests will have been responded to by the end of September 2013. In addition, once we have mailed you the cost information, it will be critical for you to follow the instructions through the completion of the election process."

The CalPERS letter identified a two-step process to purchase ARSC. CalPERS would provide Mr. Shirey with a Confirmation of Intent to Purchase ARSC Letter (confirmation of intent), which he was required to return to CalPERS within 30 days of the date on the letter. Once CalPERS received the confirmation of intent, CalPERS would mail Mr. Shirey an ARSC Cost Package (cost package). Mr. Shirey was required to return the cost package to CalPERS within 60 days of the date set forth on the cost package; if he failed to do so, he would have no further right to resubmit the request.

The CalPERS letter closed by thanking Mr. Shirey "for your patience while we process the ARSC requests. We apologize for an inconvenience this delay may cause you."

8. On March 25, 2013, CalPERS mailed Mr. Shirey a confirmation of intent form. The letter accompanying the form again outlined the two-step process and required that the confirmation of intent form be completed and returned to CalPERS within 30 days. The letter stated that once CalPERS received the confirmation of intent form, CalPERS would update the cost to purchase ARSC and provide Mr. Shirey with a cost package.

Mr. Shirey timely completed and signed the confirmation of intent form on April 10, 2013, in which he confirmed his request to purchase three years of service credit. CalPERS received Mr. Shirey's confirmation of intent form on April 16, 2013.

9. Customer Touch Point is the internal computer system CalPERS used to document all activity regarding a member's account. On April 18, 2013, a Customer Touch Point report showed that CalPERS staff member Lisa Devita prepared and mailed a cost package to Mr. Shirey. Another staff member verified that occurred. CalPERS sent Mr. Shirey the cost package by first-class mail through the United States Postal Service.

10. Mr. Shirey never received the cost package. He did not know that the cost package had been sent to him until he called CalPERS on September 19, 2013, and was told that the cost package had been sent to him on April 18, 2013. CalPERS informed Mr. Shirey that since the 60-day time period had lapsed, a new cost package could not be issued.

11. On September 19, 2013, Mr. Shirey sent an appeal letter to CalPERS. Mr. Shirey's letter stated that on or about February 2013, he contacted CalPERS by telephone to check the status of his ARSC request; that he was told that as a result of the numerous ARSC requests made by CalPERS members, he would likely not be notified about the filing of additional paperwork until September 2013; that since he had not heard anything from CalPERS, he contacted CalPERS again in September 2013 to inquire about his paperwork. Mr. Shirey's letter stated that he was then told for the first time that the paperwork had been mailed to him on April 18, 2013. Mr. Shirey's letter stated that he never received the cost package. His letter noted that he lived in a condominium; he speculated that the cost package may have been placed in the wrong mailbox.

12. CalPERS Retirement Program Specialist Jennifer Innocenti testified that CalPERS could not grant an extension beyond the 60-day time frame because of the statutory elimination of ARSC effective January 1, 2013.

13. Phillip Davis, assistant director of finance for the City of Chula Vista, testified that if CalPERS calculated Mr. Shirey's ARSC cost based on present-day factors, the city would not incur any financial liability for the additional benefits; if, however, Mr. Shirey was allowed to purchase ARSC credit at the cost originally quoted in the CalPERS cost package two years ago, the city would incur additional liability.

Evaluation

14. There is no evidence that suggests CalPERS did not mail the cost package to Mr. Shirey. Ms. Innocenti's testimony established that CalPERS maintains quality assurances to ensure that outgoing mail is properly processed. Mr. Shirey does not allege any wrongdoing by CalPERS.

Likewise, there is no evidence that suggests Mr. Shirey actually received the cost package in the mail. Mr. Shirey credibly testified that he did not receive the cost package. Mr. Shirey promptly responded to all other CalPERS mailings.

It is concluded that the cost package was lost in the mail.

15. Mr. Shirey had no independent memory of when he called CalPERS to check on the status of the ARSC processing. He testified only that he contacted between December 2012 and September 2013. He testified that whatever he put in his September 19, 2013, appeal letter was correct.

The appeal letter stated that Mr. Shirey called CalPERS sometime in February 2013. The only call received by CalPERS documented in the Touch Point system was the call received on December 4, 2012. Thus, it is concluded that the December 4, 2012, telephone call was the only phone inquiry Mr. Shirey made until he called again in September 2013.

LEGAL CONCLUSIONS

Administration of the Retirement Fund

1. The CalPERS retirement fund was established as a trust, to be administered in accordance with the provisions of the Public Employees Retirement Law solely for the benefit of the participants. (Gov. Code, § 20170.) Management and control of the retirement system is vested in the Board of Administration. (Gov. Code, § 20123). The Board of Administration has the exclusive control of the administration and investment of the retirement fund. (Gov. Code, § 20171.)

2. Pension legislation must be liberally construed, resolving all ambiguities in favor of the applicant. However, liberal construction cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Burden and Standard of Proof

3. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greator 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

4. 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.

5. 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).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

Mr. Shirey is Entitled to the benefit of Government Code section 20160

6. Under Government Code section 20160¹, Mr. Shirey seeks to correct his failure to timely submit the cost package to CalPERS. Mr. Shirey has the burden of

¹All further references are to the Government Code unless otherwise stated.

presenting documentation or other evidence to establish the right to correction. (Gov. Code § 20160, subd. (d).)

7. The first condition of section 20160 requires Mr. Shirey to seek 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.” (Gov. Code, § 20160, subd. (a)(1).) Mr. Shirey first learned that the cost package had been mailed to him when he called CalPERS on September 19, 2013. The same day, he sent CalPERS an appeal and requested that CalPERS resend the cost package. Mr. Shirey immediately attempted to correct the error, and he did so within a “reasonable time after discovery” within the meaning of section 20160, subdivision (a)(1).

8. Next, Mr. Shirey must show that 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.” (Gov. Code § 20160, subd. (a)(2).) Mr. Shirey’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).) Thus, Mr. Shirey faces a two part task: first, he must demonstrate an error or omission resulting from a mistake, inadvertence, surprise, or excusable neglect; and second, he must establish that he did not fail to make an inquiry that would have been made by a reasonable person in like or similar circumstances.

9. It is undisputed that Mr. Shirey failed to complete the cost package and return it to CalPERS by June 15, 2013. Mr. Shirey credibly established that he failed to receive the cost package in the mail and that he was unaware at the time that CalPERS had mailed the cost package to him.

Mr. Shirey admitted that he failed to check on the status of the cost package until September 2013. In order for Mr. Shirey to benefit from section 20160, any neglect on his part must be “excusable” within the meaning of Civil Procedure section 473.

Neglect is “excusable” when a reasonably prudent person under the same or similar circumstances might have made the same error. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258; *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276; *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1354.) Put another way, if a reasonably prudent person might have made the same error as Mr. Shirey, his failure to timely return the cost package to CalPERS is “excusable” within the meaning of Civil Procedure section 473.

Mr. Shirey was required to prove that a reasonably prudent person *might* have made the same error -- not that a reasonably prudent person *would* have made the same mistake.

10. Based on the January 31, 2013, letter CalPERS sent Mr. Shirey, it was reasonable for him to believe that CalPERS was processing a large number of ARSC requests and that there would be inevitable delays in the processing. The letter projected that

all ARSC requests would be responded to by the end of September 2013. CalPERS made no other indication or representation about the time-frame in which the cost package would be mailed once Mr. Shirey returned the confirmation of intent.

11. Mr. Shirey never received the cost package that CalPERS mailed to him the following week. He had 60 days, or until June 15, 2013, to return that cost package to CalPERS.

Knowing that there were delays in processing, and with the understanding that all responses would be completed by September 2013, a reasonably prudent person in Mr. Shirey's situation might have waited until after June 15, 2013, to inquire of CalPERS about the status of the cost package. CalPERS' counsel noted that Mr. Shirey could have checked the status of the cost package online, in person, or by telephone. However, given that CalPERS had indicated there were going to be delays in processing, a reasonable person might have waited until after June 15, 2013, to begin making inquiries about the status. According to Ms. Innocenti's testimony, any inquiry made after this date would have been too late, and CalPERS would have denied any extension requests due to section 20909.

Mr. Shirey established that his failure to return the cost package by June 15, 2013, was "excusable neglect" within the meaning of Civil Procedure section 473, and that his conduct constituted in that regard was an "error or omission" within the meaning of section 20160, subdivision (a)(2).

12. However, these findings do not end the inquiry. In order to prevail, Mr. Shirey must also demonstrate that he did not fail to make an inquiry that would be made by a reasonable person in like or similar circumstances. (Gov. Code § 20160, subd. (a)(3).) This is not subject to the same standard of "excusable neglect," which only requires that a reasonable person *might* have made the same mistake or error. This provision within section 20160 reflects the legislature's intent to ensure that the statute is not applied where a member fails to take an action that would be undertaken by a reasonable person in the same or similar circumstances. Mr. Shirey's omission is not subject to correction if a reasonable person in a similar circumstances would have made an inquiry.

13. Mr. Shirey inquired about the status of his request in September 2013. Having already concluded that a reasonable person might have waited until after June 15, 2013, to inquire about the status, the question is whether Mr. Shirey's failure to inquire over the next three months bars him from relief.

Complainant's counsel argued that this delay was unreasonable and that a reasonable person would have checked on the status much earlier.

Given that Mr. Shirey had the belief, albeit erroneous, that his cost package would be delayed due to the need of CalPERS to process a high volume of ASRC requests, his failure to inquire by September 2013 was not wholly unreasonable. Further, Mr. Shirey did inquire about the status, and he filed an appeal the very same day.

The weight of the evidence established that Mr. Shirey diligently pursued his rights once he became aware that CalPERS had mailed the cost package, and his delay in taking action until September was not unreasonable given the circumstances. Therefore, Mr. Shirey established that he is entitled to relief under section 20160.

14. Section 20160, subdivision (e), states that corrections of errors or omissions shall be such that the status, rights, and obligations of all parties are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time.

Allowing Mr. Shirey to purchase the three years of service credit at the cost indicated in the April 18, 2013, cost package would cause Chula Vista to incur potential financial liability.

In order to avoid liability to his employer, Mr. Shirey has not sought retroactive application; instead, he requested that he be able to purchase service credit based on a current calculation. Under this circumstance, his employer would not incur any financial liability.

Therefore, while retroactive application is not appropriate, Mr. Shirey shall be allowed to purchase three years of service credit based on current calculation. Although the legislature eliminated ARSC effective January 1, 2013, that legislation does not preclude the application of section 20160 in appropriate circumstances such as those established in this matter. CalPERS shall honor Mr. Shirey's November 26, 2012, request to purchase ARSC, which was received prior to the sunset date, consistent with the findings made herein.

ORDER

Respondent Michael Shirey's appeal is sustained. Mr. Shirey shall be allowed to purchase three years of ARSC pursuant to his November 26, 2012 request. CalPERS shall provide Mr. Shirey, by certified mail, with a new cost package within 60 days of the effective date of this decision.

Dated: April 29, 2015

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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings