

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Appeal Regarding  
Additional Retirement Services Credit of:

JEFFREY OLGUIN,

Respondent,

and

DEPARTMENT OF CONSUMER  
AFFAIRS,

Respondent.

Case No. 2013-0965

OAH No. 2014080558

**PROPOSED DECISION**

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 25 and 26, 2015, in Sacramento, California.

Wesley E. Kennedy, Senior Staff Attorney, represented petitioner Karen DeFrank, Chief, Customer Account Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Respondent Jeffrey Olguin was present throughout the hearing and represented himself.

Oral and documentary evidence was received, and argument was heard. The record was left open until no later than April 9, 2015, for petitioner to file an Amended Statement of Issues, which was filed on March 27, 2015, and replaces the original Statement of Issues. The record was closed and the matter deemed submitted for decision on March 27, 2015.

**SUMMARY**

Petitioner denied respondent's request to purchase Additional Retirement Service Credit (ARSC) on the grounds that respondent did not submit his Election to Purchase Service Credit

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within 60 days of the date on the service credit cost package mailed by CalPERS to respondent on March 21, 2013. Respondent asserted that he never received the service credit cost package with the enclosed notice of a 60-day deadline, and thus should not be denied his requested purchase of ARSC for failure to meet the deadline. Petitioner countered that respondent failed to make reasonably prudent inquiry with CalPERS regarding the status of his purchase request, and thus pursuant to Government Code<sup>1</sup> section 20160 CalPERS cannot correct any error related to respondent's failure to submit the Election to Purchase Service Credit within the 60-day deadline. Petitioner's arguments were not persuasive. CalPERS shall correct respondent's error or omission in a manner consistent with Government Code section 20160, subdivision (e).

### FACTUAL FINDINGS

1. Respondent is employed by the state of California. By virtue of his employment he is a member of CalPERS.

2. On October 8, 2012, respondent submitted to CalPERS a Request for Service Credit Cost Information - Additional Retirement Service Credit.<sup>2</sup>

3. On November 28, 2012, CalPERS sent a letter to respondent acknowledging his request for ARSC and notifying him of several important points, including:

- (a) Due to the elimination of this program as of January 1, 2013, CalPERS has received a high volume of ARSC requests.
- (b) CalPERS will review ARSC requests and mail ARSC cost information in the date order received.
- (c) CalPERS will respond to all ARSC requests by the end of May 2013.
- (d) If you receive a Confirmation of Intent to Purchase ARSC Letter, CalPERS must receive your response within 30 days of the date on the letter.

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<sup>1</sup> All statutory references are to the Government Code, unless otherwise specified.

<sup>2</sup> The Amended Statement of Issues alleges that as of October 8, 2012, respondent did not meet the eligibility criteria to purchase ARSC because he had 4.994 years of service, which is approximately 2.2 days short of the five years of credited state service required to elect to purchase ARSC. At the opening of the hearing in this matter, counsel for petitioner acknowledged that the reference to 4.994 years of service is not germane to a determination of this matter. Respondent had the requisite five years of service prior to March 12, 2013, at which time CalPERS mailed to respondent a Confirmation of Intent to Purchase ARSC. Respondent introduced into evidence a document from the [my.CalPERS.ca.gov](http://my.CalPERS.ca.gov) website stating that as of December 31, 2012, respondent had 5.285 years of credited state service. No further evidence or argument was introduced by either party on this issue.



(e) If you receive an ARSC Cost Package, CalPERS must receive the completed election document within 60 days of the date on the Cost Package.

(f) CalPERS apologizes for any inconvenience this delay may cause you.

4. On December 24, 2012, respondent and his father Ronald Olguin went to the CalPERS Sacramento Regional Office and confirmed that his request for ARSC had been accepted and was being processed.

5. On March 12, 2013, CalPERS mailed to respondent at his home address a Confirmation of Intent to Purchase ARSC, to be returned and date stamped by CalPERS within 30 days.

6. On March 18, 2013, respondent and his father, Ronald Olguin, went to the CalPERS Sacramento Regional Office, submitted the Confirmation of Intent to Purchase Service Credit, and obtained the required CalPERS date stamp on the document.

7. Respondent testified that he asked the assisting CalPERS employee on March 18, 2013, what the next step would be, and that the CalPERS employee told him he should expect to receive some documents from CalPERS within the next couple of months. Respondent's father, who was not directly participating in the conversation, recalls that the CalPERS employee said the next set of documents would be forthcoming, without specifying any approximate date. The CalPERS employee notes in the Customer Touch Point Report for March 18, 2013, do not include any reference to a discussion about when respondent should expect to receive additional documents from CalPERS. Respondent was the witness most directly participating in the conversation. There is no reason to doubt the credibility of respondent's statement that the assisting CalPERS employee told him to expect some documents within the next couple of months.

8. On March 21, 2013, CalPERS mailed to respondent at his home address a service credit cost package including an Election to Purchase Service Credit, and a notice that the Election to Purchase Service Credit must be completed and returned to CalPERS within 60 calendar days from the date on the service credit cost package, and that no extensions would be granted under any circumstances.

9. Respondent did not receive the service credit cost package sent by CalPERS on March 21, 2013. Respondent resides with his father, Ronald Olguin, who is retired and spends much of his time at home and regularly checks for incoming mail. Neither respondent nor Ronald Olguin saw the service credit cost package.

10. On May 28, 2013, respondent inquired with CalPERS via e-mail about the status of his ARSC request. This is the first contact respondent had with CalPERS since his visit to the Sacramento Regional Office on March 18, 2013.

11. On June 3, 2013, respondent received a response from CalPERS via e-mail, informing him that he is no longer eligible for the ARSC.

12. On June 4, 2013, respondent and his father went to the CalPERS Sacramento Regional Office to inquire regarding respondent's eligibility for ARSC. Respondent followed up on this visit with a letter to CalPERS dated June 5, 2013, and numerous other contacts and correspondence with CalPERS.

13. On September 9, 2013, CalPERS sent a letter to respondent notifying him that CalPERS is unable to honor his request to reconsider processing his ARSC eligibility.

14. On September 30, 2013, respondent sent CalPERS a request for hearing to appeal their denial of ARSC eligibility.

15. On February 6, 2014, the statement of issues in this matter was prepared, and the hearing in this matter ensued.

## 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).

2. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

### *Applicable Statutes*

3. Government Code section 20160 authorizes CalPERS to correct any errors or omissions of an active or retired member, subject to certain conditions, as follows:

(a)(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.

(a)(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.

(a)(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 . . . .

(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.

### *Discussion*

4. Petitioner argued that respondent is ineligible to purchase ARSC because he failed to submit the Election to Purchase Service Credit within 60 days of the date on the service credit cost package mailed by CalPERS to respondent on March 21, 2013, and that this failure is an error or omission not correctable under section 20160 because respondent failed to

make the inquiry with CalPERS regarding the status of his application to purchase ARSC that a reasonably prudent person would have made under the same or similar circumstances.

5. Respondent's failure to timely submit the Election to Purchase Service Credit is the product of surprise or excusable neglect, as these terms are used in Code of Civil Procedure section 473(b). Respondent did not receive the Election to Purchase Service Credit enclosed with the service credit cost package mailed by CalPERS to respondent on March 21, 2013. (Factual Finding 9.) Respondent was not negligent, and certainly not inexcusably negligent, in his failure to timely complete and submit a document he never received. In the context of a civil matter governed by Code of Civil Procedure section 473(b), this would be roughly analogous to a party's untimely response to a complaint or other pleading that was mailed to but never received by the party.

6. Respondent made diligent inquiries with CalPERS regarding the status of his application to purchase ARSC, consistent with what a reasonable person would do under similar circumstances. (Factual Findings 4, 6, and 10.) Based upon the substance and frequency of communications from CalPERS, respondent reasonably anticipated that CalPERS would send him the service credit cost package approximately two or three months after he submitted his Confirmation of Intent to Purchase Service Credit on March 18, 2013. (Factual Findings 6 and 7.)

7. The substance and pattern of written communications support the reasonableness of respondent's expectations. For example, respondent submitted a Request for Service Cost Information on October 8, 2012. CalPERS responded with a letter to respondent approximately seven weeks later on November 28, 2012. The letter from CalPERS included statements indicating that the member should anticipate some delays, including that CalPERS has received a high volume of ARSC requests, that ARSC cost information will be completed in date order received, that CalPERS will respond to all ARSC requests by the end of May 2013, and that CalPERS apologizes for any inconvenience this delay may cause. (Factual Findings 2 and 3.)

On March 12, 2013, more than three months after the previous CalPERS letter, CalPERS sent respondent a Confirmation of Intent to Purchase ARSC. (Factual Finding 5.) Respondent completed the Confirmation of Intent to Purchase Service Credit, and submitted it to CalPERS on March 18, 2013.

8. The preponderance of evidence is that respondent had good reason to expect that CalPERS would send him the service credit cost package two or three months after he submitted the Confirmation of Intent to Purchase Service Credit on March 18, 2013. Similarly, the preponderance of evidence is that respondent inquired with CalPERS regarding his ARSC application as frequently as would any other reasonable person under similar circumstances.

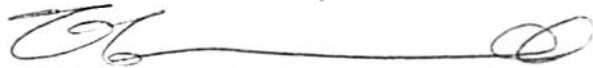
9. For these reasons, and based on the Factual Findings and Legal Conclusions as a whole, the appropriate remedy pursuant to Government Code section 20160, subdivision (a), is to have CalPERS correct respondent's error or omission in failing to file the Election to Purchase Service Credit mailed to respondent from CalPERS on March 21, 2013.



ORDER

CalPERS shall correct respondent's error or omission in failing to timely file the Election to Purchase Service Credit, in a manner consistent with Government Code section 20160, subdivision (e).

DATED: April 15, 2015

A handwritten signature in black ink, appearing to read 'Timothy J. Aspinwall', written over a horizontal line.

TIMOTHY J. ASPINWALL  
Administrative Law Judge  
Office of Administrative Hearings