

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

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

In the Matter of the Appeal of the  
Forgiveness of Retirement Benefit  
Overpayment of:

JOSEPH R. POINDEXTER,

Respondent.

Case No. 2016-0192

OAH No. 2016030383

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Heather M. Rowan, State of California, Office of Administrative Hearings (OAH), on August 16, 2016, in Sacramento, California.

Elizabeth Yelland, Senior Staff Attorney, represented the petitioner, California Public Employees' Retirement System (CalPERS).

Joseph R. Poindexter (respondent) was present and represented himself.

Evidence was received, the record was closed, and the matter submitted for decision on August 16, 2016.

**ISSUE**

Respondent retired on December 31, 2004 as a CalPERS member with over 30 years of service credit. He also had 8.707 years of non-member credit assigned to him through a divorce settlement. From December 31, 2004 until June 8, 2015, respondent was erroneously paid based on 16.414 years of non-member service credit. In 2015, CalPERS reduced respondent's warrant to an amount based on the corrected non-member service credit. Over 10.5 years, respondent was overpaid by \$58,411.42. Due to a three-year statute of limitations, CalPERS requested respondent pay CalPERS \$18,561.48, either in a lump-sum, or in monthly installments.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED 14 Sep 2016

*[Signature]*

The question is whether CalPERS is legally entitled to recover the \$18,561.48 overpayment that was incurred due to CalPERS's mistake or whether respondent's overpayment of retirement allowance should be forgiven?

#### FACTUAL FINDINGS<sup>1</sup>

1. On March 4, 2016, November 19, 2013, Anthony Suine, Chief of the Benefit Services Division, CalPERS, made and filed the Statement of Issues in his official capacity.

2. While the parties may disagree on minor details, the overall facts in this case are not in dispute. Respondent and his ex-wife were married on May 27, 1983 and were legally separated on November 11, 2000. Both spouses worked for the State of California and were CalPERS members. On September 1, 2004, the Superior Court of Sacramento County approved the "Stipulation for Qualified Domestic Relations Order Re Division of California Public Employees' Retirement System Benefits in the Dissolution of Marriage of respondent Joseph R. Poindexter and Sandra Poindexter." Respondent was awarded 50 percent of Sandra Poindexter's accumulated retirement contributions and service credit during the time of their marriage, which was 8.707 years.

3. On November 1, 2004, respondent submitted an application for non-member service retirement as well as member service retirement. His member service account with CalPERS is not at issue. On November 4, 2004, CalPERS established respondent's non-member account with 8.707 years of service credit and sent him a letter stating his benefit would be based on those years and he would need to request an estimate of his monthly allowance. On December 17, 2004, CalPERS responded to respondent's application for non-member retirement benefits with a letter stating that his benefit would be \$860.16. Attached to the letter was a chart to demonstrate the basis of the benefit. In relevant part, the chart showed:

EMPLOYER NAME	YRS OF SERVICE
DEPT TOXICS	8.707
DEPT HEALTH SVC	2.273
DEPARTMENT OF I	3.579
SOCIAL SERVICES	1.855

The chart did not provide a sum total of the years of service. The amount of service respondent should have received for Department of Toxics was one year, but was incorrectly

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<sup>1</sup> The Factual Findings are based primarily on documentary evidence. Respondent did not testify on his own behalf, and was subject to limited cross examination. To the extent any finding is based on respondent's testimony, it is noted. Truc Nguyen, a Retirement Program Specialist, testified on behalf of CalPERS; his testimony was largely limited to authenticating documents.

listed as 8.707 years. Adding these amounts together, CalPERS reported that respondent's total years of service was 16.414. This amount is nearly double respondent's non-member service credit of 8.707.

4. Respondent retired on December 31, 2004, and collected his first retirement warrant on February 1, 2005. On June 10, 2015, Sandra Poindexter requested to convert some of her member time from "Tier 2" to "Tier 1." At that time, CalPERS reviewed both respondent's benefit allowance and Sandra Poindexter's benefit allowance and discovered its mistake. On July 2, 2015, CalPERS sent a letter to respondent stating that his monthly benefit for non-member service would reduce from \$860.16 to \$403.86 and that respondent had, over the prior 10 years, received an overpayment of \$58,411.42. Of that, seven years' worth of payments would be forgiven, and respondent was responsible for \$39,848.94. CalPERS apologized for the "inconvenience" and stated, "[w]e realize you may not have been aware of the overpayment."

On July 8, 2015, CalPERS sent respondent an amended letter decreasing the amount he owed CalPERS from \$39,848.94 to \$18,561.48, to account for only three years' of overpayments. The amended letter offered respondent three options to repay: 1) monthly deductions of \$45.63 until the amount is paid in full; 2) withhold the full monthly allowance until \$18,561.48 has been reimbursed; or 3) pay the amount in full.

5. Respondent appealed CalPERS's decision. He stated that the mistake was CalPERS's doing and he should not have to repay to fix their mistake. He acknowledged and accepted the lowered monthly amount and only appealed the repayment. Respondent also informed CalPERS that he relied on its calculations because he did not have access to their figures; his only concern at the time was whether he could support himself on the stated amount. He requested that CalPERS forgive the entire amount, and asserted that CalPERS "has funds that can be shifted to cover just such incidents...."

6. On September 3, 2015, CalPERS informed respondent that an overpayment can only be forgiven if the following conditions are met: 1) the person who was overpaid had no obligation to inquire and did not know he was overpaid; and 2) reimbursement of the overpayment would cause the person undue financial hardship. To request forgiveness, respondent would have to answer the question in writing regarding why he did not inquire about the miscalculation. CalPERS stated that respondent did not inquire even though the payment was based on nearly double the service years that were awarded to him and some of the agencies listed never employed his ex-wife. The latter assertion is not supported by the evidence. CalPERS also requested that respondent provide financial information that would support a claim that repayment would cause an undue financial hardship.

7. Respondent wrote CalPERS a letter stating that the first condition was met when CalPERS admitted that they made the mistake. Additionally, he did not inquire as to the amount of his non-member service benefit because he was under no obligation to question CalPERS's calculations and did not have the skills or knowledge necessary to challenge the amounts. The dollar amounts were roughly what respondent expected they

would be. Respondent refused to provide any financial material that would show undue hardship. He stated that his appeal was not based on the hardship that the repayment would cause, but on the principle that CalPERS was attempting to make respondent pay for its mistake.

8. CalPERS again requested financial information of financial hardship and stated that, without the requested information, the installment amounts would be deducted from his monthly warrant. Respondent testified that he is responsible with his money and for that reason, CalPERS does not consider him to have a financial hardship. He did not know there was a mistake and asserted that CalPERS created a debt in his name. Based on this assertion, respondent appealed.

#### *Overpayment Amount*

9. CalPERS provided a chart entitled "Allowance Adjustment Summary" to demonstrate the base allowance overpayment as well as the overpayments of the cost-of-living adjustment (COLA). At hearing, several errors were discovered in the document, and Mr. Nguyen explained that even though there are minor errors, the calculations are correct. The chart that demonstrates the recoverable portion of the overpayment is reproduced here.

#### **Overpayment Collectible after G.C. 20164 from 07/01/13 to 06/31/2015<sup>2</sup>**

	Should be	-	Was	=	Difference	x	Months	=	Total Over-payment
<b>Base Allowance</b>	\$456.30		\$860.16		-\$403.86		36		- \$14,538.96
<b>2012 COLA</b>	\$0.00		\$92.85		-\$92.85		9		-\$835.65
<b>2013 COLA</b>	\$0.00		\$107.75		-\$107.75		12		-\$1293.00
<b>2014 COLA</b>	\$0.00		\$123.10		-\$123.10		12		-\$1477.20
<b>2015 COLA</b>	\$0.00		\$138.89		-\$138.89		3		-\$416.67
After 3-year SOL									- \$18,561.48

10. The issue regarding why no COLA would be due to respondent (column two) had he been paid the correct amount over the three-year statutory period was not raised at hearing. Respondent wrote a letter after the hearing, however, regarding whether CalPERS had calculated the COLA payments properly. CalPERS did not respond to that letter. Regardless of respondent's letter, there is no statutory provision that allows CalPERS to recover COLA payments that were rightfully paid.

<sup>2</sup> These dates are incorrect. Under the three-year statute of limitations (SOL), the correct period from which CalPERS is entitled to recover is July 1, 2012 through June 30, 2015.

## Discussion

11. As explained in the Legal Conclusions below, it is determined that CalPERS is entitled to recover the overpayment it paid to respondent. The calculation, however, appears to be incorrect in light of Factual Findings 9 and 10. Respondent's repayment amount must be recalculated based on a corrected COLA computation. Even though the overpayment is solely attributable to CalPERS's mistake in the initial calculation of respondent's non-member retirement amount, the law requires that respondent repay the overpayment, as described in the Legal Conclusions below.

## LEGAL CONCLUSIONS

1. "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including ... the burden of persuasion by a preponderance of the evidence..." (*McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044; Gov. Code § 20160, subd. (d); Evid. Code, § 500.)<sup>3</sup> Grounds do not exist to grant respondent's appeal pursuant to Government Code sections 20160, subdivision (a), in that the preponderance of the evidence established that CalPERS has legal authority to collect three years' worth of overpayments based on Factual Findings 1 through 8.

2. CalPERS is a creation of statutes, codified in the Government Code, which grant it certain powers. CalPERS has no authority other than that granted by those statutes. It has the authority to pay benefits to a member only when the statutes authorize it and then only in the amount authorized. (See, *Hudson v. Posey* (1967) 255 Cal.App.2d 89.) Respondent cannot be paid an allowance in excess of that to which he is statutorily entitled.

3. Section 20160 et seq. addresses errors made by CalPERS and mandates that they be corrected if certain factors are established. Section 20160, subdivision (a), provides, in pertinent part, that the Board of Administration of CalPERS (Board) may, in its discretion and upon any terms it deems just, correct the errors or omissions of any 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.

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<sup>3</sup> Statutory references are to the Government Code, unless indicated otherwise.

(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.

(b) Subject to subdivisions (c) and (d), the Board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(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.”

4. Government Code section 20164 provides in pertinent part:

(a) The obligations of this system to its members continue throughout their respective memberships, and the obligations of this system to and in respect to retired members continue throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged. The obligations of the state and contracting agencies to this system in respect to members employed by them, respectively, continue until all of the obligations of this system in respect to those retired members, respectively, have been discharged. The obligations of any member to this system continue throughout his or her membership, and thereafter until all of the obligations of this system to or in respect to him or her have been discharged.

(b) For the purposes of payment 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 limitations shall be three years, and shall be applied as follows:

(1) In cases where the system makes an erroneous payment to a member or beneficiary, this system’s right to collect shall expire three years from the date of payment.

5. The determining issue in this case is whether the factors present establish the elements of an estoppel and whether it should be applied to give respondent the relief he seeks. It is well settled that estoppel cannot be used to enlarge CalPERS’s powers. (See, *Page v. City of Montebello* (1981) 112 Cal.App.3d 658 at 667; *Board of Administration, State Employees’ Retirement System v. Ames* (1963) 215 Cal.App.2d 215 at 230; and *Boren v. State Personnel Board* (1951) 37 Cal.App.2d 634.) Nor can estoppel provide a benefit to respondent which is not otherwise statutorily authorized because public employee benefits are wholly statutory. (*Hudson v. Posey, supra*, 255 Cal.App.2d 89.) Estoppel will not be applied against the government if doing so effectively nullifies a strong rule of policy adopted for the benefit of the public. (*Lentz v. McMahan* (1989) 49 Cal.3d 393; *County of San Diego v. Cal. Water* (1947) 30 Cal.2d 817.)

6. Estoppel is an equitable doctrine seeking to prevent a person or entity from profiting from their own wrongdoing. In determining whether or not estoppel applies to a given situation, the burden of establishing that all of the requirements have been met is upon the party asserting the estoppel. The California Supreme Court in the case of *City of Long*



*Beach v. Mansell* (1970) 3 Cal.3d 462, stated that the claiming party must establish four elements for estoppel to apply:

- (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.

Even assuming that respondent established these four elements, to apply equitable estoppel to a government entity, respondent must also overcome a greater hurdle: estoppel may apply to a government entity only if it does not offend some public policy to do so. (*Medina v. Board of Retirement, Los Angeles* (2003) 112 Cal.App.4th 864, 869.) To forgive the overpayment respondent received would enlarge CalPERS's authority regarding granting a beneficiary's allowance in amounts in excess of that authorized by statute. It would be detrimental to the public policy behind the creation of the Public Employees' Retirement System. "No court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations." (*Ibid.*)

7. The Board owes a fiduciary duty of trustee to a trust fund and its beneficiaries. It cannot ignore a mistake that benefits one person any more than it can refuse to correct one that inures to its benefit. To find an estoppel in this case would be sufficiently adverse to public interest or policy. Here, the Board has a primary obligation to protect the retirement fund for the benefit of *all* its beneficiaries and to minimize the employers' costs of providing benefits. To allow respondent to essentially keep years' worth of an overpayment that is in excess of the statutory formula would result in an unfunded liability. Forgiving this benefit would unjustly enrich him and allow CalPERS to act in excess of its statutory authority.

8. Accordingly, while it made an error and did not discover its error for several years, CalPERS is nevertheless required under section 20160 to correct the error and may require respondent to repay the overpayments of retirement allowance resulting from the error. Although respondent was overpaid from the time he began collecting his non-member warrant in 2004 until CalPERS discovered the error in 2015, there is a three-year statute of limitations that limits the amount CalPERS can recover. (*See* § 20164, subd. (b)(1).)

9. CalPERS is only statutorily authorized to recover the amount respondent actually received in error. Based on Factual Findings 9 and 10, respondent received an overpayment that must now be repaid. Respondent's repayment amount must be recalculated, however, to ensure that CalPERS does not recover COLA payments that were rightfully paid to the respondent.

## ORDER

The appeal of respondent Joseph R. Poindexter is DENIED, provided that CalPERS will recalculate and correct the overpayment amount pursuant to Legal Conclusion 9 and Factual Findings 9 and 10. Respondent will be allowed to make the repayments in installments per agreement between the parties.

DATED: September 12, 2016

DocuSigned by:

*Heather M. Rowan*

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HEATHER M. ROWAN  
Administrative Law Judge  
Office of Administrative Hearings