ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Request to Waive Interest on the Purchase of an Additional Year of Retirement Service Credit of:

PATRICIA L. CORNELY, Respondent,

and

FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT, Respondent.

Agency Case No. 2020-0583

OAH No. 2020100952

PROPOSED DECISION

Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, heard this matter on June 24, 2021, by videoconference.

Senior Attorney Kevin Kreutz represented complainant California Public Employees' Retirement System.

Respondent Patricia L. Cornely represented herself.

There was no appearance by or on behalf of respondent Foothill-De Anza Community College District.

The record closed and the matter was submitted for decision on June 24, 2021.

FACTUAL FINDINGS

Introduction

1. Respondent Patricia L. Cornely established membership with the California Public Employees' Retirement System (CalPERS) through her employment with Foothill-De Anza Community College District (Foothill-De Anza) on May 1, 1999.

2. The issue in this matter concerns respondent's purchase of additional retirement service credits (ARSC), sometimes colloquially called "airtime." Respondent purchased four years of ARSC in 2013, and she retired in 2014. On November 15, 2019, CalPERS informed respondent that her ARSC cost had been recalculated and that she had overpaid for the four years she purchased. CalPERS offered her the opportunity to buy a fifth year of ARSC at the recalculated price for a fifth year in 2013, plus interest through December 31, 2019. Respondent objected to the assessment of interest, requested that interest be waived, and requested an extension of time beyond December 31, 2019 to make an election.

3. CalPERS denied respondent's requests by letter dated January 6, 2020. Respondent appealed on January 28, 2020, and requested an administrative hearing.

4. A Statement of Issues was issued by Donald R. Martinez, Chief, Member Account Management Division, CalPERS, on October 29, 2020. This hearing followed.

Background: Employment and Retirement Contributions

5. Respondent became a member of CalPERS upon her hiring as a classified employee by Foothill-De Anza in 1999.

6. In 2003, respondent became a part-time certificated faculty member, and requested that her retirement contributions for both classified work and certificated work be made to CalPERS, not CalSTRS (California State Teachers' Retirement System).

7. In 2012, an audit of the community college system resulted in respondent being required to move her certificated contributions to CalSTRS going forward. However, respondent's contributions to CalPERS from the beginning of her part-time certificated work until 2012 were allowed to remain in CalPERS while a determination was made about her right to have retirement funds for both classified and certificated work remain with CalPERS.

8. Respondent retired in December 2014.

9. The passage of Senate Bill 525 in 2017 (codified in Government Code section 20309.7), resolved the question about respondent's membership in CalPERS, and allowed people in respondent's situation to have prior certificated work for school employers credited to CalPERS. However, it took CalPERS some time to determine how to include respondent's certificated compensation into her retirement calculations.

Purchase of ARSC and Subsequent Recalculations

10. Respondent requested information about purchasing ARSC in advance of her retirement. She signed a Request for Service Credit Cost Information – ARSC on December 15, 2012, stating she wanted to purchase five years of ARSC based on an online estimator that stated the lump-sum cost for five years was $117,079.95.

11. On May 2, 2013, CalPERS sent respondent an ARSC Confirmation of Intent Election Packet, stating that the lump-sum cost to purchase five years of ARSC was $152,652.52, and that the cost for four years was $122,122.02.

12. Respondent raised concerns about the cost calculations, noting that the base pay rate used to calculate the cost of ARSC was higher than the pay rate quoted in respondent's SPM (service prior to membership) election package. Respondent met with a CalPERS representative in the San Jose office in May 2013, who forwarded the question. A CalPERS representative from Sacramento subsequently stated that the ARSC calculation was correct.

13. Respondent then selected the number of years of ARSC she could afford to purchase based on those calculations. She purchased four years of ARSC for a lump-sum payment of $122,122.02, submitting her Confirmation of Intent to Purchase Service Credit on May 20, 2013. CalPERS sent respondent an ARSC Election form, and she submitted her election and choice of lump-sum option on July 12, 2013. Respondent paid $122,122.02 in July 2013.

14. Respondent retired for service effective December 30, 2014, and has been receiving monthly retirement benefits since that time.

15. After respondent's retirement, CalPERS corrected its calculations for her retirement benefits, based on corrected information about her rate of pay, and reduced her retirement benefit amount. At hearing, respondent explained that she was on a conference call in April 2019 with CalPERS staff and Foothill-De Anza staff, during which a CalPERS staff person realized an error had been made in how respondent's classified and certificated pay rates were used to calculate retirement contributions.

16. On September 12, 2019, Charles Miller, a CalPERS staff services manager from the Compensation Compliance and Review unit, sent respondent a follow-up email. Miller explained the provisions of the PERL (Public Employees' Retirement Law, Government Code section 20000 et seq.)[1] that governed how respondent's earnings were used in determining her retirement benefits, and what earnings were considered "overtime." He provided respondent with details on the calculations, what time period was her highest final compensation period, and the different payrates used for service credit purchases and retirement benefits.

17. On September 30, 2019, Tana Camargo, a CalPERS section leader for the Member Account Management Division, Service Credit Costing, Systems and Project Support Section, sent respondent an email stating: "After review of your ARSC purchase and the recent payroll updates, I am pleased to share that we have determined an additional year of service credit for ARSC will be available to purchase as a one-time opportunity. We will be sending you an amended election with the purchase and cost information and it must be returned as soon as possible." It appears that CalPERS did not actually send the cost information for another seven weeks.

18. On November 15, 2019, CalPERS sent respondent a letter informing her that the costs for her purchase of ARSC had been recalculated. The letter noted that respondent had purchased four years of ARSC in July 2013 for $122,122.02. The letter went on to state: "Due to payroll corrections completed by Foothill-DeAnza Community College District, your ARSC cost calculation is affected and has been recalculated." The corrected lump-sum cost to purchase four years was reduced to

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[1] All subsequent statutory citations are to the Government Code.

$90,050.58, and the cost for five years was reduced to $112,562.60. The letter informed respondent that the additional cost for her to purchase the fifth year of ARSC was $35,808.71, an amount which included interest through December 31, 2019. Enclosed with the letter was an Amended Election Document with the option to purchase the fifth year of ARSC for that amount, and a stated deadline of December 31, 2019.

19. Respondent corresponded by email with CalPERS staff regarding the ARSC cost recalculations. Respondent stated that based on the information CalPERS provided about the recalculated costs for ARSC, the amount she paid in 2013 for four years ($122,122.02) was more than sufficient to cover the recalculated cost for five years. She asked for more information about the calculations, and stated that the December 31, 2019 deadline did not provide enough time for her to make a decision.

20. Camargo explained in an email on November 18, 2019, that the cost to purchase the fifth year was based on respondent's reduced salary calculation as if processed at the time of her original request in 2013, but that the amount for the fifth year was "brought forward with interest through December 2019," meaning that it had not yet been fully paid. Respondent continued to ask questions regarding the calculations and the assessment of interest, and requested an extension of time.

21. On November 22, 2019, Christine Mercado, a CalPERS associate governmental program analyst for the Service Credit section of the Member Account Management Division, sent respondent a follow-up email. Mercado stated that an incorrect pay rate was used in the original calculation for respondent's purchase of ARSC, and that under section 20160, subdivision (b), the "board shall correct all actions taken as a result of errors or omissions." CalPERS had thus sent respondent a new election document to correct her original election, and had provided her with the choice of continuing with her purchase of four years ARSC and receiving a refund of

her overpayment, or purchasing a fifth year of ARSC. Mercado then explained how the monthly salary figures for the ARSC recalculations were derived.

22. On December 9, 2019, Camargo emailed respondent and stated that CalPERS had re-reviewed the payroll data and ARSC calculations, and the cost to purchase the additional fifth year of ARSC had changed slightly, to $35,635.45.

23. Respondent asked additional questions on December 10, 2019, about whether the additional year of ARSC would be applied retroactively to her retirement date, how the interest was calculated, how it would affect her retirement benefits if she bought the fifth year, what refund she would receive if she continued with four years, and how much interest she would receive on the refund of her overpayment.

24. In emails on December 13, 2019, Camargo informed respondent that the fifth year of ARSC would be applied retroactively if purchased, and she provided updated figures. The recalculated costs to purchase ARSC were $86,459.60 for four years, and $108,074.50 for five years, calculated based on the corrected payroll information. Camargo stated that the cost for respondent to purchase the fifth year now would be $35,635.45, representing the difference between what respondent had paid for four years based on the old calculations and the new cost for five years ($14,047.52), plus interest from 2013 through 2019 at a rate of 7.5 percent. Camargo stated that if respondent did nothing, she would receive a refund for her overpayment on the four years, and that there was no authority to issue interest to respondent on the amount she had overpaid.

25. On December 17, 2019, respondent wrote a letter to Marcie Frost, Chief Executive Officer for CalPERS, asking for reconsideration of the determinations by CalPERS that she must pay interest on the purchase of a fifth year of ARSC, and that

such an election must be made by a deadline of December 31, 2019. Respondent's letter to Frost was referred back to the department handling ARSC.

26. On December 23, 2019, respondent followed up by email with Sharon Hobbs, Assistant Division Chief over the Service Credit Purchase and Elections Section, Member Account Management Division. Respondent sent an email stating that Hobbs told her on a prior conference call that "since you were the final decision-maker on my request for an extension of time in my decision on the 5th year of ARSC that has been offered to me, you would prepare and send to me the process for an Appeal" and stating that she had not yet received that information. Hobbs replied to ask: "Are you appealing the due date for your election to purchase 1 additional year of ARSC?" Respondent confirmed: "I am appealing the due date and the charging of interest for the 5th year of ARSC which was fully paid in 2013."

27. On December 26, 2019, Hobbs sent respondent an email refusing to grant an extension of the December 31, 2019 deadline, and stating that: "We do not have statutory authority to waive interest." Hobbs cited sections of the Government Code regarding purchase of additional service credit, and noted that section 21052 provides that a member electing to receive such service credit must contribute "an amount equal to the increase in employer liability, using the payrate and other factors affecting liability on the date of the request for costing of the service credit." Hobbs stated that the cost to purchase the service credit included interest and other actuarial factors in effect at the time of the request. This email from Hobbs did not include information regarding respondent's appeal rights.

28. On January 6, 2020, Hobbs sent respondent a letter stating that Frost had asked her to respond to respondent's recent correspondence. Hobbs stated that the offer to purchase the fifth year of ARSC had expired on December 31, 2019. She again

stated that CalPERS did not have authority to waive the interest. Hobbs stated that since respondent's election had not been received, CalPERS would begin the process to refund her the difference between the original cost of her four-year purchase in 2013 and the recalculated cost after correct payroll information was received in 2019.

Hobbs then provided information regarding appeal rights: "I understand you would like to appeal CalPERS' determination that interest cannot be waived. You may appeal CalPERS' determination that you were required to submit your election by the due date of December 31, 2019, and pay the interest owed through the election due date with respect to your request to purchase one additional year of ARSC by filing a written appeal with CalPERS, in Sacramento, within thirty days of the date of the mailing of this letter. . . ."

29. On January 13, 2020, respondent replied to Hobbs by email, stating that she would be submitting an appeal request, and that she preferred the overpayment not be returned pending her appeal.

30. Hobbs responded on January 21, 2020, stating that the overpayment must be returned to her. Hobbs noted that respondent was owed a refund of $35,662.42 for the overpayment for four years of ARSC, but that $2,750.93 would be deducted from her refund, to repay the outstanding amount respondent owed for CalPERS's prior overpayment of her retirement benefits. (The refunded amount was subsequently provided to respondent by way of a rollover deposit into her Fidelity Investments individual retirement account.)

31. On January 28, 2020, respondent sent an appeal letter to Donald R. Martinez, Chief, Member Account Management Division. This proceeding followed.

32. At hearing, Mercado testified regarding ARSC cost calculations generally, the history of calculations for respondent, and CalPERS's communications with respondent regarding the purchase of ARSC. Mercado explained that the cost to purchase ARSC is determined using the present-value method based on the highest pay rate within 36 months of the request. Because only the member, and not the employer, is paying contributions for these years of service credit, ARSC is funded at the front end by including interest.

CalPERS's Contentions

33. CalPERS contends that the erroneous calculation of the 2013 ARSC costs was due to incorrect payroll information reported to CalPERS by Foothill-De Anza, which was not discovered until corrected information was reported in 2019.

34. As noted above, CalPERS contends that if respondent wants to purchase the fifth year of ARSC after the 2019 recalculation of ARSC costs, she must pay an amount that includes not only the difference between the amount she paid for four years based on the old calculations and the new cost for the five years, but also interest from 2013 forward.

35. The Statement of Issues states that respondent's window of opportunity to purchase the fifth year of ARSC has closed because she did not make the election by December 31, 2019, and alleges she is no longer entitled to purchase this service credit. However, the Statement of Issues also frames the issue for appeal as whether respondent is entitled to have interest on one additional year of retirement service credit waived, a formulation that is nonsensical if respondent could no longer make such a purchase. At hearing, counsel argued that if respondent wants to purchase the

fifth year she must pay what CalPERS calculates as the full amount (including interest), implicitly conceding that respondent could do so if her appeal is denied.

Respondent's Testimony and Contentions

36. Respondent expressed her frustration regarding the years of uncertainty over her membership in CalPERS and the length of time it took to resolve issues about her payrate calculations and retirement benefits, in addition to the more recent communications regarding the ARSC calculations.

37. Respondent disputes that Foothill-De Anza erred and places the onus on CalPERS for not having provided her employer with clear information on what should be reported regarding her compensation.

38. Respondent was overcharged for her purchase of four years of ARSC, paying $122,122.02 for what should have cost $86,459.60. Respondent argues that the amount she paid in 2013 was enough to cover the correct cost for the fifth year if it had been purchased at that time.

39. Respondent noted that CalPERS had the use of her $35,662.42 in overpaid funds from 2013 until 2020, and that the Public Employees' Retirement Fund earned investment returns during that time period.

40. Respondent has an individual retirement account at Fidelity Investments. She asked Fidelity to provide her with an estimate of her loss in investment value as a result of having made an overpayment to CalPERS rather than retaining that amount in her retirement portfolio since 2013. Fidelity estimated that respondent's loss of investment interest was $55,358.77 as of February 2020.

41. Respondent points to section 21052, which provides that the amount for calculating the member's contribution of an amount equal to the increase in employer liability shall be made using the payrate and other factors affecting liability on the date of the request for costing. The date of her costing and election was in May 2013. Respondent contends that no interest should be assessed on the recalculated amount for purchasing a fifth year of ARSC, because the recalculated amount of $108,074.50 for five years of ARSC used her corrected payrate as of 2013 and represents the fully burdened actuarial cost as of that time.

42. Respondent contends that section 20160 provides the mechanism for CalPERS to make a correction of her election, to show that she had paid sufficient funds in 2013 to cover the corrected cost of five years of ARSC ($108,074.50).

43. Respondent understood from Hobbs's letter of January 6, 2020, which set forth her appeal rights, that she could appeal both the assessment of interest for the fifth year of ARSC and the deadline to submit her election. Her communications to CalPERS made clear that she was appealing the election deadline as well as the assessment of interest for purchase of a fifth year of ARSC.

LEGAL CONCLUSIONS

Relevant Provisions of the PERL

1. Section 20909 provides that a member of CalPERS may, prior to retirement, elect to purchase up to five years of additional retirement service credit, by making contributions as specified in sections 21050 and 21052.

2. Section 21050 provides, in pertinent part: "An election by a member to receive credit for service under this part, in addition to his or her current and prior service credit, shall be effective only if accompanied by a lump-sum payment or an authorization for payments, other than a lump-sum payment, in accordance with regulations of the board." (§ 21050, subd. (a).)

3. Section 21051 provides that the member electing to receive service credit shall contribute, in accordance with section 21050, an amount equal to the contributions the member would have made to the system for the period for which service credit is granted and the interest that would have accrued on those contributions. (§ 21051, subd. (a)(1)-(2).)

4. Section 21052 provides, in pertinent part: "A member or retired former employee who elects to receive service credit subject to this section shall contribute, in accordance with section 21050, an amount equal to the increase in employer liability, using the payrate and other factors affecting liability on the date of the request for costing of the service credit. The methodology for calculating the amount of the contribution shall be determined by the chief actuary and approved by the board."

5. Section 20160 governs the board's correction of errors or omissions.

Subdivision (a) provides that the board may, in its discretion, correct the errors or omissions of any active or retired member. It is not relevant here, where there is no suggestion that the error in calculating the 2013 ARSC purchase cost was due to any error or omission on the part of respondent. (Factual Finding 33.)

Subdivision (b) is relevant to this matter: "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."

Subdivision (c) provides that the duty and power to correct mistakes terminates upon the expiration of obligations of CalPERS to the party seeking correction, as those obligations are defined by section 20164.

Subdivision (d) provides that the party seeking correction of an error or omission has the burden of proof.

Subdivision (e) provides, in pertinent part: "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. . . ."

Discussion

6. It is undisputed that respondent's cost to purchase ARSC in 2013 was incorrectly calculated at that time based on incorrect payroll information. Section 20160, subdivision (b), requires correction of the error. Section 21052 provides that the ARSC cost calculations shall be made using the payrate and other factors affecting liability on the date of the costing request, which in this case is May 2013. CalPERS provided recalculated ARSC purchase costs based on what should have been noted as the correct payroll information in 2013.

CalPERS argues that to fully fund the liability, interest must now be assessed on respondent's cost to purchase a fifth year of ARSC. In different circumstances, that contention might be persuasive. Here, however, it is not.

Respondent overpaid for her lump-sum purchase of four years of ARSC in 2013, and the amount she paid for four years exceeded the corrected five-year cost, that is, the amount she should have paid in 2013 to purchase five years based on correct payroll information. (Factual Findings 13, 24.) CalPERS had the benefit of respondent's ARSC overpayment from 2013 to 2020, and it earned interest on the money during that time. (Factual Findings 38-39.) When CalPERS refunded respondent's overpayment, it did not pay her any interest on that amount. (Factual Findings 24, 30.)

In light of these facts, and the mandate of section 21060, subdivision (e), that correction of errors shall adjust the parties' status, rights, and obligations to be the same as they would have been but for the error, respondent's contention is correct. Her payment in 2013 was sufficient to fund the purchase of five years of ARSC at the corrected price, and no additional interest should be assessed on respondent's purchase of an additional fifth year.

Based on the matters set forth in Factual Findings 18-20, 25-28, 31, 35, and 43, it is determined that the scope of respondent's appeal includes the December 31, 2019 election deadline as well as the question of whether interest may be assessed on the purchase of a fifth year of ARSC. CalPERS has provided no persuasive reason why the election deadline could not be extended, and it did not provide respondent with information regarding her appeal rights until after that deadline passed. Respondent must be afforded a reasonable amount of time after the effective date of this decision within which to make an amended election regarding purchase of a fifth year of ARSC.

ORDER

The appeal of respondent Patricia L. Cornely is granted.

CalPERS shall afford respondent the opportunity to make an amended election to purchase a fifth year of additional retirement service credit based on the recalculated cost for such a year as of her original election in 2013, without assessing interest from 2013 forward.

DATE:07/15/2021

HOLLY M. BALDWIN
Administrative Law Judge
Office of Administrative Hearings