

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 Recalculation of Retirement
Allowance of:**

MARY S. MAURER, Respondent.

Agency Case No. 2023-0740

OAH No. 2024030054

PROPOSED DECISION

Julie Cabos Owen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on July 16, 2024. The California Public Employees' Retirement System (CalPERS or PERS) was represented by Senior Staff Attorney Austa Wakily. Mary S. Maurer (Respondent) was present and represented by James Bozajian, Attorney at Law.

Testimony and documents were received in evidence. The record closed and the matter was submitted for decision on July 16, 2024.

While reviewing the evidence to prepare the Proposed Decision, the ALJ noted Exhibit 5 had been identified and admitted for jurisdictional purposes as Respondent's July 21, 2023 appeal letter. However, the letter admitted as Exhibit 5 was instead Respondent's June 9, 2023 letter to State Senator Ben Allen's office. The ALJ amended

the official exhibit list and renamed Exhibit 5 in Case Center to reflect its correct title. Although Respondent's appeal letter was not submitted as evidence, it had been submitted to OAH with the agency's request to set this matter for hearing. The ALJ, on her own motion, took official notice of Respondent's appeal letter, for jurisdictional purposes, and uploaded the letter to Case Center in the OAH documents section to ensure a complete record is available to the parties, the agency, and any reviewing court.

FACTUAL FINDINGS

CalPERS Retirement System

1. CalPERS is a retirement system created by statute for the purpose of administering retirement, disability, and death benefits to California state employees in accordance with the provisions of the Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.) CalPERS also provides the same services to employees of other governmental entities that choose to participate in the CalPERS pension system by contract. (Gov. Code, § 20460.)

2. CalPERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions, and by interest and other earnings on those contributions. The amount of a member's contributions is determined by applying a fixed percentage to the member's compensation. CalPERS determines a public agency employer's contribution using criteria specified by law.

3. When a CalPERS member decides to retire, the amount of the member's service retirement allowance (i.e., their monthly pay) is calculated by applying a percentage figure, based on the member's age on the date of retirement, to the

member's years of service and the member's final compensation. CalPERS staff may review the member's file, including the member's salary and type of membership reported by the employer, to ensure that only those items allowed under the PERL will be included in the member's final compensation for purposes of calculating the member's retirement allowance.

Respondent's Employment History and Requests for Estimates

4. Respondent first established membership with CalPERS in the 1990's when she was employed by the California Department of Insurance as a Deputy Press Secretary for then Insurance Commissioner, John Garamendi. It was unclear when Respondent separated from employment with the Department of Insurance. However, she retained her membership with CalPERS.

5. From 2000 through 2004, she held another CalPERS-covered employment as Field Deputy to State Assembly Member, Fran Pavley.

6. In 2005, Respondent was elected to serve on the Calabasas City Council. She began serving as a full-time City Council member on March 23, 2005. Her service concluded December 15, 2022.

7. The City of Calabasas (City) is a public agency which contracts with CalPERS for retirement benefits for its eligible employees. The provisions of the City's contract with CalPERS are contained in the PERL.

8. On March 22, 2005, the City submitted to CalPERS a Member Action Request (MAR), reporting Respondent as a new City employee and enrolling her into CalPERS membership. The MAR noted Respondent's March 23, 2005 hire date and her position as a full-time "Councilmember." (Exhibit 6.) However, the City failed to check

the required Box 19 on the MAR to indicate Respondent was an elected city official, and thus an "Optional Member." (*Ibid.*) Box 19 contained the language: "This person is an Optional Member (e.g. "Elective Officer," "Legislative Employee") who is electing membership. (Please attach appropriate election form AESD-3, AESD-59, or AESD-229)." (*Ibid.*)

9. On March 18, 2005, Respondent signed an AESD-59 form titled, "Election of Optional Membership – Elective Officer." That form states, in part:

California Government Code Section 20322 provides that an "elective officer" is excluded from membership in [CalPERS] unless he or she files with [CalPERS] an election in writing to become a member.

(Exhibit 13.)

10. Above her signature on the AESD-59 form, Respondent completed a section indicating:

I am an elective officer[,] being a Councilmember of the City of Calabasas[.] I elect to become a member of CalPERS. I request that this election be filed with [CalPERS] as my election to become a member.

(Exhibit 13.)

11. City personnel did not file the AESD-59 with CalPERS as required. Consequently, CalPERS was unaware of Respondent's status as an elective officer and optional member of CalPERS.

12. For several years, Respondent's City Council service was her only employment. However, beginning in 2013, Respondent was also employed by CalPERS State employers, the California Department of Toxic Substances Control (full-time from September 2013 through January 2017), and the California Conservation Corps (full-time from February 2017 through December 2022).

13. In 2020, Respondent began considering retirement from the California Conservation Corps and from City Council service. On October 2, 2020, Respondent requested CalPERS provide her with a Retirement Allowance Estimate Letter for a projected retirement date of September 1, 2021. She listed the California Conservation Corps as her employer and her position title as District Director. She also listed her City employment but did not include her position title.

14. On October 5, 2020, CalPERS sent Respondent a Retirement Allowance Estimate Letter using a projected retirement date of September 1, 2021. CalPERS calculated Respondent's unmodified monthly retirement allowance as \$3,907.14, based on 19.795 years of service credit and her employment with the State and the City. CalPERS made its calculation by applying the final compensation (i.e., highest average annual compensation) from all Respondent's employers to her total years of service credit with the State and the City, rather than separately applying Respondent's final compensation from the City to her City service credit. (Exhibit 11.)

15. The PERL (specifically, Gov. Code, § 20039) requires that a local elective member's final compensation be based on the member's highest average annual compensation during the period of service in the elective office. However, in October 2020, CalPERS was unaware of Respondent's elective officer status since the City had failed to file Respondent's AESD-59 with CalPERS as required.

16. In 2022, Respondent again began contemplating retirement. The first week of August 2022 was the deadline for filing paperwork indicating her intent to seek City Council re-election. Consequently, Respondent had to decide by that deadline whether to run for re-election.

17. In response to Respondent's request, CalPERS sent to her an April 14, 2022 Retirement Allowance Estimate Letter with a projected retirement date of January 1, 2023. CalPERS calculated Respondent's unmodified retirement allowance as \$4,533.09, based on 21.173 years of service credit and her employment with the State and the City. CalPERS made its calculation by applying the final compensation from all Respondent's employers to her total years of service credit with the State and the City, rather than separately applying Respondent's final compensation from the City to her City service credit. (Exhibit 12.)

18. Based on the CalPERS estimate, Respondent chose not to file paperwork in August 2022 to run for City re-election.

19. In August 2022, Respondent also informed her State employer, the California Conservation Corps, that she anticipated retiring on December 15, 2022. Thereafter, Respondent began depleting her residual vacation time through her anticipated retirement date.

20. In September 2022, Respondent's retirement case file was assigned to CalPERS Associate Government Program Analyst Robin Owens. Ms. Owens' unit handles retirement benefits, including service retirement and optional members (i.e., elected officials who had to opt into the CalPERS retirement system). Ms. Owens also helps members address community property issues.

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21. In September 2022, Ms. Owens reviewed Respondent's case file and determined documents may be missing. Specifically, as a Councilmember, Respondent was likely an elected city official, and thus an optional member who should have signed an election document (in this case, the AESD-59) to opt into CalPERS as a member. Without the signed election document in the CalPERS system, the employee is not a member of CalPERS.

22. Ms. Owens determined the missing information required review by the CalPERS Membership unit. She requested the Membership unit contact the City to confirm Respondent's membership status and provide the missing information.

23. In September 2022, City personnel called Respondent and told her that CalPERS informed the City there was a document missing from Respondent's case file. Respondent understood the City was working with CalPERS on the issue, but she did not understand the ramifications of the missing document.

24. On September 26, 2022, City Human Resources Specialist, Carolina Tijerino, sent an email to City staff including Chief Financial Officer Ron Ahlers, City Manager Kindon Meik, and City Attorney Matthew Summers, informing them the missing document had been located. The email was forwarded to Respondent, and it stated, "Please see attached Election of Optional Membership form [AESD-59] for [Respondent]. It turns out she did have one in her file, but it was never uploaded into CalPERS. Please let me know if I should upload it into CalPERS or leave it as is." (Exhibit G.)

25. Respondent had a discussion with City staff about the located AESD-59 form she signed in 2005. Respondent did not understand the meaning of the document, and Mr. Ahlers told her it could impact her retirement. City staff questioned

whether Respondent should provide it to CalPERS. Respondent ultimately instructed City staff to send the AESD-59 to CalPERS.

26. On September 30, 2022, CalPERS received the Election of Optional Membership - Elective Office (AESD-59) form Respondent signed in 2005 regarding her service as a City Council official. After receiving the AESD-59 form, CalPERS determined Respondent, as an elected City Councilmember, is subject to Government Code section 20039.

27. In early October 2022, while conferring with Ms. Owens by phone about a community property issue, Respondent mentioned she had checked the CalPERS website and there was a dramatic drop in the calculation of her retirement allowance. Ms. Owens informed Respondent that her retirement allowance had been recalculated.

28. On October 20, 2022, CalPERS sent a revised benefit estimate letter to Respondent reporting 21.070 years of service credit and an unmodified monthly allowance of \$2,947.93 based on her employment with the State and the City subject to Government Code section 20039.

29. Respondent began inquiring about the validity of the recalculation of her retirement allowance. CalPERS staff informed her they had no authority to change the recalculation.

30. On November 23, 2022, Respondent submitted to CalPERS her Service Retirement Election Application with an effective retirement date of December 15, 2022.

31. Despite CalPERS' reduced retirement allowance estimate, Respondent chose to submit her retirement application in November 2022. She did not speak to

her State employer about remaining employed because she thought the reduced retirement allowance estimate “was a grand mistake by CalPERS and . . . it would be worked out.” She also felt “too much time had lapsed to return” to her State position.

32. On December 15, 2022, CalPERS sent Respondent a first payment acknowledgement letter confirming her retirement date of December 15, 2022, her election to receive an Unmodified Allowance, and her calculated monthly retirement benefit of \$2,920.79. Thereafter, Respondent began receiving her monthly retirement benefits.

33. After retirement, Respondent continued her efforts to convince CalPERS to recalculate her monthly retirement benefit. She also reached out to State Senator Allen for assistance. On June 9, 2023, Respondent sent State Senator Allen a letter and attachments setting forth her arguments about why CalPERS should recalculate her retirement benefit. State Senator Allen provided the letter and attachments to CalPERS.

Jurisdiction and Pleadings

34. In a July 3 2023 letter to Respondent, CalPERS denied Respondent’s request for CalPERS to recalculate her retirement allowance by applying her State salary to her service credit earned as an elected City official. CalPERS explained, in pertinent part:

As previously advised, employers are responsible for enrolling optional members who choose to opt-in to CalPERS membership by submitting an optional member election form. CalPERS did not receive your optional member election form from the [City] until September 30,

2022, thus, resulting in two inaccurate benefit estimates dated April 14, 2022, and October 5, 2022. Upon correcting your membership enrollment in our system on October 6, 2022, we mailed a corrected benefit estimate letter on October 20, 2022. [¶] . . . [¶]

You have been receiving the correct retirement benefit amount as of your retirement date of December 15, 2022, and we do not have the authority to calculate your final compensation in a different way.

(Exhibit 4.)

35. Respondent appealed CalPERS' determination and requested an administrative hearing.

36. On February 29, 2024, Complainant, Kimberlee Pulido, filed the Statement of Issues in her official capacity as Chief of the Retirement Benefit Services Division of CalPERS.

Issue on Appeal

37. The appeal is limited to the issue of whether CalPERS, in accordance with the PERL, correctly determined Respondent's final compensation for her 8.528 years of service credit with the City is subject to Government Code section 20039, limiting her final compensation amount to the compensation she received while a City Council official with the City.

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Evidence and Testimony at Hearing

38. Robin Owens testified for CalPERS at the administrative hearing. Her demeanor was professional and forthright, and her testimony was consistent and convincing. She presented as credible witnesses and was not impeached on any grounds.

39. Ms. Owens persuasively substantiated CalPERS' bases for denying Respondent's request for recalculation of her retirement allowance as detailed in CalPERS's July 3, 2023 correspondence.

40. Ms. Owens noted CalPERS has over one million members but only about 2,000 CalPERS staff. Consequently, CalPERS staff cannot continually conduct extensive audits of every member's file. With several thousand contracting agencies that have thousands of job titles and unique benefits, CalPERS depends on employers to report accurate information, including the submission of Election of Optional Membership forms to enroll optional members. Optional members (i.e., elected officials) comprise only one percent of CalPERS membership, so it is not a typical issue that staff would flag.

41. Ms. Owens pointed out it is the City's responsibility to report information accurately to CalPERS. In Respondent's case, the City should have checked Box 19 on the MAR and submitted Respondent's signed Election of Optional Membership (AESD-59) form so CalPERS could have flagged Respondent as an optional member. However, based on the incomplete information provided by the City, CalPERS entered Respondent in its system as regular City employee.

42. In about 2013, Respondent was also entered into the CalPERS system as a State miscellaneous employee based on her employment the California Department

of Toxic Substances Control. In 2014, CalPERS conducted an audit of Respondent's file pertaining to her dual employment with the City and the State. CalPERS corrected the accrual of Respondent's service credit with both employers so that she earned only one year of CalPERS service credit annually. In 2014, there was no audit of any other potential errors in Respondent's CalPERS file.

43. Respondent's membership status was not corrected in the CalPERS system until CalPERS received her Election of Optional Membership (AESD-59 form) on September 30, 2022. At that point, CalPERS correctly calculated Respondent's retirement allowance as required by Government Code section 20039.

44. Respondent believes her retirement allowance should be recalculated to reflect the higher (albeit incorrect) estimate amounts.

45. Respondent testified earnestly on her own behalf at the administrative hearing. Her demeanor was professional, and her testimony was forthcoming. She presented as a credible witness. However, none of her testimony acted to discredit the testimony of Ms. Owens.

46. Respondent believes "there should be some compensation" for CalPERS' "failure to manage" her account. Respondent understands that the City made the mistake of not checking Box 19 on her MAR, but she believes CalPERS should have discovered the mistake. This assertion was contradicted by Ms. Owens' testimony about CalPERS' reliance on employers to provide correct information and CalPERS staff's inability to audit every member's file.

47. Respondent also asserted, if Box 19 had been checked, she would have been provided several correct estimates of her retirement allowance, and she "would not have retired" because she could not afford to do so. This assertion is contradicted

by Respondent's November 2022 submission of her retirement application despite her knowledge of the corrected retirement allowance since October 2022.

LEGAL CONCLUSIONS

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) Thus, Respondent has the burden of establishing by a preponderance of the evidence that she is entitled to recalculation of her retirement allowance. Respondent has not met her burden of proof.

2. CalPERS is a statutory entity governed by the PERL. In determining a CalPERS member's retirement benefits, CalPERS looks to the provisions of the PERL and relevant regulations.

3. Government Code section 20322, subdivision (a), allows optional membership for local elected officers as follows: "An elective officer is excluded from membership in [CalPERS] unless the officer files with [CalPERS] an election in writing to become a member."

4. Government Code section 20039 defines the final compensation for local officials as follows:

Notwithstanding any other provision of this part, "final compensation" of a local member for the purpose of determining any pension or benefit resulting from state service as an elective or appointed officer on a city council

or a county board of supervisors accrued while in membership pursuant to [Government Code] Section 20322, shall be based on the highest average annual compensation earnable by the member during the period of state service in each elective or appointed office. Where that elective or appointed service is a consideration in the computation of any pension or benefit, the member may have more than one final compensation.

5. The PERL requires a local elective member's final compensation be based on the member's highest average annual compensation during the period of service in the elective office. Consequently, Respondent's current retirement allowance was correctly calculated in compliance with the PERL.

6. Nevertheless, Respondent seeks correction of what she believes is an error. Even if the failure to discover Respondent's optional membership until September 30, 2022, could be characterized as a CalPERS "error," it is not correctable under the PERL. Although Government Code section 20160 allows CalPERS to correct errors, certain criteria must be met. The criteria include: (1) The request for correction of error is made within a reasonable time after discovery of the right to seek correction, not to exceed six months after discovery of this right; (2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect; (3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available; and (4) Failure by a member to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute correctable error or omission. In this case, the third criterion would not be

met because the correction would provide Respondent with a greater retirement allowance than authorized by the PERL (i.e., Gov. Code, § 20039).

7. As noted in *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522 (*City of Pleasanton*), 544:

PERS's fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. PERS has a duty to follow the law. As stated in *City of Oakland*, the policy reflected in the constitutional provision is to "ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland, v. Public Employees' Retirement System* [(2002) 95 Cal.App.4th 29, 46].) It does not authorize an order compelling PERS to pay greater benefits than [the law] allows, either by estoppel or as tort damages for an inadvertent failure to timely correct a contracting agency's error. (Cf. § 20160, subd. (a)(3) [authorizing PERS to correct errors or omissions of members, contracting agencies, or itself, but not to provide the party seeking correction with a "status, right, or obligation not otherwise available" under the PERL].)

8. The PERL governs the scope of the benefits earned. (*City of Pleasanton, supra*, 211 Cal.App.4th at p. 544.) Thus, while "[p]ension provisions should be broadly construed in favor of those who were intended to be benefited thereby [citations], . . . they cannot be construed so as to confer benefits on persons not entitled thereto." (*Stamper v. City of Los Angeles* (1947) 80 Cal.App.2d 242, 244.) Consequently, CalPERS

cannot be required to pay greater benefits than the PERL allows. (*Chaidez v. Board of Administration* (2014) 223 Cal. App. 4th 1425 (*Chaidez*), 1431.)

9. Respondent asserts CalPERS should be equitably estopped from applying Government Code section 20039. In order to apply the doctrine of equitable estoppel, four elements must be present: (1) the party being estopped must be apprised of the facts; (2) the party must intend or reasonably believe that its conduct will be acted upon; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must actually rely upon the other party's conduct to their detriment. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

10. In this case, Respondent has not established the first and fourth elements of equitable estoppel. First, CalPERS was not apprised of the facts. It did not know of Respondent was an Optional Member, because the City did not mark Box 19 and did not submit the required Optional Membership form until September 30, 2022. Consequently, CalPERS issued its first two estimates (in October 2020 and April 2022) using incorrect information provided by Respondent's City employer. When the error was discovered, CalPERS issued the corrected October 2022 Estimate Letter. Furthermore, the evidence did not establish Respondent relied upon CalPERS's conduct to her detriment. In October 2022, when Respondent's pension benefit was correctly calculated, Respondent had not yet submitted her retirement application. Although Respondent had decided not to run for reelection from the lower paying City employment, she had not yet retired from her State service until November 2022. She had given notice by then, but she made no effort to rescind that notice or to seek to return to State service to acquire additional years of service. Instead, she chose to retire in hopes that she could challenge the correct retirement allowance calculation at

hearing. Since all four elements have not been proven, Respondent has failed to establish estoppel applies in this case.

11. Moreover, even if all criteria for estoppel were met, CalPERS correctly asserts that equitable estoppel cannot be applied to require payment of a larger pension than the law allows. Typically, estoppel has not been applied against a governmental agency when that agency "utterly lacks the power to effect that which an estoppel against it would accomplish." (*City of Long Beach v. Mansell, supra*, 3 Cal.3d at p. 499; *City of Pleasanton, supra*, 211 Cal.App.4th at p. 543.)

12. In *City of Pleasanton, supra*, 211 Cal.App.4th 522, the court declined to apply equitable estoppel to allow the inclusion of standby pay in the formula for calculating a member's pensionable compensation because CalPERS was precluded by statute (Gov. Code, § 20636) from doing so. Additionally, in similar circumstances to the case at hand, the court in *Chaidez, supra*, 223 Cal. App. 4th at pp. 1431-1432, refused to equitably estop CalPERS from applying Government Code section 20039. In that case, an elected city council member sought to have his retirement benefits calculated using his highest (city administrator) salary, applied to all his years of service including his years serving as a city council member, rather than applying his council member compensation to his council member years of service. The *Chaidez* court noted "no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations." (*Ibid.*) Consequently, CalPERS cannot be required to pay Respondent a larger pension than the law allows.

13. Given the foregoing, Respondent failed to establish she is entitled to recalculation of her retirement allowance. Consequently, CalPERS's denial of Respondent's request to recalculate her retirement allowance will be upheld.

ORDER

The appeal of Respondent, Mary S. Maurer, is denied.

DATE: 07/31/2024

Julie Cabos-Owen

JULIE CABOS OWEN

Administrative Law Judge

Office of Administrative Hearings