

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application)
to Rescind Election to Redeposit for Prior)
Service and Receive Refund of Monthly)
Payments by)
KENNETH T. DAVENPORT,)
Respondent.)
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CASE NO. 6537
OAH NO. L-2005040065
PRECEDENTIAL DECISION
06-01
EFFECTIVE: April 19, 2006

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated [December 13, 2005](#), concerning the [application of Kenneth T. Davenport](#); hereby designates its decision as precedential; and RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

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I hereby certify that on [February 16, 2006](#), the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the administrative law judge's Proposed Decision is a true copy of the decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FRED BUENROSTRO, CHIEF EXECUTIVE OFFICER

Dated: March 20, 2006 BY _____
KATHIE VAUGHN
ASSISTANT EXECUTIVE OFFICER

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

In the Matter of the Application to Rescind
Election to Redeposit Funds for Prior Service
and Receive Refund of Monthly Payments by:

KENNETH T. DAVENPORT,

Respondent,

CASE NO. 6537

OAH NO. L2005040065

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge (ALJ), Office of Administrative Hearings, in Orange, California on November 17, 2005.

Kenneth T. Davenport (respondent) represented himself.

Senior Staff Counsel Rory J. Coffey represented the California Public Employees' Retirement System (CalPERS).

Oral and documentary evidence was received and the matter was submitted.

FACTUAL FINDINGS

The Administrative Law Judge makes the following Factual Findings:

1. Donna Ramel Lum, made and filed the Statement of Issues in her official capacity as the Chief of the Benefit Services Division of CalPERS.
2. Respondent was employed by the Los Angeles Unified School District (LAUSD) from August 12, 1966 through December 30, 1973. By virtue of this employment respondent was a miscellaneous school member of CalPERS.
3. On December 31, 1973, LAUSD employed respondent as a Security Agent. By virtue of this employment respondent became a safety member of CalPERS.

4. Respondent terminated his employment with LAUSD, effective November 15, 1982, and requested a refund of his accumulated CalPERS retirement and interest. The refund of his contributions was mailed to respondent on April 1, 1983, and respondent's CalPERS membership was terminated.

5. On May 19, 1985, respondent was re-employed by LAUSD as a school police officer. By virtue of this employment respondent again became a safety member of CalPERS.

6. In 1995 respondent contacted CalPERS with a request for information concerning the cost of redepositing his previously withdrawn retirement contributions. By letter, dated June 26, 1995, CalPERS informed respondent that the cost of purchasing his prior 16.058 years of service credit would be \$42,783.69. Respondent took no action at the time.

7. During 2001 respondent began considering retirement and he began assessing his options. Respondent suffered from what he believed to be a job related orthopedic condition so he applied for disability retirement. On March 28, 2001, respondent signed an application for service retirement, pending disability retirement. Respondent's request was received by CalPERS on April 28, 2001. As a result of the application respondent was placed on the retirement roll, effective April 1, 2001.

8. Since respondent was a safety member of CalPERS LAUSD was notified, as required by Government Code section 20026, that it needed to make a determination concerning respondent's qualification for disability retirement. By letter, dated June 14, 2001, LAUSD notified CalPERS that LAUSD had determined that respondent was disabled within the meaning of the Public Employees' Retirement Law (PERL) based on an "Orthopedic condition." The disability was determined to have been industrial in nature. It was further determined that respondent's last date of employment was March 21, 2001. On March 28, 2001, respondent signed an application for service retirement pending disability retirement. Respondent's request was received by CalPERS on April 28, 2001. As a result of the application respondent was placed on the retirement roll, effective April 1, 2001. By letter, dated August 2, 2001, CalPERS notified respondent that LAUSD had approved him for industrial disability retirement, and that his service retirement would be changed to industrial disability retirement, retroactive to March 22, 2001.

9. During the disability determination process respondent was notified that since his current employment commenced on May 19, 1995, his retirement benefits would be limited to 37 percent of his base salary, rather than 50 percent, by virtue of California Government Code section 21417. Government Code section 21417, which was in effect in 2001 when respondent was in the process of deciding on his retirement options, provided that the industrial disability retirement allowance of a CalPERS member, whose membership

commenced after January 1, 1980, would be less than that of members whose membership commenced before January 1, 1980. In respondent's case, he would receive 37 percent of his base salary, rather than 50 percent. However, respondent had an option available that would allow him to avoid the Government Code section 21417 limitation. He could purchase credit for prior service, service that commenced in 1966, well before January 1, 1980.

10. On February 25, 2001, respondent again requested redeposit information from CalPERS. On March 1, 2001, CalPERS informed respondent that the current cost of purchasing his prior 16.058 years of service credit was \$59,857.41. Respondent elected to purchase the 16.058 years of credit for prior service so that he could avoid the limitation on his retirement benefits dictated by Government Code section 21417. Accordingly, respondent signed and returned a repurchase form. That form, which is dated March 29, 2001, states, in pertinent part: "I hereby elect to receive service credit as provided by law and authorize the deduction from my salary of \$461.44 for 195 Quad-weekly payments." The form then contains the following warning, underlined and in bold type, just above the signature space: "**I UNDERSTAND THIS ELECTION IS IRREVOCABLE.**" (Exhibit 2, emphasis in original.)

11. On March 12, 2003, respondent requested recalculation of his industrial disability retirement based on an August 3, 2001 Consent Decree and a January 29, 2003 Supplemental Consent Decree (settlement) between CalPERS and the Equal Employment Opportunity Commission in the case of *Arnett v. CalPERS*¹. In the Consent Decree, the parties stipulated to entry of a permanent injunction prohibiting the enforcement of California Government Code section 21417 and agreed that CalPERS "shall recalculate the benefit entitlements of all current (as of July 1, 2001) industrial disability retirement recipients who commenced industrial disability retirements from January 1, 1980 to the present and whose benefits are limited by Section 21417."² (Exhibit 12.) Respondent wanted to rescind his March 29, 2001 election to purchase credit for past service, receive a refund of funds already deposited, and then he wanted to have the opportunity of reviewing and changing his retirement options.

12. Respondent was not aware of the *Arnett* settlement until February, 2003. As soon as respondent became aware of the *Arnett* settlement, he took immediate action in notifying CalPERS that he believed he was within the "class" of individuals affected by the *Arnett* settlement. Based on respondent's belief that he was within the class of plaintiffs covered by the *Arnett* settlement, he requested that CalPERS refund the money he deposited to purchase service credit to avoid the limitations of Government Code section 21417. Respondent testified that he would not have spent the money to circumvent Government

¹ This was a case filed in the United States District Court, Northern District of California; Civil Case number 95-03022 CRB. Copies of the Consent Decree and the Supplemental Consent Decree are included as Exhibits 12 and 13.

² Ultimately, in 2004, California Government Code section 21417 was repealed.

Code section 21417 if he knew that ultimately 21417 would be successfully challenged as violating the Age Discrimination in Employment Act, and repealed.

13. CalPERS reviewed respondent's request and all documents in its files before concluding that respondent's March 29, 2001 election to redeposit funds for prior service was, and is, irrevocable, because respondent did not qualify for membership in the class of plaintiffs effected by the *Arnett* settlement and no error or omission had occurred in respondent's March 29, 2001 retirement election that was correctable pursuant to Government Code section 20160.

14. CalPERS notified respondent of its determination, respondent timely appealed CalPERS' determination, and the instant hearing ensued.

15. The facts are not disputed. The issues on appeal are limited to whether respondent may rescind his March 29, 2001 election to redeposit his CalPERS contributions and interest for prior service, whether he may receive a refund of the funds redeposited, and whether he may change the retirement settlement option he chose in 2001.

LEGAL CONCLUSIONS

The foregoing factual findings, considered in their entirety, result in the following legal conclusions:

1. CalPERS contends that respondent is not in the class of plaintiffs affected by the *Arnett* settlement because respondent's retirement benefits were never "limited" by Government Code section 21417. Respondent answers CalPERS' contention by noting that the only reason his benefits were not limited by Government Code section 21417 was because he spent a substantial sum of money to purchase prior service credit, thus removing him from the effect of Government Code section 21417. If respondent had not elected to purchase prior service credit he would have been subjected to the limitations of Government Code section 21417 and there would have been no doubt that he was in the *Arnett* class of plaintiffs. In essence, respondent was forced to pay for a benefit that was ultimately determined to be an entitlement. The fact that respondent acted to avoid the adverse consequences of Government Code section 21417 should not serve to prevent him from benefiting from the *Arnett* decision and the subsequent repeal of Government Code section 21417, as did others in the same or similar position. Concluding that respondent is not in the class of plaintiffs affected by the *Arnett* settlement because his retirement benefits were not "limited" by Government Code section 21417 results from too strict an interpretation of the language in the *Arnett* settlement agreement. As set forth in Finding 11, the Consent Decree provides for entry of a permanent injunction prohibiting the enforcement of California Government Code section 21417 and an agreement that CalPERS "shall recalculate the benefit entitlements of all current (as of July 1, 2001) industrial disability retirement

recipients who commenced industrial disability retirements from January 1, 1980 to the present and whose benefits are limited by Section 21417.” As of July 1, 2002, respondent was a current industrial disability retirement recipient. Respondent commenced retirement, effective March 22, 2001, well within the January 1, 1980 to the present (On January 29, 2003, the parties entered into a Supplemental Consent Decree agreeing that the August 3, 2001 Consent Decree “shall remain in effect.”) time frame established by the *Arnett* settlement. Although respondent’s benefits were not actually “limited” by Government Code section 21417, respondent was adversely impacted by Government Code section 21417. A liberal reading of the *Arnett* settlement leads to the conclusion that the parties intended to afford relief to the class of plaintiffs who were adversely affected by limitations imposed by Government Code section 21417. Respondent is in that class. His retirement benefits would have been limited by Government Code section 21417 if he had not had the ability to purchase credit for pre-1980 service. Respondent’s election to do so should not now act to his detriment. Consequently, respondent is entitled to a refund of all monthly payments made from March 22, 2001 to the present to purchase credit for prior service, minus deductions, if any, for appropriate offsets³.

2. There is also justification to remedy respondent’s problem pursuant to Government Code section 20160. Government Code section 20160 allows the CalPERS board to exercise its discretion to correct errors or omissions of any retired member, upon any terms it deems just. In the present instance an error did occur, an error of fact. Respondent elected to purchase credit for prior service based on his mistaken belief that Government Code section 21417 was a valid statute. Later, a settlement agreement was entered into that, for all intents and purposes, indicated the parties agreed that Government Code section 21417 was impermissibly discriminatory. Ultimately, the legislature, in apparent agreement, repealed Government Code section 21417. Respondent’s election to purchase credit for prior service resulted from respondent’s mistaken belief that Government Code section 21417 was a valid statute and would continue in effect. As soon as respondent became aware of his right to correct the mistake, as reflected by the *Arnett* settlement, he acted to correct his erroneous election within a reasonable time. Accordingly, CalPERS has the ability to grant the relief requested by respondent.

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³ Respondent purchased 16.058 years of service and it may well be that he received more money over the time period at issue because of the increase number of service years. There may need to be a recalculation of the amounts he would have received from March 22, 2001 to the present had he not been credited with the 16.058 years of service.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Respondent's appeal is granted. The contract for repurchase of service credits entered into between respondent and CalPERS, dated March 29, 2001, shall be voided. CalPERS shall refund all monthly payments respondent has made from March 22, 2001 to the present to purchase credit for prior service, as provided for in the March 29, 2001 contract, minus any appropriate offsets. Respondent shall be given the opportunity to re-evaluate his retirement options and to select an appropriate option, based upon the current legislative scheme. Respondent shall make his election within 60 days of the effective date of this decision.

Dated: December _____, 2005.

ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings