

Precedential Decision 98-02

BEFORE THE BOARD OF ADMINISTRATION CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal of)	Case No.: 1558
Decreased Level of Retirement)	OAH No.: L-1997120250
Allowance of)	
HARVEY H. HENDERSON,)	Precedential Board Decision
)	No. 98-02
Respondent.)	Effective: November 18, 1998

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 June 11, 1998, concerning the application of Harvey H. Henderson; RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

I certify that on August 19, 1998, the Board of Administration, California Public Employees' Retirement System, at its meeting at Sacramento, California, made and adopted the foregoing Resolution.

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, hereby designates as precedential its Decision concerning the application of Harvey H. Henderson; RESOLVED FURTHER that this Board Decision shall be effective immediately.

I certify that on November 18, 1998, the Board of Administration, California Public Employees' Retirement System, at its meeting at Sacramento, California, made and adopted the foregoing Resolution.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
JAMES E. BURTON, CHIEF EXECUTIVE OFFICER

BY
BARBARA HEGDAL
ASSISTANT EXECUTIVE OFFICER

II

Harvey H. Henderson, the respondent, became a member of CalPERS by virtue of his employment with the City of El Cajon on March 20, 1976. At the time he filed his application for retirement, he was employed as Assistant City Manager. By virtue of his employment, respondent is classified as a miscellaneous member of CalPERS. At the time of retirement, respondent was 55 years old.

III

Respondent filed an application for service retirement on October 31, 1991, and specified a retirement effective date of March 28, 1992. During his employment, he elected to buy back four years of military service credit. The cost of this service credit was \$31,024.20, which he elected to pay in installments of \$203.40. He began making these payments in January, 1989. At the time of his retirement, he owed \$19,303.97 to CalPERS for the purchase of his military service credit.

IV

CalPERS staff calculated respondent's retirement allowance following receipt of his application and his election form. In calculating his retirement allowance, CalPERS mistakenly included the amount he owed on the purchase of his military service credit as part of his regular earnings. This error resulted in increasing his retirement allowance above that which he was statutorily entitled to.

V

In due course, CalPERS notified respondent that he would receive a retirement allowance of \$3,112.22 per month. This letter was received by respondent on or about October 7, 1992.

VI

Almost four years later, on or about August 26, 1996, CalPERS notified respondent that an error was made in computing his retirement allowance and that he would begin receiving the correct, adjusted amount of \$2,911.19 beginning with the December 1, 1996 payment. In the same letter, he was also notified that he had been overpaid a total of \$13,706.06 and that he was required to repay it.

VII

It is fair to say that respondent was shocked and angered. He informally appealed the matter to the Post Retirement Services Division. Subsequently, CalPERS agreed to waive or forgive the overpayment amount but refused to restore respondent's monthly benefit to its previous level.

VIII

The computation of a retirement allowance is an extremely complicated mathematical exercise. For present purposes, it is enough to say that the three critical factors are 1) age at time of retirement, 2) years of service, and 3) final salary. CalPERS receives data from numerous sources and inputs this date into a formula from which the retirement allowance is determined.

In the case of Harvey Henderson, CalPERS received the necessary data and a technician inputted the data incorrectly. Although an internal CalPERS computer printout indicated that the "payrate is outside of range limits" (exhibit 1-14) no one picked up on the discrepancy until four years later, long after respondent had become accustomed to a lifestyle based on the erroneous allowance figure.

There is no evidence that respondent knew or should have known that he was receiving a higher monthly retirement figure than he was entitled to. He had gone to a retirement workshop at some time before he decided to retire. Based on his rough estimating, the figure that CalPERS gave him was "in the ballpark" with his rough calculation.

Mr. Henderson was refreshingly candid in his testimony about whether he would have retired when he did if he had known what the correct retirement allowance was. His response was he would have "possibly" continued to work. There is no question that he and his wife have created a lifestyle based upon the reasonable expectation of the monthly allotment. Furthermore, respondent's wife has been stricken with cancer and requires medical procedures that are not covered by medical insurance. There is no question that he detrimentally relied on CalPERS mistaken retirement allowance number.

The difference in his monthly benefit is dramatic. CalPERS notification letter of August 26, 1996 (exhibit 1-15) began:

"This letter is to inform you that the monthly benefit that you have been receiving from PERS is incorrect. Your correct monthly allowance, based on your election of Optional Settlement #2 should currently be \$2,911.20. Your monthly benefit will be adjusted from \$3,302.69 to \$2,911.20 on your December 1, 1996 dated warrant."

Respondent will experience an income loss as a result of the change of \$391.49 per month. As respondent's counsel points out in his post hearing brief (exhibit C), "Assuming a joint 28 year life expectancy and a 2% annual cost of living increase, the future value of the \$391.49 reduction is \$174,000. Assessed on a current basis, the present value of the future income stream at 5.5% is \$83,000." One need not agree with respondent's arithmetic to conclude that over his anticipated life course the loss to respondent is significant.

IX

The words we use to characterize events or conditions change how we view them. To use the word loss to describe what has happened to respondent is accurate but misleading. Respondent will most certainly lose the benefit of the bargain he thought he had agreed to. The numbers CalPERS gave him that he based his decision to retire on were wrong. Respondent also suffered loss in the sense of losing the opportunity to continue working until a more advantageous time was presented to retire. There is loss in the sense that he has been out of the job market for over five years and his opportunities for employment, should he need or choose to work again, are substantially diminished.

We would look at the picture very differently if we characterized what respondent erroneously received as a windfall to which he was not entitled. Clearly he received far more per month than he was entitled to for approximately four years. Because CalPERS determined to waive a claim for

reimbursement, respondent has received a windfall that he was not entitled to well in excess of \$13,000.

Both the word loss and the word windfall are accurate but misleading because they fail to capture the whole picture. They are words of advocacy used by two very good lawyers representing their respective clients well.

X

This case rests not on the characterization of the events surrounding the erroneous overpayment. It rests on the application of statutory and decisional law to acknowledged facts. CalPERS screwed up. Respondent is faultless. He relied on their misrepresentation to his detriment. What says the law?

DETERMINATION OF ISSUES

I

Government Code section 21350 provides:

"Upon retirement for service, a member is entitled to receive a service retirement allowance which shall consist of:

- (a) The member's service retirement annuity, including, with respect to patrol members and solely in respect to the portion of the annuity derived from the normal accumulated contributions of those members, respectively, automatic continuance to surviving spouse, or if there is no surviving spouse at retirement, to surviving children, or if there are no eligible surviving children at retirement, to surviving dependent parents as provided in this article;
- (b) The member's current service pension;
- (c) The member's prior service pension."

II

Government Code section 21352 provides:

"The service retirement annuity is the sum of the annuities which are the actuarial equivalents of the normal and additional accumulated contributions of a member at the time of his or her retirement."

III

Government Code section 21353 provides:

"The combined current and prior service pensions for a local miscellaneous member, a school member, and for a state miscellaneous member, is a pension derived from the contributions of the employer sufficient, when added to the service retirement annuity that is derived from the accumulated normal contributions of the member at the date of retirement, to equal the fraction of one-fiftieth of the member's final compensation set forth opposite the member's age at retirement, taken to the preceding completed quarter year, in the following table, multiplied by the number of years of current and prior service except service in a category of membership other than that of state miscellaneous member or local miscellaneous member or school member or service covered under the First Tier retirement formula, with which the member is entitled to be credited at retirement:

<u>Age at Retirement</u>	<u>Fraction</u>
55	.730
55 1/4	.741
55 1/2	.753
55 3/4	.764

The fractions specified in the above table shall be reduced by one third as applied to that part of final compensation which does not exceed four hundred dollars (\$400) per month for all service of a member any of whose service has been included in the federal system. This reduction shall not apply to a member employed by a contracting agency which enters into a contract after July 1, 1971, and elects not to be subject to this paragraph or with respect to service rendered after the termination of coverage under the federal system with respect to the coverage group to which the member belongs.

The improved retirement allowance provided by this section is granted subject to future reduction prior to a member's retirement, by offset of federal system benefits or otherwise, as the Legislature may from time to time deem appropriate because of changes in such federal system benefits."

IV

Government Code section 21354 provides:

"The combined current and prior service pensions for a local miscellaneous member is a pension derived from the contribution of the employer sufficient, when added to the service retirement annuity that is derived from the accumulated normal contributions of the member at the date of retirement, to equal the fraction of one-fiftieth of the member's final compensation set forth opposite the member's age at retirement, taken to the preceding completed quarter year, in the following table, multiplied by the number of years of current and prior service except service in a

category of membership other than that of local miscellaneous member with which the member is entitled to be credited at retirement:

<u>Age at Retirement</u>	<u>Fraction</u>
55	1.000
55 1/4	1.007
55 1/2	1.013
55 3/4	1.020

The fraction specified in the above table shall be reduced by one third as applied to that part of final compensation that does not exceed four hundred dollars (\$400) per month for all services of a member any of whose services has been included in the federal system. This reduction shall not apply to a member employed by a contracting agency that enters into a contract after July 1, 1971, and who elects not to be subject to this paragraph or with respect to service rendered after the termination of coverage under the federal system with respect to the coverage group to which the member belongs.

This section shall supersede Section 21353 with respect to all local miscellaneous members who retire after the date this section becomes applicable to their respective employers.

This section shall not apply to a contracting agency nor its employees until the contracting agency elects to make all local miscellaneous members subject to it by amendment to its contract made in the manner prescribed for approval of contracts or in the case of a new contract, by express provision of the contract. The operative date of this section with respect to a local miscellaneous member shall be the effective date of the amendment to his or her employer's contract electing to be subject to this section."

V

THE CORRECTION OF MISTAKES

Government Code section 20160 provides:

"(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an 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.

(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."

Government Code section 20163 provides, in relevant part:

". . . Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and

his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled."

Government Code section 20164 provides:

"(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 payments 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 limitation of actions shall be Three years, and shall be applied as follows:

(1) In cases where this 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.

(2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

(3) In cases where payment is erroneous because of the death of the retired member or beneficiary or because of the remarriage of the beneficiary, the period of limitation shall commence with the discovery of the erroneous payment.

(c) Notwithstanding subdivision (b), where any payment has been made as a result of fraudulent reports for compensation made, or caused to be made, by a member for his or her own benefit, the period of limitation shall be 10 years and that period shall commence either from the date of payment or upon discovery of the fraudulent reporting, whichever date is later.

(d) The board shall determine the applicability of the period of limitations in any case, and its determination with respect to the running of any period of limitation shall be conclusive and binding for purposes of correcting the error or omission."

VI

LAW APPLICABLE TO ESTOPPEL

The Public Employees' Retirement System is a creation of statutes, codified in the Government Code, which grant it certain powers. PERS 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, 62 Cal.Rptr. 803. Respondent cannot be paid an allowance in excess of that to which he is statutorily entitled.

Government Code section 20160 et seq. addresses errors made by PERS and mandates that they be corrected if certain factors are established. The issues in this case are 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 the powers of the Public Employees' Retirement System, see, *Page v. City of Montebello* (1981) 112 Cal.App.3d 658 at 667, 169 Cal.Rptr. 447 at 452; *Board of Administration, State Employees' Retirement System v. Ames* (1963) 215 Cal.App.2d 215 at 230, 29 Cal.Rptr. 917 at 926; and, *Boren v. State Personnel Board* (1951) 37 Cal.App.2d 634, 234 P.2d 981, or to provide a benefit to respondent which is not otherwise statutorily authorized because public employee benefits are wholly statutory, see *Hudson v. Posey*, supra.

Estoppel is an equitable doctrine that is centuries old. It seeks to prevent a person or entity from profiting from their own wrongdoing. As the Court of Appeal noted in *California School Employees Association v. Jefferson Elementary School District* (1975) 45 Cal.App.3d 683 at page 692:

"The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted..." (internal quotations and emphasis omitted).

In determining whether or not estoppel shall be applied 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, 91 Cal.Rptr. 23, 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."

In this administrative hearing, the respondent, Henderson, has established the four requisite elements of estoppel. However, for the doctrine of equitable estoppel to be applied to a governmental entity, there must be a further showing.

The California Supreme Court in *City of Long Beach v. Mansell*, supra, noted that estoppel should only be applied to a governmental agency in rare circumstances and discussed the limitations of the application of estoppel on governmental agencies as follows:

"The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel."

The Public Employees' Retirement System has already granted respondent's request that he be excused from repaying the overpayment. However, this does not prevent the correction of the error that all acknowledge took place.

The Court of Appeal in *Crumpler v. Board of Administration, Public Employees' Retirement System* (1973) 32 Cal.App.3d 567 at page 584, held that estoppel will not be applied to preclude a proper reclassification prospectively, that is from the time of the proper reclassification forward. In making its ruling, the court stated:

"We will not, however, extend estoppel to preclude the board from reclassifying petitioners prospectively from the date of the board's decision. Public interest and policy would be adversely affected if petitioners, despite the discovery of the mistaken classification, were required to be continued to be carried as local safety members when all other contract members of the retirement system throughout the state performing like duties and functions are classified as miscellaneous members. Manifestly, it would have a disruptive effect on the administration of the retirement system.

The conclusion we have reached respecting the extent to which the board should be estopped is in keeping with, if not compelled, by the provisions of section 20180 pertaining to the duty of the board to correct errors."

Similar logic applies to this case regarding the correction of the amount of respondent's retirement allowance. Despite the fact that there is a foundational showing of the four factors referenced in *City of Long Beach v. Mansell*, supra, respondent is unable to overcome the sound public policy argument raised by the board. To do as respondent requests would enlarge the authority of the Public Employees Retirement System regarding the granting of 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.

CalPERS is not estopped from paying respondent only that which it is statutorily authorized to pay. It is not estopped from reducing his retirement allowance from an incorrect amount to a correct amount. Respondent has established the traditional elements of estoppel. However, judging the facts

against the statutory and decisional law, estoppel is not established against CalPERS because to do so would violate a strong public policy.

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 have a lifetime of higher retirement allowance than permitted by the statutory formula would result in an unfunded liability, and would also have a direct impact on his former employer against whose reserves his lifetime allowance will be drawn. The unfunded liability would pass to the employer in the form of increased contributions and higher future contribution rates to fund its miscellaneous members' account. This would be a windfall to respondent or in equivalent legal terms unjust enrichment.

To find an estoppel here would, in essence, grant to CalPERS powers that were not ceded to it by the Legislature. The grant of power was to administer a plan based upon a specific statutory retirement benefit formula. To find an estoppel here would be to allow CalPERS to unilaterally alter the statutory retirement benefit formula without benefit of enabling statutory authorization. That is the task of the Legislature, not the Board.

If this were a matter solely driven by the equities of the situation then respondent wins. He didn't make the mistake, CalPERS did. This is not uncommon in that there are public policy considerations that inform and condition the decision making process in this administrative hearing. The arguments raised by the Board are sound ones. They broaden the scope of inquiry so that the consequences of a particular decision can be assessed against the backdrop of its impact on the retirement system.

An act that is violative of the law is still violative even if its impact might be viewed as minor and tangential. To find an estoppel here is violative of the law as expressed particularly in the cases cited above.

Respondent makes an interesting argument in his opening brief (exhibit B, page 11, lines 5 to 19). He states:

"An application of estoppel principles to respondent's matter would not, as petitioner argues, expand CalPERS statutory power. Petitioner is empowered by statute to pay benefits at respondent's prior level; it is undisputed that some government retirees receive benefits equal to or exceeding the previous level of respondent's benefits. Petitioner is so empowered even though respondent's benefit was based on an erroneous calculation. The section 20164, subdivision (b)(1), three year statute of limitation permits respondent to receive a retirement benefit at the previous unadjusted level. Even petitioner's interpretation of this statute of limitations permits respondent to retain some erroneous benefits received by him. It is notable that petitioner has stricken any obligation for respondent to repay an overpayment amount of \$13,706.06... . Thus, CalPERS' action of striking this

overpayment contradicts its claim that it lacks authority to pay respondent at his previous level."

The issue is not whether there are other retirees who are receiving benefits higher than respondent. The issue is whether his benefit is higher or lower than that of other retirees whose statutory retirement formula is exactly the same. That formula is expressed as 1) salary + years of service + age at retirement = retirement allowance. For those retirees who retired exactly at respondent's age with his length of service, and his final salary, the statutory retirement allowance is \$2,911.19 per month. It is that amount and no other. To allow respondent to have a higher allowance would be to treat him unequally which is violative of the mandate given to CalPERS by the Legislature. This, in and of itself, violates public policy. Those similarly situated require identical treatment when it comes to the carrying out of statutory retirement allowance.

ORDER

I

Respondent's appeal of the Board of Administration, California Public Employees' Retirement System decision decreasing his level of retirement allowance is denied.

Dated: June 11, 1998

STEPHEN E. HJELT
Administrative Law Judge
Office of Administrative Hearings