



# Retirement Board Regular Meeting

## Sacramento County Employees' Retirement System

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### Agenda Item 2

**MEETING DATE:** July 17, 2019

**SUBJECT:** Member Appeal

**SUBMITTED FOR:**  Consent  **Deliberation and Action**  **Receive and File**

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### RECOMMENDATION

Based on evidence presented by, procured from, and obtained on behalf of Lynn Tam-Toy (hereinafter "Tam-Toy"), staff recommends the Retirement Board:

- (1) Find that Tam-Toy has overlapping service credit between SCERS and CalPERS;
- (2) Find that Tam-Toy is disqualified from receiving reciprocity pursuant to Government Code Section 31831;
- (3) Deny Tam-Toy's request to establish reciprocity between SCERS and CalPERS; and
- (4) Find that Tam-Toy is not entitled to offsetting consideration/compensation from SCERS other than the five options described in the Chief Executive Officer's (CEO) denial letter dated March 28, 2019.

Tam-Toy is a 60 year-old **former Typist Clerk**, who previously worked for the Social Services Department and accrued **9 years of Miscellaneous Tier 2 service** in the Sacramento County Employees' Retirement System ("SCERS").

### BENEFIT MEMBER APPEAL REQUEST

Tam-Toy is a SCERS deferred member. In a letter dated April 29, 2019, Tam-Toy appealed to the SCERS Board of Retirement the SCERS CEO's denial of her request for reciprocity between SCERS and CalPERS. If that appeal is not granted, Tam is asking in the alternative for offsetting consideration or compensation from SCERS for having misclassified her status as reciprocal with CalPERS for the past 26 years, when she was not actually entitled to reciprocity.

### FACTUAL AND PROCEDURAL HISTORY

#### Tam-Toy's Concurrent Membership in SCERS and CalPERS from April 1991 to March 1992

1. On March 21, 1983, Tam-Toy entered SCERS membership. (See Exhibit A ["Inter-System Membership Advice" Memo from SCERS to PERS, dated May 20, 1992].)

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2. On April 1, 1991, Tam-Toy entered CalPERS membership. (See Exhibit A.)
  3. On March 31, 1992, Tam-Toy left active SCERS membership and went on deferred status. (See Exhibit A.)
  4. Because Tam-Toy joined CalPERS in 1991 but did not leave SCERS until 1992, there was one year of service overlap. Tam-Toy does not deny that there was overlapping service. (See Exhibit K [Letter from Tam-Toy to Eric Stern dated April 29, 2019].)

#### SCERS' and CalPERS' Communications with Tam-Toy Re: Reciprocity from 1992 to 2016

5. According to CalPERS' records, Tam-Toy had a telephone call with a CalPERS representative on March 5, 1992. According to those records, CalPERS informed Tam-Toy that because she had worked concurrently for Sacramento County and the State, "reciprocity cannot [sic] be established." (See Exhibit B [CalPERS' "Member Services Division Telephone Contact Sheet," dated March 5, 1992].)
6. CalPERS' records reflect that, from 2005 to 2016, Tam-Toy had multiple communications with CalPERS regarding the issue of whether she had established reciprocity between SCERS and CalPERS. (See Exhibit C [CalPERS' Notes from Communications with Participant from 2005 to 2016].)
7. From 1992 forward, SCERS repeatedly and incorrectly told Tam-Toy that she did have reciprocity between SCERS and CalPERS. SCERS conveyed that erroneous information to Tam-Toy through correspondence and annual service credit statements. (See Exhibit I [Correspondence and Annual Statements from SCERS to Tam-Toy from 1992 to 2017].)

#### SCERS Informs Tam-Toy that Reciprocity Cannot Be Granted

8. On August 26, 2016, Tam-Toy had a meeting with SCERS staff. During the meeting, staff informed Tam-Toy that she did not have reciprocity between SCERS and CalPERS. (See Exhibit D at p. 2 [SCERS MBase Notes Log for Tam-Toy].) By a letter dated August 30, 2016, SCERS staff confirmed the same in writing. (See Exhibit E [Letter from Cathy Miguel to Tam-Toy dated August 30, 2016].)
9. In a letter dated September 6, 2016, Tam-Toy appealed SCERS' denial of her request for reciprocity. (See Exhibit F [Letter from Tam-Toy to Cathy Miguel dated September 6, 2016].)
10. In a letter dated November 9, 2018, SCERS' General Counsel denied her request for reciprocity with CalPERS. (See Exhibit G [Letter from Robert Gaumer to Tam-Toy dated November 9, 2018]; See Exhibit D at p. 1.)
11. In a letter dated March 6, 2019, Tam-Toy appealed the General Counsel's decision to the SCERS CEO. (See Exhibit H [Letter from Tam-Toy to SCERS dated March 6, 2019].) In that letter, Tam-Toy argued that she detrimentally relied on erroneous statements

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contained in SCERS' past communications with her. (See Exhibit I [Attachments to Tam-Toy's March 6, 2019 Letter].)

12. In a letter dated March 28, 2019, the SCERS CEO denied Tam-Toy's appeal. (See Exhibit J [Letter from Eric Stern to Tam-Toy dated March 28, 2019].) That letter sets out five benefit options in lieu of reciprocity:
  - a. Retire as of the earliest retirement eligible date she could have retired, which was June 3, 2009 when she reached 50 years of age. Her estimated monthly benefit would be approximately \$299 and she would receive a one-time retroactive payment of approximately \$35,034, subject to all applicable taxes and deductions, to reflect the unpaid benefits since 2009.
  - b. Retire as of the normal retirement age, which was December 3, 2014 when she reached the 2% at 55½ normal retirement benefit formula. Her estimated monthly benefit would be approximately \$407 and she would receive a one-time retroactive payment of approximately \$20,735, subject to all applicable taxes and deductions, to reflect the unpaid benefits since 2014.
  - c. Retire today or as soon as is feasible for her to do so. Her estimated monthly benefit would be approximately \$491.
  - d. Remain in deferred status and retire at a future date. Her estimated monthly benefit would increase at a future date because of her age, but would not exceed \$530 when she reaches age 62½.
  - e. Request a refund of contributions of approximately \$23,250.
13. In a letter dated April 29, 2019, Tam-Toy appealed the SCERS CEO's decision to the Board. She admits in her letter that the law disqualifies her from reciprocity, but she nevertheless seeks "some sort of offsetting consideration/compensation" due to SCERS' errors (See Exhibit K [Letter from Tam-Toy to Eric Stern dated April 29, 2019].)
14. In a letter dated May 21, 2019, Eric Stern notified Tam-Toy that her appeal will be submitted to the Board. (See Exhibit L [Letter from Eric Stern to Tam-Toy dated May 21, 2019].)

### **CONCLUSIONS OF LAW**

1. Pursuant to SCERS Policy 010, Tam-Toy has the right to appeal the denial of a benefits request to the Board of Retirement and to address the Board on her appeal. (See Exhibit M.)
2. Government Code section 31831 states that, in order to obtain reciprocity, a member must have left County service and within six months thereafter become a member of CalPERS. (See Exhibit N.)

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3. SCERS has a fiduciary duty to adequately inform the Member of benefit options and failure to do so is tantamount to misrepresentation and concealment, however slight, under California Civil Code section 2228. See *Hittle v. Santa Barbara County Employees Retirement Association*, 39 Cal. 3d 374, 392 (1985).
  4. A retirement system's breach of fiduciary duty by not advising the member about benefit rights gives rise to the system's *duty* to allow the member to modify a selection of benefits options under the theory of *equitable estoppel*. See *Hudson v. County of Los Angeles* (2014) 2<sup>nd</sup> DCA B248983. The requisite elements for *equitable estoppel* are: (1) the party to be estopped was apprised of the facts; (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended; (3) the party asserting estoppel was ignorant of the facts; and (4) the party asserting estoppel suffered injury in reliance on the conduct.
  5. However, the principles of estoppel may not be invoked to directly contravene statutory limitations, and estoppel *against a government agency is barred where the agency to be estopped does not possess the authority to do what it appeared to be doing*. See *Medina v. Board of Retirement of Los Angeles County Employees' Retirement Association*, 112 Cal.App.4th 864 (2003). In *Medina*, two deputy district attorneys were erroneously classified as safety members because they had once been deputy sheriffs. When the error was discovered years later, the County retirement association was not estopped from retroactively reclassifying the two deputy district attorneys as general members, because under the statutes governing the retirement association's power to classify employees as safety members, the association did not possess the authority to continue to classify district attorneys as safety members.
  6. It is a basic and foundational principle in the *Internal Revenue Code* that a public pension plan must follow the terms of its governing plan document and only the terms of its governing plan document; and, if a public pension plan takes any action with employee money not specifically authorized under the terms of the plan document, then the pension fund can lose its tax-qualified status. This principle is stated repeatedly by the IRS in various places including: Revenue Procedure 2008-50, section 5.01, Revenue Procedure 94-62, PLR 87-52001, and Revenue Ruling 70-315.
  7. SCERS does not have the legal authority to grant Tam-Toy reciprocity with CalPERS. However, SCERS does have the legal authority to allow Tam-Toy to choose one of the following five benefit options:
    - A. Retire as of the earliest retirement eligible date she could have retired, which was June 3, 2009 when she reached 50 years of age. Her estimated monthly benefit would be approximately \$299, and she would receive a one-time retroactive payment of approximately \$35,034, subject to all applicable taxes and deductions, to reflect the unpaid benefits since 2009.
    - B. Retire as of the normal retirement age, which was December 3, 2014 when she reached the 2% at 55½ normal retirement benefit formula. Her estimated monthly

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benefit would be approximately \$407 and she would receive a one-time retroactive payment of approximately \$20,735, subject to all applicable taxes and deductions, to reflect the unpaid benefits since 2014.

- D. Retire today or as soon as is feasible for her to do so. Her estimated monthly benefit would be approximately \$491.
- E. Remain in deferred status and retire at a future date. Her estimated monthly benefit would increase at a future date because of her age, but would not exceed \$530 when she reaches age 62½.
- F. Request a refund of contributions of approximately \$23,250.

### **PROPOSED DISPOSITION**

Tam-Toy's request that SCERS grant reciprocal benefits with CalPERS is denied because she has overlapping service credit between SCERS and CalPERS. Therefore, Tam-Toy is disqualified from receiving reciprocity pursuant to Government Code section 31831. Further, Tam-Toy is not entitled to offsetting consideration or compensation from SCERS other than the five options described in the CEO's denial letter of March 28, 2019.

Prepared by:

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Stephen Lau  
General Counsel

Reviewed by:

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Eric Stern  
Chief Executive Officer

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Mario Sierras  
Chief Benefits Officer