

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the Appeal of Accepting the Late  
Application for Disability Retirement of:**

**RODNEY ROWE,**

**Respondent,**

**and**

**VENTURA UNIFIED SCHOOL DISTRICT,**

**Respondent.**

**Agency Case No. 2021-0753**

**OAH No. 2021120761**

**PROPOSED DECISION**

Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 31, 2022, by videoconference.

The record closed and the matter was submitted for decision at the conclusion of the hearing.

Preet Kaur, Senior Attorney, represented complainant California Public Employees' Retirement System (CalPERS).

Rodney Rowe (respondent) represented himself.

No appearance was made by or on behalf of Ventura Unified School District (VUSD) despite timely and appropriate notice of the hearing. The matter proceeded by default as to VUSD.

### **SUMMARY**

Respondent appeals CalPERS' rejection of his disability retirement application submitted on January 27, 2021. CalPERS concluded that the application was filed beyond the time limits required by Government Code section 21154, and respondent failed to establish his late filing was due to a correctable mistake pursuant to Government Code section 20160. However, respondent met his burden of establishing by a preponderance of the evidence that he did make honest mistakes of a complex area of law which was correctable pursuant to Government Code section 20160 and therefore his application, while late, should have been accepted for consideration. Therefore, respondent's appeal is granted and CalPERS shall accept as timely his disability retirement application.

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## FACTUAL FINDINGS

### Parties and Jurisdiction

1. CalPERS is a defined benefit plan administered under the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.) CalPERS is governed by its Board of Administration (Board). (Ex. 1.)

2. Respondent was last employed by VUSD as a Head Custodian I. By virtue of his employment, respondent is a school miscellaneous member of CalPERS. (Ex. 1.)

3. As explained in more detail below, on January 27, 2021, CalPERS received a Service Pending Industrial Disability Retirement Application from respondent. (Ex. 3.) CalPERS concluded the application had been filed late, and that respondent failed to demonstrate he had made a correctable mistake in filing it late. CalPERS notified respondent his application had been rejected, and advised him (and VUSD) of his right to appeal its determination. (Ex. 4.) Respondent timely requested a hearing to challenge the rejection of his application; VUSD did not. (Ex. 5.)

4. The Statement of Issues was filed on behalf of complainant by the Chief of its Disability and Survivor Benefits Division, Keith Riddle, in his official capacity. (Ex. 1.) The Statement of Issues alleges this appeal is limited to the issue of whether respondent made an error or omission as a result of mistake, inadvertence, surprise, or excusable neglect correctable by Government Code section 20160, which would allow CalPERS to accept his late application for disability retirement. (Ex. 1.)

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## **Pertinent Background Information**

5. Respondent describes himself as a person with low education, who received special education services while in public school. (Testimony [Test.] of respondent.)

6. From April 23, 2014, through January 15, 2021, respondent requested publications from CalPERS, which were mailed to him at least 13 times. The publications included School Member Benefits (Publication 2), Disability Retirement Election Application (Publication 35), Service Credit Purchase Options (Publication 12), a Retirement Allowance Estimate Request Form, and Planning Your Service Retirement (Publication 1). (Test. of Mari Cobbler; Exs. 13-21, 25, 32.)

7. The myCalPERS participant notes for respondent's file documents that respondent called CalPERS at least 15 times from May 11, 2017, through January 8, 2021, concerning disability retirement. (Test. of Cobbler; Ex. 8.)

8. During respondent's calls to CalPERS, staff explained the process of applying for a disability retirement, including requesting an estimate for a service retirement versus a disability retirement. Staff also explained documents required to make a complete disability retirement package and the timeframe to submit the required documents. Staff also advised that if required documents were not submitted timely, a disability retirement application may be cancelled; if cancelled, respondent would be required to submit a new disability retirement application, including all of the required documents, which may affect his requested retirement date. (Test. of Cobbler; Ex. 8.)

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9. Respondent called CalPERS so many times to ask about a disability retirement and to request publications because he did not understand what staff were telling him during the telephone calls. (Test. of respondent.)

### **Disability Retirement Application for Respondent Filed by VUSD**

10. On May 29, 2020, CalPERS received an Employer-Originated Disability Retirement Application submitted by VUSD on behalf of respondent. Respondent's stated last day on payroll was May 5, 2020. (Test. of Cobbler; Ex. 23.)

11. Mari Cobbler, a CalPERS Associate Governmental Program Analyst, testified that VUSD filed the application for disability retirement for respondent because it did not believe respondent could do his job, and VUSD was required to file such an application rather than terminating him. (See also Gov. Code, § 21153.)

12. By letter dated May 29, 2020, CalPERS requested respondent to provide documents regarding his disability. He also was provided a disability retirement application for him to complete and submit if he agreed with VUSD that he was disabled. (Ex. 23.) Respondent did not respond to the letter. (Test. of Cobbler.)

13. By letter dated June 19, 2020, CalPERS informed respondent the documents it previously requested had not been received, particularly his application for disability retirement. (Ex. 26.) Respondent did not respond. (Test. of Cobbler.)

14. On June 25, 2020, CalPERS received respondent's application for Service Retirement through Member Self-Service, with an effective retirement date of May 5, 2020. Respondent retired for service effective May 5, 2020, and has received service retirement benefits since July 6, 2020. (Test. of Cobbler; Exs. 28, 30.)

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15. By letter dated June 25, 2020, CalPERS advised respondent of his right to apply for a Service Pending Disability Retirement. The letter states in pertinent part:

You may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. To request a service pending disability retirement, you must complete a Disability Retirement Election Application. Please note that your retirement date cannot be earlier than the day following your last day on pay status.

(Ex. 28.)

16. By letter dated July 10, 2020, CalPERS informed respondent that his employer's application for disability retirement filed on his behalf "has been cancelled because the requested application information has not been received." The letter also states that "if you wish to re-apply for retirement at a later date, it will be necessary for you to complete a new application at that time." (Ex. 31.)

17. At hearing, respondent explained why he did not respond to CalPERS' two letters requesting information from him. Respondent remembered from his prior telephone conversations with CalPERS staff that he had limited time to obtain all necessary documentation if he requested a disability retirement. Respondent, in good faith, arrived at the erroneous conclusion that the deadline was not determined by his employer's submission of an application on his behalf, but when he submitted his own application. Respondent did not have all the required documentation when he received the two CalPERS letters described above. Respondent did not submit his own disability retirement application in response to CalPERS' two letters described above

because he did not think he could meet the deadline to submit the supporting documentation. (Test. of respondent.)

18. Respondent filed the service retirement application because he imperfectly understood CalPERS staff telling him that was the quickest way to receive retirement benefits. Respondent needed those benefits to support himself while he was gathering the required documentation to support a disability retirement application. For the same reason, respondent also did not timely act on the advice in CalPERS' June 25, 2020 letter concerning his ability to request a service pending disability retirement. (Test. of respondent.)

19. Respondent erroneously concluded, in good faith, that the cancellation of his employer's disability retirement application filed on his behalf would not prevent him from filing his own disability retirement application, which he planned to do once he had gathered all the required supporting documentation. (Test. of respondent.)

### **Respondent's Disability Retirement Application**

20. On January 27, 2021, CalPERS received a Service Pending Industrial Disability Retirement Application from respondent dated January 21, 2021, with a requested retirement date of May 6, 2020. Disability was claimed on the basis of orthopedic (knees, carpal tunnel) conditions. (Test. of Cobbler; Ex. 3.) Ms. Cobbler testified respondent was not eligible for an industrial disability retirement based on his position with VUSD. Although not clear from Ms. Cobbler's testimony, CalPERS' subsequent actions indicate it treated respondent's application as one for a disability retirement.

21. By letter dated January 29, 2021, CalPERS requested respondent to provide documents regarding his disability within 21 days. (Ex. 11.)



22. By letter dated February 26, 2021, CalPERS informed respondent that his application for disability retirement "has been cancelled because the requested application information has not been received." The letter also stated that if respondent wished to re-apply for retirement at a later date, it would be necessary for him to complete a new application at that time. (Ex. 34.)

23. However, by March 1, 2021, CalPERS received from respondent the documents it had previously requested, i.e., a completed Employer Information for Disability Retirement form; Physical Requirements of Position/Occupational Title; a Job Description of Head Custodian I from VUSD; and an Essential Functions Position Analysis. Upon receipt of these materials, CalPERS' rekeyed respondent's disability retirement application and reactivated its process of reviewing it. (Test. of Cobbler.)

24. By letters dated June 1, 2021, CalPERS advised respondent and VUSD that, because respondent had previously service retired effective May 5, 2020, it construed respondent's application for disability retirement as his request to change from service retirement to disability retirement. Respondent and VUSD were advised that, pursuant to Government Code section 20340, a member cannot change his or her retirement status after retiring or having their retirement contributions refunded, absent a correctable mistake pursuant to Government Code section 20160. In order to determine if such a change in respondent's retirement status could be made, CalPERS requested respondent and VUSD to provide written responses to questions specific to each party. (Test. of Cobbler; Exs. 35, 36.)

25. CalPERS did not receive a response from VUSD. (Test. of Cobbler.)

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26. On June 21, 2021, CalPERS timely received from respondent a Qualified Medical Evaluation Report prepared by Thor Gjerdrum, M.D.; and an MRI report dated February 12, 2019. (Test. of Cobbler, respondent; Ex. 12.)

27. On June 21, 2021, CalPERS also timely received respondent's responses to CalPERS' questions. Respondent wrote he had not filed a disability retirement application in response to CalPERS' June 2020 letter because CalPERS staff had advised him he would receive service retirement benefits faster if he filed for a service retirement, and that he should not file for a disability retirement if he did not have all the required documentation together because there was a "time clock" on the process. (Test. of respondent; Ex. 12.)

28. Review of the various letters, publications, and notes in respondent's myCalPERS file show that respondent was not advised as he wrote in his written response to CalPERS, but that instead he profoundly misunderstood the advice given to him by CalPERS staff concerning the process of applying for disability retirement, as explained above in Factual Findings 17 through 19.

### **CalPERS' Determinations**

29. By letter dated July 22, 2021, CalPERS advised respondent it had determined his disability retirement application was submitted late. (Ex. 4.) The letter did not specify why respondent's application had been deemed late. At hearing, Ms. Cobbler testified respondent's application did not meet the time limits for filing such an application set forth in Government Code section 21154, but she did not explain why.

30. CalPERS' July 22, 2021 letter also advised respondent that it had determined there were no grounds to consider his late application due to a

correctable mistake under Government Code section 20160. CalPERS determined that because respondent had called CalPERS 15 times to inquire about disability retirement and was provided assistance and information regarding the disability retirement process, “[t]he evidence suggests you had knowledge of the application process and, therefore, we are unable to establish that a correctable mistake was made.” (Test. of Cobbler; Ex. 4, p. A29.)

31. Based on the above, CalPERS concluded there was no error or omission as a result of mistake, inadvertence, surprise, or excusable neglect made by respondent within the meaning of Government Code section 20160 and, consequently, CalPERS could not accept respondent's late application for disability retirement. (Test. of Cobbler.)

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. An applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

2. A party seeking correction of an error or omission pursuant to Government Code section 20160 has the burden of establishing the right to do so. (Gov. Code, § 20160, subd. (d).) Subsequent undesignated statutory references are to the Government Code. Since the statute is silent, the preponderance of the evidence standard also applies to section 20160. (Evid. Code, § 115.)

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3. The preponderance of the evidence standard requires evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

### **Timeliness of a Disability Retirement Application**

4. To qualify for a disability retirement, one must show a “disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the [Board] . . . on the basis of competent medical opinion.” (§ 20026.)

5. The timeliness of an application for a disability retirement is governed by section 21154, which provides in part:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. . . .

6. Cases interpreting section 21154 have commented that it “reflects a legislative intent that a claimed disability bear a causal relationship to the discontinuance of service by providing outside time limits, referenced to the cessation of service, within which an application must be filed or need not be considered.” (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1307.)

7. As to how section 21154, subdivisions (a) and (d) interact, it has been held that if the employee/applicant is able to prove that he or she has been continuously disabled from the date of discontinuance of service to the time of the application for disability retirement, his application is timely under subdivision (d). If the employee is not able to prove continuous disability, he or she must file within four months of leaving service pursuant to subdivision (a). (*Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1044 [*Piscioneri*].)

8. In *Piscioneri*, the court held that the question of incapacity is a factual question to be determined at an administrative hearing. "It would be premature to decide it as a legal issue before a hearing was held. In other words, the administrative tribunal should initially decide whether the application was timely by making a finding, based on the evidence before it, as to whether the application was made while applicant was physically or mentally incapacitated to perform firefighter duties." (*Piscioneri, supra*, 95 Cal.App.4th at p. 1045.) The court concluded, "[The applicant] may or may not be entitled to his disability retirement—but he is entitled to a hearing." (*Piscioneri, supra*, 95 Cal.App.4th at p. 1054.)

9. Section 21152, subdivision (d), provides that an application for a disability retirement may be made by "[t]he member or any person in his or her behalf." Section 20340, subdivision (a), provides that a person "ceases to be a member" upon retirement.

10. It has been held that sections 21152 and 20340 read together, as well as the need for administrative and actuarial efficiency and the difficulty of making disability determinations years after the date of retirement, evidence a legislative intent that under normal circumstances retirees may not change their retirement status after they have retired. (*Button v. Board of Administration* (1981) 122 Cal.App.3d

730, 735 [*Button*].) Thus, in this case, *Button* would prevent respondent from seeking a disability retirement after he had retired for service, absent abnormal circumstances.

11. Moreover, respondent's January 27, 2021 disability retirement application exceeded the deadlines established by subdivisions (a) through (d) of section 21154 and therefore was late. Specifically, the application was not filed while respondent was in state service. (Subd. (a).) Respondent was not absent due to military service, so subdivision (b) does not apply. The application was submitted well more than four months after respondent discontinued state service. (Subd. (c).)

12. Under subdivision (d), respondent could attempt to show he was physically or mentally incapacitated to perform his duties from the date of his discontinuance of service to the time he submitted his application. Under *Piscioneri*, an applicant is entitled to a hearing to try to prove such a longstanding disability for purposes of showing a timely application under subdivision (d). However, respondent service retired well before he submitted his disability retirement application. Subdivision (d) specifically references a longstanding disability of the CalPERS member. Pursuant to *Button*, respondent was no longer a member after he service retired and therefore was not eligible to file a disability retirement application. Moreover, the longer time limit of subdivision (d) does not cover the entire period from when respondent stopped working through when he filed his application, since he service retired well before he submitted his application.

13. This situation highlights the significant errors of law respondent made in seeking a disability retirement. Respondent only filed for service retirement in June 2020 because he mistakenly believed CalPERS staff told him he could do that while still pursuing a disability retirement. Had respondent instead filed for service pending disability retirement in June 2020, his application would have been timely under

section 21154, subdivision (a). Moreover, had respondent not filed for service retirement in June 2020, his January 2021 disability retirement application could have been timely under section 21154, subdivision (d), if he could prove he remained continuously disabled from May 2020 through January 2021, as explained in the *Piscioneri* case. Respondent did neither because he labored under profound confusion and misunderstanding of the PERL and the advice given to him by CalPERS staff.

### **Correction of a Mistake**

14. The *Button* court held "the existence of abnormal or unusual circumstances will permit subordination of conventional interests in favor of other policy considerations," and that "inadvertence or mistake constitutes a special circumstance excusing a retired member's earlier inaction." (*Button, supra*, 122 Cal.App.3d at p. 735.)

15. In *Button*, the court held that if a retired public employee was disabled when he retired, his belief, as well as that of CalPERS' Board, that he was not disabled when he retired was a correctable mistake of fact, and therefore he would be able to correct his retirement pension status from "service" to "disability," even though his request to do so exceeded the applicable deadlines by 11 years. (*Button, supra*, 122 Cal.App.3d at pp. 736-738.)'

16. The *Button* court explained that "[Cal]PERS' interests in administrative and actuarial efficiency are not of overriding importance so as to allow honest mistakes to remain uncorrected," including post-retirement changes in status. (*Button, supra*, 122 Cal.App.3d at p. 737.) The court also noted "pension statutes are to be liberally interpreted in favor of the applicant so as to effectuate, rather than defeat, their avowed purpose of providing benefits for the employee....." (*Ibid.*)

17. In *Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559, the court similarly allowed a retiree to change his retirement status well after applicable deadlines. In *Rodie*, the retiree knew when he retired that he was eligible for both disability and service benefits; he elected a disability retirement. The following year he applied for and was awarded federal Social Security disability benefits, only to discover that his state benefits were then reduced correspondingly. The *Rodie* court stated that it could “discern no reason for treating an employee's mistaken choice between two types of retirement to which he is entitled by reason of past services differently from any other mistake depriving him of benefits to which he is fairly entitled.” (*Id.*, p. 566.)

18. Section 20160, subdivision (a), governs a request by a CalPERS member or beneficiary to correct an error or mistake, and provides:

Subject to subdivisions (c) and (d) [not applicable here], 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.

19. Cases interpreting Code of Civil Procedure section 473 have concluded the controlling factors in determining whether a mistake of law is excusable are the reasonableness of the misconception and the justifiability of the failure to determine the correct law. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611.) An honest mistake of law is a valid ground for relief where a problem is complex and debatable. (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1111.) On the other hand, "where the court finds that the alleged mistake of law is the result of . . . laxness or indifference [citations] normally relief will be denied." (*Fidelity Fed. Sav. & Loan Assn. v. Long* (1959) 175 Cal.App.2d 149, 154.)

20. In this case, CalPERS contends respondent did not make a mistake correctable by section 20160 because he "had knowledge of the application process." Such knowledge came from respondent's multiple telephone calls with CalPERS staff and receipt of several publications, some sent many times. Nonetheless, respondent's profound confusion and lack of understanding of what he was being advised led to his having an imperfect knowledge of the process.

21. Respondent made a number of erroneous conclusions about what he was required to do to submit a valid and timely disability retirement application. His errors were made in good faith, which is amply demonstrated by his subsequent actions, all indicating he always intended to apply for disability retirement. The fact that he contacted CalPERS so often shows his confusion. Indeed, he filed for a service retirement instead of a disability retirement or service pending disability retirement because he was confused about instructions on how to expedite receiving pension benefits while pursuing a disability retirement. He did not understand his former employer's application for disability retirement on his behalf started the time limit for him to submit required information. When respondent filed his own application for disability retirement, he selected the wrong option, i.e., an industrial disability retirement, for which he was not eligible. Nonetheless, once he filed his own application, respondent timely provided CalPERS with all requested information, and acted in a manner consistent with his imperfect understanding of how he was supposed to proceed.

22. Respondent's late disability retirement application, erroneously filed after he previously filed for a service retirement, was the result of his mistake, inadvertence, surprise, or excusable neglect as defined in Code of Civil Procedure section 473 and therefore was a correctable mistake under section 20160. Those familiar with the PERL know it can be complex. The *Button* decision is a good example, where the general rule prohibiting someone from requesting disability retirement after service retirement is based on subtle statutory construction and policy considerations. The complexity of this case is highlighted by the fact CalPERS initially advised respondent his application could not be accepted because he had previously service retired, only to advise him one month later that it was rejected because it was late. For a lay person with

respondent's background, it is easy to see how he could have become confused navigating his way through the application process.

23. Thus, respondent's various mistakes were honest and reasonable, given his circumstances and the involved area of the law which is not easily accessible to lay people. Given the number of times respondent contacted CalPERS, and his various actions toward submitting a disability retirement application, it cannot be concluded that respondent's mistakes were the result of laxness or indifference.

24. The rationale of the *Button* and *Rodie* cases support a similar result in this case. In *Button*, the mistake was that the retiree did not know he was disabled until well after he retired. In *Rodie*, the retiree made a pension selection he later discovered was not in his best interests. In this case, respondent had always sought a disability retirement, but he did not know he could not seek disability retirement after service retiring, and he made a number of other mistakes interpreting the applicable procedures in applying for one. The *Button* and *Rodie* courts both support the notion that pension laws should be liberally construed to help an applicant obtain earned benefits, not serve as a barrier.

25. Finally, allowing respondent to correct his mistakes in applying for disability retirement is supported by the policy considerations mentioned in some of the cases cited above. In *Haywood*, the court commented that the time limits specified in section 21154 show a legislative intent for disability retirement applications to be filed relatively close in time to the cessation of service. In this case, the first request for disability retirement was filed less than one month after respondent stopped working for VUSD in May 2020; the second application was filed in January 2021; and respondent kept in constant contact with CalPERS concerning his situation through CalPERS' ultimate rejection in July 2021 of his application.

26. In *Button*, the court focused on CalPERS' need for administrative and actuarial efficiency, and its difficulty in making disability determinations years after the date of retirement. The instant case presents no such problems. Respondent made CalPERS aware of his desire for a disability retirement within the deadlines set forth in section 21154 but thwarted his application by his honest mistakes. CalPERS has been on notice of respondent's intention to seek disability retirement soon after he stopped working and respondent provided CalPERS with requested medical information. Thus, CalPERS will not be deprived of a meaningful review of respondent's application due to the passage of time.

27. Based on the above, respondent met his burden of establishing by a preponderance of the evidence that he made errors or omissions as a result of mistake, inadvertence, surprise, or excusable neglect correctable by section 20160, which would allow CalPERS to accept for review his late application for disability retirement. (Factual Findings 1-31; Legal Conclusions 1-26.) This conclusion means CalPERS shall consider respondent's application. Respondent must still prove he is entitled to a disability retirement.

## ORDER

Respondent's appeal is granted. CalPERS shall accept for review respondent's late application for disability retirement.

DATE: 12/06/2022

  
Eric C. Sawyer (Dec 6, 2022 09:53 PST)

ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings