

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Appeal for an Earlier Effective Date of
Industrial Disability Retirement of:**

MARK H. FLORES, Respondent;

and

**CORRECTIONAL TRAINING CENTER, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent.**

Agency Case No. 2021-0495

OAH No. 2021120209

PROPOSED DECISION

Administrative Law Judge Karen Reichmann, State of California, Office of Administrative Hearings, heard this matter on May 31, 2022, by videoconference.

Attorney Vance Piggott appeared on behalf of respondent Mark H. Flores, who was present.

No appearance was made by or on behalf of respondent Correctional Training Center, California Department of Corrections and Rehabilitation (CDCR).

Senior Attorney Charles Glauberman represented the California Public Employees' Retirement System (CalPERS).

The record closed and the matter was submitted for decision on May 31, 2022.

ISSUE

Did CalPERS err in refusing to grant respondent Flores an earlier effective retirement date based on the mistake statute (Government Code section 20160)?

FACTUAL FINDINGS

1. Respondent Mark H. Flores (respondent) was employed by the CDCR and worked as a correctional officer at the Correctional Training Center in Soledad. By virtue of his employment, respondent became a state safety member of CalPERS.

2. On November 20, 2020, respondent submitted an application for service retirement pending industrial disability retirement, dated October 29, 2020. He requested an effective date of retirement of May 16, 2019. In connection with the application, CalPERS received a Report of Separation and Advance Payroll Information form, filled out by a CDCR Senior Personnel Specialist, reflecting respondent's last day on pay status as May 15, 2019.

3. On November 25, 2020, CalPERS notified respondent that because his application was received more than nine months after the requested effective date of retirement, his retirement benefits could not commence earlier than the first day of the month in which the application was received, namely November 1, 2020. Respondent was advised that his application for service retirement would be processed using this

date, but that if he were to be approved for industrial disability retirement, his request for the earlier retirement date would be evaluated at that time.

4. On January 11, 2021, CalPERS wrote to both respondent and CDCR asking for additional information to assist in determining whether to grant respondent's request for the May 16, 2019, effective date of retirement. The parties were asked to respond by February 1, 2021. Neither party responded by that time. A second letter was sent to both respondent and CDCR on March 1, 2021. Respondent submitted a response on March 16, 2021. CDCR never responded to CalPERS's inquiry.

5. On April 23, 2021, CalPERS notified respondent that his application for industrial disability retirement had been granted.

6. Also on April 23, 2021, CalPERS issued a Final Determination Letter to respondent, denying his request for an earlier effective retirement date and concluding that there had been no correctable mistake. Respondent was advised of his right to appeal.

7. Respondent filed a timely appeal, and this hearing followed.

8. CalPERS's records reflect that respondent was provided with information from CalPERS regarding industrial disability retirement on several occasions, beginning in February 2020:

a. On February 25, 2020, respondent called CalPERS and asked for information about applying for service retirement pending disability retirement. Information was provided over the phone, and CalPERS Publication 35, which contains information on disability retirement, application materials, and other forms, was sent to respondent. This publication advises members that they may apply for disability

retirement while still employed and advises members to apply “as soon as you believe you are unable to perform your usual job duties.”

The publication also advises, “if you have a workers’ compensation claim, you should not wait until your condition is ‘permanent and stationary’ under workers’ compensation requirements to submit your application. Delaying your application for retirement may affect important benefits you may be entitled to receive.”

The directions for filling out the application state, “the effective date of your retirement can be no earlier than the day following your last day on payroll, as long as your application is **received by CalPERS within nine months** of that date. If not, the retirement date can be no earlier than the first of the month in which CalPERS receives your application.” (Emphasis in original.)

b. Respondent called CalPERS on February 26, 2020. Notes from this call reflect that respondent was advised to submit an application for service retirement pending industrial disability retirement and that the CalPERS representative discussed with respondent “backdating retirement date up to 9 months from separation.” Respondent also asked about purchasing service prior to membership credit.

c. On February 28, 2020, respondent visited the CalPERS regional office in San Jose. He submitted estimate requests for service retirement and industrial disability retirement. The CalPERS representative provided the service retirement pending industry disability retirement application and the industrial disability retirement application to respondent and explained how to fill them out and submit them.

At this visit, respondent also submitted a request for the cost for purchasing service prior to membership credit.

d. On March 5, 2020, CalPERS sent respondent benefit estimate letters for both service and industrial disability retirement, based on a February 2020 retirement date.

e. On March 24, 2020, respondent called CalPERS and asked if he could complete the service retirement application over the phone. He was advised that this was not an option. Respondent told the CalPERS representative that he had not worked in three years. The representative told respondent that CalPERS's records reflected him as "active," and advised respondent to contact his employer for a separation date.

f. On June 26, 2020, CalPERS wrote respondent and advised him that CDCR had informed CalPERS that he had been permanently separated from employment, and advised respondent of his options, including retirement. The letter advised respondent to "submit your retirement application within nine months of separating from employment to receive the earliest retirement date," and that if he failed to do so, his retirement date could be no earlier than the first day of the month in which the application is received.

g. Respondent contacted CalPERS on September 18, 2020, again asking about applying for service retirement pending disability retirement. He was advised that he could not backdate his application because more than nine months had passed since his date of separation from employment. Respondent was advised to apply as soon as possible, and application forms were mailed to him again.

h. On October 19, 2020, respondent called CalPERS for information about the different retirement benefit options. The CalPERS representative provided some information over the phone and also sent respondent information in the mail, again

including application forms. Respondent told the representative that CalPERS had an incorrect separation date. Respondent was advised to contact his employer to correct the date.

i. On October 28, 2020, respondent had a scheduled telephone appointment with a CalPERS representative. The representative reviewed the service retirement pending industrial disability retirement application with respondent and urged him to submit it as soon as possible.

j. On November 6, 2020, respondent had another scheduled telephone appointment with a CalPERS representative. The representative reviewed the application for service retirement pending industrial disability retirement with respondent.

9. Associate Governmental Program Analyst Mari Cobbler testified at hearing to explain CalPERS's decision not to grant an earlier retirement date to respondent. CalPERS concluded that respondent was on notice by February 2020, when he spoke to a CalPERS representative and was sent Publication 35, that he had to submit his application within nine months of his last day on payroll to be entitled to a retirement date earlier than the first of the month in which the application was submitted. She explained that respondent could have inquired with his employer about his separation date and that it was unreasonable not to do so. She noted that respondent should have been aware that he was no longer receiving compensation from his employer as of May 2019. She added that it was unreasonable for respondent to wait from February 2020 until November 2020 to submit his application for service retirement pending industrial disability retirement.

10. Respondent testified that he stopped working in February 2017, due to an injury to his foot. His condition was treated through workers' compensation. Respondent hoped that his condition would improve and that he would be able to return to work.

11. Respondent stated that there were two qualified medical evaluators (QME's) involved in his workers' compensation case, and that he learned in February 2020 from these QME's that he would not be able to return to work. He added that their final reports were not issued until March or April 2020.

12. Respondent testified that one of the CalPERS representatives he spoke with in February 2020 told him that because he was "still active in the system" he could not "do anything," and to contact his employer. Respondent added that he then contacted CDCR, and was told he had to wait for the final QME reports. He testified that during the March 24, 2020, phone call, he was told by a CalPERS representative that he was "active" and "couldn't do anything until CDCR acted."

13. Respondent testified that that he did not learn until June 2020 that he was separated from employment, and that he did not learn until the September 18, 2020, phone call with a CalPERS representative that he had failed to apply within nine months of his separation date.

14. Respondent testified that as soon as he received the final QME reports in March or April 2020, he began the process of submitting his application, but that he was delayed because he did not have the necessary medical paperwork. He denied waiting until November 2020 to submit his application and believes he submitted it in August or October.

15. Respondent did not recall reviewing the information in CalPERS Publication 35 regarding when he could submit his application.

16. Respondent's testimony that he was misinformed by both CalPERS and CDCR about when he could apply for disability retirement was contradicted by other evidence, uncorroborated, and not found to be credible. Respondent's assertion that he submitted his application prior to November 20, 2020, was likewise not credible.

17. Respondent testified that he suffered financially in 2019 and 2020, after he exhausted his leave and leave that was donated to him through a catastrophic leave bank, and that he had no income for an extended period of time, until he began receiving retirement benefits.

18. Because respondent was not granted an earlier retirement date, he and his wife were not entitled to retiree health benefits, which are available only when no more than 120 days elapse between the last day of employment and the retirement date. This has been a significant hardship to respondent and his wife. Respondent has purchased health insurance through Covered California, and travelled to Mexico to save money on dental treatments.

LEGAL CONCLUSIONS

1. Government Code section 21151, subdivision (a), provides that a state safety member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability.

2. Government Code section 21154 provides that an application for industrial disability retirement may be submitted:

(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.

3. Government Code section 21251 provides:

A member's written application for retirement, if submitted to the board within nine months after the date the member discontinued his or her state service, and, in the case of retirement for disability, if the member was physically or mentally incapacitated to perform his or her duties from the date the member discontinued state service to the time the written application for retirement was submitted to the board, shall be deemed to have been submitted on the last day for which salary was payable. The effective date of a written application for retirement submitted to the board more than nine months after the member's discontinuance of state service shall be the first day of the month in which the member's application is received at an office of the board or by an employee of this system designated by the board.

4. 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.

5. The evidence failed to establish that respondent's failure to submit his application within nine months of his last day on payroll with CDCR was a correctable mistake. Respondent became aware in February 2020 that he would not be able to return to work at CDCR. He contacted CalPERS and received information about the process and timeframe for seeking disability retirement, and was warned that delaying his application could adversely affect the benefits he would be entitled to receive. Despite receiving this information in February 2020, he did not file his application until November 2020. Respondent's testimony that he was told by individuals at CalPERS and at CDCR that he could not file his application was not credible. Respondent's delay was not reasonable. Accordingly, he has not met his burden of establishing that he is entitled to correction of his mistake pursuant to Government Code section 20160.

6. Respondent's last day in state service was May 15, 2019. (Factual Finding 2.) Respondent's application was received more than nine months later, on November 20, 2020. (Factual Finding 2.) The retirement date of November 1, 2020, as determined by CalPERS, is mandated by Government Code section 21251.

ORDER

The appeal of respondent Mark H. Flores of the April 23, 2021, determination letter denying his request for an earlier retirement date is denied.

DATE: 06/28/2022

Karen Reichmann

KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings