

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Statement of Issues  
(Application For Earlier Date of  
Retirement) Of:

Case No. 9155

OAH No. 2012080639

STACY A. ESAU,

Respondent,

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND  
REHABILITATION,

Respondent.

**PROPOSED DECISION**

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on October 19, 2012.

Renee Salazar, Staff Counsel, represented petitioner Mary Lynn Fisher, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Kenneth N. Myleco, Attorney at Law, represented respondent Stacy A. Esau.

Deputy Attorney General Loren E. Dieu represented respondent California Department of Corrections and Rehabilitation.

Evidence was received and the record was left open for submission of additional evidence and written argument. On November 28, 2012, the parties submitted by stipulation a group exhibit paginated from 1 to 59. This exhibit was marked respondent CDCR's exhibit A and received in evidence. Respondent's Esau's post-trial brief was received on February 1, 2013, marked respondent Esau's exhibit 30 and made a part of the record. Respondent CDCR's post-trial brief was received on April 2, 2013, marked respondent CDCR's exhibit B, and made a part of the record. Petitioner CalPERS post-hearing brief was received on

April 2, 2013, marked CalPERS' exhibit 20, and made a part of the record. Respondent Esau's reply brief was received on April 22, 2013, marked respondent Esau's exhibit 31. The matter was submitted on April 22, 2013.<sup>1</sup>

### ISSUE PRESENTED

Whether respondent Stacy Esau is entitled to an earlier effective date for her disability retirement than April 20, 2010.<sup>2</sup>

### FACTUAL FINDINGS

1. Petitioner/complainant Mary Lynn Fisher filed the Statement of Issues solely in her official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent Stacy A. Esau was employed by respondent California Department of Corrections and Rehabilitation. At the time respondent filed her application for retirement, she was employed as a Painter II-Correctional Facility, at Duel Vocational Institute. By virtue of her employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.<sup>3</sup>

3. On or about January 24, 2008, respondent signed an application for disability retirement requesting a retirement effective date of June 20, 2005. In filing the application, disability was claimed on the basis of an orthopedic (neck, right shoulder, and right upper extremity) condition.

4. CalPERS obtained medical reports concerning respondent's orthopedic condition from competent medical professionals. After review of the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance

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<sup>1</sup> A hearing was convened before the Administrative Law Judge on November 29, 2011, at which CalPERS seemingly agreed to change the effective date to June 20, 2005, and begin the process of recalculating respondent Esau's retirement benefits. However, CalPERS thereafter determined it did not have the authority to agree to the earlier date. Respondent Esau filed an action in the San Joaquin Superior Court seeking injunctive relief, and the Superior Court remanded the matter back to the Administrative Law Judge to decide the effective date issue in a proposed decision.

<sup>2</sup> Respondent Esau also asked for back pay, temporary disability payments and interest on both, but as the Legal Conclusions make clear, CalPERS is without jurisdiction to decide such questions and make such awards.

<sup>3</sup> All statutory references are to the Government Code, unless otherwise stated.

of the usual duties of a Painter II-Correctional Facility at the time the application for disability retirement was filed.

5. Respondent was notified of CalPERS' determination and was advised of her appeal rights by letter dated October 20, 2008.

6. Respondent filed a timely appeal by letter dated November 18, 2008, and requested a hearing.

7. On January 1, 2009, respondent Esau returned to work as a painter at Duel Vocational Institute. Her last day of pay was April 19, 2010.

8. An administrative hearing was scheduled for March 30, 2010. Prior to the hearing, CalPERS received a medical report dated March 26, 2010, from its Independent Medical Examiner (IME). The IME had earlier concluded that respondent Esau was not substantially incapacitated for her usual duties, but after reviewing a February 9, 2010 neurological evaluation of respondent Esau, the IME change his opinion and concluded that respondent was substantially incapacitated for her usual duties as a Painter II-Correctional Facility. The March 30, 2010 hearing was taken off calendar.

9. By letter dated May 20, 2010, CalPERS notified respondent Esau that her industrial disability retirement application had been approved. In response, respondent Esau requested an effective date of June 20, 2005.

10. Respondent Esau was injured on the job at Duel Vocational Institute on or about October 27, 2004. She filed a workers' compensation claim on October 28, 2004. She was approved for light duty by respondent CDCR/DVI, through December 17, 2004. On December 10, 2004, she was sent the first of a series of option letters. The first was sent by Return to Work Coordinator Linda Torlai. The December 10, 2004 letter referenced respondent Esau's light duty status and included information regarding return to work options, temporary disability leave, and separation from state service. The attached Option Discussion Checklist included the typical items that an injured worker might want to discuss with the coordinator including disability retirement. There was no separate item for "industrial" disability retirement. Respondent Esau did not fill out the options check list, as she planned to continue working as a painter at DVI. On February 24, 2005, the new Return to Work Coordinator Deborah Jacobs sent respondent Esau a letter informing her that respondent CDCR had a limited term light duty policy allowing 60 days of temporary modified duty. Respondent Esau had been on light duty for 76 days as of February 23, 2005, so her last permissible light duty day was end of shift on that date. She was advised to contact Ms. Jacobs if her treating physician cleared her for full duty.

11. On June 10, 2005, Ms. Jacobs sent respondent Esau the second options letter. This letter acknowledged a June 9, 2005 report by respondent Esau's treating physician indicating that she "may not be able to perform the duties of a Painter II with [respondent CDCR]." The same options were discussed and the options check list was attached. Dr.

Patel's worker's compensation evaluation of June 30, 2005, concluded that respondent Esau could not perform her painting job because she had to use her injured right hand for turning, twisting, gripping and grasping with more torque at the wrist and elbow. He felt that she could do the job if these limitations were accommodated. On July 13, 2005, respondent Esau met with Ms. Jacobs and Sherry Pinson, the Personnel Officer at DVI. Ms. Jacobs sent respondent Esau a letter confirming their discussion of four options: return to work with reasonable accommodation, medical transfer/demotion to another classification, temporary disability/industrial disability leave/vocational rehabilitation, and disability retirement. Respondent Esau testified that Ms. Jacobs told her that she was not eligible for industrial disability retirement because she was not a peace officer. Respondent Esau testified that she was given the same information from Personnel Officer Stephanie Peterson. She questioned their opinions and responded that that was not her understanding. In either 2005 or 2006, respondent Esau researched the topic on the internet. She concluded that if the information she read was true, Ms. Jacobs and Ms. Peterson had lied. Respondent did complete the request for reasonable accommodation form on August 1, 2005, asking that her job be restructured.

12. On May 15, 2006, the replacement Return to Work Coordinator Gloria Montes De Oca sent respondent Esau the third options letter and the options discussion checklist. The letter acknowledged an April 3, 2006 report authored by Dr. Abelow, a workers' compensation Qualified Medical Examiner. Dr. Abelow, a board-certified orthopedic surgeon, examined respondent Esau and concluded that she could not return to her usual and customary occupation. Respondent Esau met with Ms. De Oca, Mary Vierra, and Stephanie Peterson on June 20, 2006. Respondent Esau testified that all three told her that she was not eligible for industrial disability retirement and that option was only available to correctional officers and other peace officers. Ms. De Oca testified that she did not tell respondent Esau that she was not eligible for industrial disability retirement and neither did the others say so in her presence. Ms. De Oca's notes for the meeting were received in evidence and included among the items discussed, "Disability/Industrial Disability." Ms. De Oca recorded in her notes that that "IDR" was an injury or illness incurred on the job and "DR" was non work related illness or injury. She added, "at this time [respondent Esau] feels she can cont [*sic*] working." Later, she noted respondent Esau wanted to return to work as a painter or in another class in plant operations.

13. Another meeting between Ms. De Oca and respondent Esau was held on July 10, 2006. Respondent Esau was still interested in staying a Painter II. They explored other classifications and respondent Esau told Ms. De Oca that she was applying for positions at other institutions. Respondent Esau had also applied for a building and trades supervisor position vacated by her former supervisor and was unsuccessful. She expressed an interest in finding such a position elsewhere.

14. On November 5, 2007, Ms. De Oca sent respondent Esau the fourth Options letter and attached the standard option discussion checklist. Dr. Abelow's April 6, 2006 report was referenced indicating that respondent Esau "may not be able to perform the duties of a Painter II with [respondent CDCR]." Respondent Esau returned the checklist on which

she added industrial disability retirement. On December 5, 2007, Ms. De Oca and Stephanie Peterson met with respondent Esau. They discussed industrial disability retirement and respondent related her intention to apply for it, but defer the application until she learned whether she received a job offer from Folsom/PIA where she had interviewed for a supervisory position. She told Ms. De Oca that she really would like to keep working. Ms. De Oca agreed to fill out the employer certification portion of the industrial disability retirement application and mail the application to respondent Esau. She listed respondent Esau's last day on payroll as June 20, 2005. Respondent learned in early 2008, that she had not been offered the position for which she had interviewed and she submitted her industrial disability retirement application to CalPERS as noted in Factual Finding 3 above.

### LEGAL CONCLUSIONS

1. Section 21252, subdivision (a), reads:

(a) 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.

(Emphasis added.)

2. Section 21165 reads:

Notwithstanding any other provision of this article, the retirement for disability of a member, other than a local safety member, with the exception of a school safety member, who has been granted or is entitled to a leave of absence with compensation, which shall include nonindustrial disability insurance benefits payable pursuant to Article 5 (commencing with Section 19878) of Chapter 2.5 of Part 2.6, shall not become effective prior to the expiration of the leave of absence with compensation, unless the member applies for or consents to his or her retirement as of an earlier date.

3. Respondent Esau's last day for which salary was payable was April 19, 2010. Thus, absent any other provision of law modifying the effect of section 21252, that is the effective date of her industrial disability retirement.

4. Respondent Esau contends that her effective date of retirement should be June 20, 2005, the date initially agreed upon by CalPERS during the hearing on November 29, 2011. This date, as noted in the Factual Findings, was the date entered by Ms. De Oca as respondent Esau's last day on the payroll with respondent CDCR, DVI. Respondent Esau argues section 20160 allows CalPERS to rectify mistakes, including those made by respondent CDCR. According to respondent Esau, the mistakes to be rectified were the misrepresentations by CDCR representatives to respondent Esau about her eligibility for industrial disability retirement and the failure by CDCR to apply for industrial disability retirement on respondent Esau's behalf after receipt of Dr. Patel's June 30, 2005 evaluation.

5. Section 20160, subdivisions (b) through (e), reads:

(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.

6. As the Factual Findings reflect, there was a conflict in the testimony of witnesses about whether CDCR-DVI representatives told respondent Esau that she was not eligible for industrial disability benefits in meetings preceding the December 5, 2007 meeting. It is unnecessary to resolve the conflict, because even if such representations had been made, there is no evidence to establish that respondent Esau would have obtained an earlier effective date of industrial disability retirement had she applied in 2005. She did apply on January 24, 2008, and it was CalPERS' denial of the application that caused her to return to work with a "new" last day on the payroll of April 19, 2010. In accordance with the clear language of Government Code section 21252, that became her effective date for retirement irrespective of the events leading up to her filing the application .

7. CalPERS' post-hearing brief was accompanied by a Request For Official Notice of an earlier Board of Administration decision addressing a very similar factual situation. Official Notice is taken of the Board's decision in *In the Matter of the Application for Disability Retirement of Ernesto A. Chavez, respondent and the Department of Consumer Affairs, respondent*. (CalPERS case number 9448 and OAH number 2010020528, decided June 13, 2012) (*Chavez*.) This is in accordance with section 11515 in conjunction with Evidence Code section 452, subdivision (c) (official acts of a state executive branch agency). Although the Board's earlier decision is not binding (expressly relied upon) in the manner of a precedential decision so designated in accordance with section 11425, it does convey the Board's administrative interpretation of section 21252. (*City of Oakland v. CalPERS* (2002) 95 Cal. App.4th 29, 57, citing *Styne v. Stevens* (2001) 26 Cal.4th 42, 53.) In *Chavez*, the application for disability retirement was submitted by his employer Department of Consumer Affairs. It was denied by CalPERS and Chavez briefly returned to work. The Department of Consumer Affairs appealed the denial and Chavez was determined to be disabled. The decision addressed the appropriate effective date and concluded that the appropriate date was the date on which Chavez's leave balances had been exhausted following his return to work.

8. In this matter, CalPERS denied respondent Esau's application submitted on January 24, 2008. This followed an evaluation by CalPERS' independent medical evaluator and consideration of medical evaluations performed by other physicians including Dr. Patel and Dr. Abelow. One may reasonably infer that even if an earlier application had been submitted by respondent Esau, it would have been denied and respondent Esau ordered back to work. This is because it was not until CalPERS' independent medical evaluator's consideration of the February 9, 2010 neurological evaluation that CalPERS changed its decision and determined to grant respondent Esau's application. In summary, even if

respondent CDCR representatives did mistakenly inform respondent Esau that she was not entitled to industrial disability retirement in 2005 and 2006, her effective date of retirement would still be April 19, 2010, in accordance with the language of Government Code section 21252.

9. The same conclusion pertains to respondent Esau's contention that an earlier effective date is appropriate because respondent CDCR failed to perform its duty mandated by section 21153, recited below. Even if such a duty existed, had respondent CDCR filed the application, it is reasonable to expect that it would have been denied for the reasons outlined in Legal Conclusion 8 above.

*Reinstatement, Back Pay, Temporary Disability and Other Benefits Contentions*

10. Respondent Esau argues that respondent CDCR had a non-discretionary duty to submit an application to CalPERS to retire respondent Esau for industrial disability upon receipt of Dr. Patel's evaluation declaring respondent Esau unable to perform her usual and customary duties as a Painter II at DVI. Respondent Esau contends that this was required by the language of section 21153. Respondent Esau asserts that she is entitled to back pay with interest for the period that she was not working between the day following the termination of her light duty assignment on January 23, 2005, until she resumed work on January 5, 2009.

11. Section 21153 reads:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

12. Section 19253.5 reads, in pertinent part:

(i)(1) If the appointing power, after considering the conclusions of the medical examination provided for by this section or medical reports from the employee's physician and other pertinent information, concludes that the employee is unable to perform the work of his or her present position or any other position in the agency and the employee is eligible and does not waive the right to retire for disability, the appointing power shall file an application for disability retirement on the employee's behalf. The appointing power shall give the employee 15 days written notice of its intention to file such an application and a reasonable opportunity to respond to the appointing power prior to the appointing power's filing of the

application. However, the appointing power's decision to file the application is final and is not appealable to the State Personnel Board.

(2) Notwithstanding Section 21153, upon filing the application for disability retirement, the appointing power may remove the employee from the job and place the employee on involuntary leave status. The employee may use any accrued leave eligible during the period of the involuntary leave. If the employee's leave credits and programs are exhausted or if they do not provide benefits at least equal to the estimated retirement allowance, the appointing power shall pay the employee an additional temporary disability allowance so that the employee receives payment equal to the retirement allowance. The appointing power shall continue to make all employer contributions to the employee's health plans during the period of the involuntary leave.

(3) If the application for disability retirement is subsequently granted, the retirement system shall reimburse the appointing power for the temporary disability allowance which shall be deducted from any back disability retirement benefits otherwise payable to the employee. If the application is denied, the appointing power shall reinstate the employee to his or her position with back salary and benefits pursuant to subdivision (g), less any temporary disability allowance paid by the appointing power. The appointing power shall also restore any leave credits the employee used during the period of the involuntary leave.

13. The gist of respondent Esau's contention is that had respondent CDCR applied for disability retirement on behalf of respondent Esau, she would have been entitled to back salary and benefits pursuant to subdivision (i)(3) upon the denial of the application by CalPERS. This of course, presumes that respondent could not perform any other work for respondent CDCR (See, e.g., *Gonzalez v. Department of Corrections and Rehabilitation* (2011) 195 Cal. App.4th 89, 94.) More importantly, this obligation falls within the body of law administered by the State Personnel Board, not CalPERS. Thus, even assuming respondent CalPERS had an obligation to submit an application for industrial disability retirement for respondent Esau in early 2005, the failure to do so must be addressed in another forum.<sup>4</sup>

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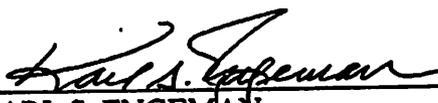
<sup>4</sup> This is not to suggest that there is no avenue for relief for failure to comply with the mandate imposed by sections 19253.5 and 21153. The *Gonzalez* decision was decided upon a petition for a writ of mandate to enforce the obligation, and as noted above, respondent Esau has a pending action in the San Joaquin Superior Court.

14. In respondent Esau's Reply Brief, she raises a related and somewhat more creative argument. This argument is based on the same premise that respondent CDCR should have filed an application for disability retirement on respondent Esau's behalf at the time that her modified work assignment was terminated and the agency's failure to do so constitutes an error or omission correctable by CalPERS. In this case, the correction sought is payment to respondent Esau of the temporary disability allowance specified in subdivision (i)(2) of section 19253.5 that respondent CDCR allegedly should have paid respondent Esau, plus interest. Respondent Esau reasons that as CalPERS would have had to reimburse CDCR according to subdivision (i)(3) of the same section for such payments once respondent Esau's application was finally granted, CalPERS was "ultimately responsible" for the temporary disability payments. This contention fails for at least three reasons. First, CalPERS' obligation under subsection (i)(3) is to respondent CDCR, not respondent Esau, and is only triggered by the payment of temporary disability benefits by the employing state agency which did not occur. Second, as noted above, section 19253.5 is part of the civil service law administered by the State Personnel Board and CalPERS has no statutory authority to require respondent CDCR to comply with section 19253.5 or to determine if the circumstances requiring the filing of an application for disability retirement on respondent Esau's behalf existed. Third, while section 20160 is a part of the Public Employees' Retirement Law, subsection (b) requires the Board of Administration to "correct all actions taken as a result of errors or omissions of ... any state agency or department... or this system." Here, CalPERS took no action as the result of respondent CDCR's failure to file an industrial disability application on behalf of respondent Esau. Thus, there is no action to correct, including the non-payment of temporary disability benefits to respondent.

#### ORDER

Respondent Esau's effective date of retirement is April 19, 2010.

Dated: May 17, 2013

  
KARL S. ENGEMAN  
Administrative Law Judge  
Office of Administrative Hearings