ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Statement of Issues Against: JOHN M. FOGERTY, Respondent, and DEPARTMENT OF CALIFORNIA HIGHWAY PATROL, Employer.	CASE NO. 2012-0695 OAH NO. 2012101074

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge, Office of Administrative Hearings, in San Bernardino, California on June 11, 2013.

John M. Fogerty (respondent) personally appeared and was represented by Scott A. O'Mara, Esq., Law Offices of O'Mara & Hampton

CalPERS' senior staff attorney Elizabeth Yelland, Esq., represented the California Public Employees' Retirement System (CalPERS).

There was no appearance on behalf of the Department of California Highway Patrol (CHP or employer).

Oral and documentary evidence was received and the record was left open so that respondent could submit a closing brief. The closing brief was received, marked as Exhibit "S," and the matter was deemed submitted on July 1, 2013.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED July 17, 2013

ISSUE

Did respondent timely submit a complete application for industrial disability retirement?

FACTUAL FINDINGS

1. Anthony Suine made and filed the Statement of Issues while acting in his official capacity as the Chief of the Benefit Services Division of CalPERS.

2. Respondent was employed by CHP as a Highway Patrol Officer from July 17, 1972 until April 27, 2007. At the time of his retirement respondent had advanced to the rank of Chief.

3. By virtue of his employment, respondent is a state safety member of CalPERS pursuant to Government Code section 20390.

4. On March 7, 2007, respondent signed and thereafter submitted a "Service Pending Industrial Disability Retirement" application.

5. Respondent failed to include a Workers Compensation Carrier Request form (PERS-BSD 92) with his March 7, 2007, retirement application. Consequently, CalPERS notified respondent that his application had been cancelled.

6. On May 4, 2007, respondent contacted CalPERS, via email, with the following information and questions: ". . . My treating physicians have said they submitted the required reports regarding my injuries. Why has my application been cancelled? What do I need to do to continue the process?" (Exh. 12) CalPERS immediately responded to respondent's email as follows: "Thank you for contacting Ask CalPERS. Your application for Industrial Disability Retirement was cancelled because we did not receive a completed Workers Compensation Carrier Request (PERS-BSD 92)." (Exh. 13)

7. On May 8, 2007, respondent called CalPERS and spoke with a CalPERS analyst about the status of his Industrial Disability Retirement (IDR) application. Respondent was again advised that his IDR application was cancelled on April 28, 2007, due to respondent's failure to include a Workers Compensation Carrier Request. Respondent was advised that he needed to submit an entirely new application package. CalPERS employees could not reverse the cancellation process because the process was fully automated and once the computer cancelled an application and created an automatic cancellation letter, which is sent to the applicant, a new application must be submitted to begin the process anew.

8. It was not until November 2, 2011, that respondent signed and thereafter submitted a new application for Service Pending Industrial Disability Retirement.

9. By letter, dated June 26, 2012, CalPERS notified respondent of the following:

> Your file has been carefully reviewed in conjunction with your industrial disability retirement application, which you submitted after you had retired for service.
>
> Based on the provisions of law and the facts of your situation, your request to change your retirement status from service to an industrial disability retirement is respectfully denied.
>
> Government Code section 20160 may be used as authority to correct a mistake due to excusable inadvertence, oversight, or mistake of fact or law on the part of the claimant. No exception, however, can be made for a mistake caused by the claimant's neglect or a legal duty, error in judgment, or change in circumstances.
>
> The information in your file did not establish that you made a correctable mistake at the time you retired for service.
>
> * On May 4, 2007, you emailed CalPERS and asked why your application had been cancelled and what did you need to do (sic) to continue the process.
>
> * On May 7, 2007, CalPERS responded that your Industrial Disability Retirement was cancelled because CalPERS did not receive a completed workers' compensation carrier request.
>
> * On May 8, 2007, you phoned CalPERS Call Center, and the analyst told you that your IDR application was cancelled on 4/27/2007 due to the missing workers' compensation carrier report. He advised you to resubmit another IDR application.
>
> * CalPERS did not receive your new IDR application until 11/14/2011. You had 6 months from the date of knowledge to resubmit a new application.
> Based upon review of your case, evidence suggests that you had knowledge of the application process and therefore, were unable to establish that a correctable mistake was made. . . . (Exh. 7)

10. Respondent timely appealed CalPERS' denial of his IDR application and the instant hearing ensued.

11. Respondent testified that he was unaware of the fact that he only had six (6) months from the date he knew his 2007 IDR application had been cancelled (May 8, 2007) to

submit a new IDR application until he received CalPERS' June 26, 2012, denial letter.

12. Respondent had no contact with CalPERS from May 8, 2007, the date he became aware that his 2007 application had been cancelled, until November 2011, when he submitted a new IDR application.

13. An ordinary reasonably prudent person in respondent's position would have inquired concerning any time limitations involved with submitting a new IDR application and certainly would not have waited four and one-half years to submit a new IDR application packet.

14. Respondent erred in not submitting a new IDR application packet within six months of the May 8, 2007, date when he was advised that his 2007 application had been cancelled due to a material omission of information, and that he needed to submit an entirely new, complete, IDR retirement packet.

LEGAL CONCLUSIONS

Burden of Proof

1. Respondent has the burden of proof and that burden is by a preponderance of the evidence.

In *McCoy* v. *Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, the Court of Appeal stated the following concerning the burden of proof in an administrative hearing:

> As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence.

In the absence of a statutory provision to the contrary, the applicant for a benefit has the burden of proof, as the moving party, to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (1 Cal. Public Agency Practice, sec. 39.03[9]; see also, *Glover* v. *Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. Government Code section 20160, subdivision (d), provides that "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)."

Analysis

3. Respondent made a mistake in his 2007 IDR application by not including a Workers Compensation Carrier Request. In May 2007, respondent was informed that his application had been cancelled due to his mistake in not including a Workers Compensation Carrier Request and that he needed to correct the mistake by submitting a new, complete application packet. Pursuant to Government Code section 20160 (known as "the mistake statute"), respondent had six months to correct the mistake he made in his IDR application by submitting a new, complete application. Government Code section 20160, subdivision (a) provides, in pertinent part:

> Subject to subdivisions (c) and (d), the board may, in its discretion and upon 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.*** (emphasis added.)

4. Respondent contends that he should be exempted from the six month rule because CalPERS failed to inform him of the six month rule embodied in Government Code section 20160 and/or, CalPERS should be estopped from enforcing the six month rule because respondent detrimentally relied on CalPERS' failure to warn him of the six month limitation period.

Respondent was a CHP officer for 35 years and advanced to the rank of Chief. He has gained sophistication in reading and interpreting laws and regulations in the course of his duties as a CHP officer and Chief. Respondent knows, or reasonably should have known that most governmental forms/applications have time limitations and that laws have statutes of limitations. Consequently, respondent is assumed to have known the contents, including the time limitations, of Government Code section 20160.

Estoppel does not apply in the present instance. CalPERS made no representations to respondent concerning time limitations in submitting a new, complete IDR application packet. Respondent's estoppel claim is predicated on his assertion that he relied on CalPERS' *failure to inform* him of any time limitation to his detriment. In *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489, the California Supreme Court held that a party claiming estoppel must establish the following four elements:

> (1) the party to be estopped must be apprised of the facts;

(2) the party must intend or reasonably believe that his or her conduct will be acted upon;

(3) the party asserting the estoppel must be ignorant of the true state of facts; and

(4) the party asserting the estoppel must actually rely upon the other party's conduct to his or her detriment.

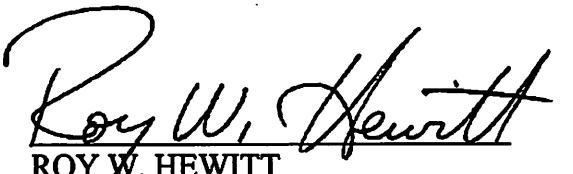
Respondent failed to establish element (1) (that CalPERS was apprised of the fact that respondent did not know about the six month requirement), and/or element (2) (that CalPERS intended for respondent to rely on a lack of information when he missed the six month filing deadline). Government Code section 20160 establishes the requirement that a claimant make reasonable efforts to obtain information about any time limitations. In pertinent part, Government Code section 20160, subdivision (a)(3) provides: "***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.***" (Emphasis added.)

In sum, respondent cannot sit idly by for four and one-half years and then blame CalPERS for a lack of information (the six month limitation period) that is clearly set forth in the Government Code.

ORDER

CalPERS' correctly determined that respondent's 2011 application for IDR was untimely and properly denied respondent's application on that basis. Accordingly, respondent's appeal is denied.

Dated: July 16, 2013



ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings