

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Application for Earlier
Effective Date of Retirement:

Case No. 9197

WALTER G. HOWELL,

OAH No. 2013031155

Respondent,

and

DAVIS JOINT UNIFIED SCHOOL
DISTRICT,

Respondent.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, Office of Administrative Hearings, State of California, on November 21, 2013, in Sacramento, California.

John Mikita, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Walter Howell (respondent) appeared and was represented by Doris McCreedy, Attorney at Law.

There was no appearance by or on behalf of respondent Davis Joint Unified School District (District). At the hearing, CalPERS established that District was properly served with the Statement of Issues and Notice of Hearing. This matter therefore proceeded as a default against District under Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on November 21, 2013.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED *December 20, 2013*

Rathie C. Schrey

PROCEDURAL FINDINGS

1. On or about September 22, 2006, respondent signed an application for disability retirement (application) with CalPERS, which listed an effective retirement date of March 25, 2005.¹ The application was received at CalPERS on November 29, 2006. Respondent had been employed by District as a Groundskeeper until his separation on March 23, 2005. By virtue of his employment, respondent was a local miscellaneous member of CalPERS subject to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for retirement.

2. In filing the application, respondent claimed disability on the basis of orthopedic conditions, which included his right knee and low back (orthopedic conditions).

3. CalPERS obtained medical reports and information concerning respondent's orthopedic conditions and the reason for the late-filed disability retirement application. On October 9, 2008, CalPERS informed respondent that his application for disability retirement was approved. The effective date of his retirement was November 1, 2006, which was the first day of the month in which the application was received.

4. By separate letter dated October 9, 2008, CalPERS informed respondent that his request for an earlier effective retirement date was denied because he failed to establish that he made a correctable mistake at the time he separated from his employment. Respondent was advised of his appeal rights. Respondent, through his counsel, filed an appeal and request for hearing by letter dated November 5, 2008.

5. On March 26, 2013, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, made and thereafter filed the Statement of Issues.

ISSUE

6. The issue on appeal is whether respondent made a mistake which was the result of inadvertence, mistake, surprise, or excusable neglect correctable by Government Code section 20160, which would have entitled him to an effective retirement date retroactive to March 24, 2005.

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¹ On the application, respondent requested an earlier effective retirement date of March 25, 2005. However, it was established at hearing that the correct date is March 24, 2005, which was the first day after his last day on the payroll at District.

FACTUAL FINDINGS

Background and Events Prior to the Filing of the Application

7. Prior to his separation from service on March 23, 2005, respondent worked for 25 years as a Groundskeeper for District. In June 24, 2004, respondent injured his right knee when he fell off his work trailer. In June 2004, he hired attorney Doris McCready to assist him with filing a workers compensation claim for the injury.

8. After his injury, respondent continued to work for District. At hearing, respondent testified that he was not able to perform all of his duties. District provided him with a limited duty assignment. Respondent had two operations to repair the damage to his knee. After the second surgery he was not able to return to work. As a result, respondent stopped working in August 2004 and was placed on paid leave.

9. On March 9, 2005, Steve Horowitz, Assistant Superintendent for Human Resources for District, sent respondent a memorandum in which he notified respondent that during an audit of attendance information, a math error was found concerning respondent's accrued vacation. Respondent's paid leave expired on February 22, 2005. However, because the District did not provide respondent with advanced notice of the expiration of his paid leave, his paid leave status continued until March 23, 2005. Respondent was notified that if he was unable to return to work effective March 24, 2005, the District would place him on a 39-month reemployment list, which provides that if he is medically determined to be able to perform the duties of a Groundskeeper, he would be eligible for reemployment when a Groundskeeper position becomes available from March 24, 2005, through June 24, 2008.

10. On March 23, 2005, respondent was examined by Jeffrey A. Metheny, M.D., an orthopedic surgeon. Dr. Metheny prepared a Primary Treating Physician's Permanent and Stationary Report, in which he states that as of March 23, 2005, he determined that respondent was permanent and stationary. Dr. Metheny also determined that respondent was no longer able to perform the duties of his position. At hearing, respondent testified that Dr. Metheny did not inform him that he was precluded from performing the duties of his position. Respondent also did not recall whether he received a copy of Dr. Metheny's report.

11. Respondent did not return to work and was separated from service with the District on March 23, 2005. Respondent was 48 years old.

12. On March 28, 2005, Kathy Ware, Personnel Technician for the District sent respondent a memorandum and separation documents. The memorandum states in part:

"You may qualify for disability retirement with CalPERS, and a copy of the disability retirement booklet is attached for your review/use. If you have any questions about this process, I urge you to call CalPERS Member Services at

(888) 225-7377 or visit the CalPERS office at 2750 Gateway Oaks Drive, Room 140, Sacramento (across from Chevy's on the River).”

The letter also states that respondent can contact Ms. Ware if he has any questions, and her telephone number was provided.

13. Ms. Ware testified at the hearing in this matter. Ms. Ware worked for the District for 28 years prior to her retirement on December 30, 2011. Ms. Ware met respondent through her work at the District. Ms. Ware met with respondent concerning his separation from the District. Ms. Ware did not provide respondent with information concerning the rule that required an employee to submit an application for retirement within nine months of separating from employment in order for the effective date of retirement to be the last day for which salary was payable. Ms. Ware testified that at the time respondent separated from the District, she was not aware of the rule. She testified that she learned of the rule when she attended a CalPERS workshop, three or four years before she retired.

14. At hearing, respondent admitted that that he knew he could not go back to work after he received the March 28, 2005 memorandum from Ms. Ware. He also admitted that when he received the memorandum he was fully aware of his option to apply for disability retirement. However, he chose not to apply for disability retirement at that time, nor make an inquiry concerning applying for disability retirement, because he loved his job and hoped to return to work.

15. Respondent testified that at the time he separated from the District, he was not aware of the rule that required the filing an application for retirement within nine months of separating from employment in order for the effective date of retirement to be the last day for which salary was payable. Respondent testified that had he known of the rule at the time he separated, he “probably” would have made a different decision.

16. In approximately February 2006, respondent stopped receiving workers compensation permanent disability benefits. Respondent testified he had no other source of income.

17. On April 20, 2006, counsel for respondent sent a letter to CalPERS requesting the “Employment After Retirement” booklet and “Retirement Allowance Estimates” for disability and service retirement.

18. On September 25, 2006, counsel for respondent sent a letter and completed “Retirement Allowance Estimate Request” form to CalPERS. Counsel requested on respondent’s behalf, the estimated retirement allowance for service and disability retirement.

19. On November 2, 2006, CalPERS sent respondent written estimated monthly allowances for service and disability retirement.

Events After the Filing of the Application

20. By letter dated November 27, 2006, counsel for respondent sent CalPERS the completed application. CalPERS received the application on November 29, 2006.

21. On February 28, 2007, Mari C. Cobbler, Retirement Program Specialist, Disability Retirement Section, CalPERS, sent respondent a letter concerning his request for retirement date earlier than the first day of the month in which CalPERS received the application. Ms. Cobbler testified at the hearing in this matter. Ms. Cobbler's letter requested, in part, that respondent provide information as to whether he contacted CalPERS for information regarding disability retirement before he ceased working and if no, why not.

22. By letter dated March 20, 2007, counsel for respondent provided Ms. Cobbler information in response to her letter. Ms. McCready explained in part, that respondent did not contact CalPERS before he ceased working, because respondent thought he would be able to continue working until his regular retirement age.

22. On February 28, 2007, Ms. Cobbler also sent the District a letter requesting information concerning respondent's employment with the District, including whether respondent was provided information concerning disability retirement.

23. On March 16, 2007, David Tooker, Interim Assistant Superintendent for Human Resources for the District responded to Ms. Cobbler's letter. Mr. Tooker's letter confirms that respondent was provided information concerning disability retirement both orally and by memorandum. Mr. Tooker included copies of the March 9 and 28, 2005, memorandums sent to respondent concerning his separation from service.

24. On October 9, 2008, CalPERS denied respondent's request for an earlier effective retirement date. According to the denial letter, 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 of a legal duty, error in judgment, or change in circumstances." The denial letter stated that respondent had not established that he "made a correctable mistake" at the time he separated from him employment.

25. Ms. Cobbler testified that there is no information in the CalPERS disability retirement booklet that notifies an applicant of the rule that an employee must submit an application for retirement within nine months of separating from employment in order for the effective date of retirement to be the last day for which salary was payable. However, the booklet states that an individual "...should apply for your disability or industrial disability retirement as soon as you believe you are unable to perform your job duties because of an illness or injury that is expected to be permanent..."

Discussion

26. Respondent has the burden of presenting evidence establishing that in filing his application he made an error or omission that was a result of mistake, inadvertence, surprise, or excusable neglect, which would warrant granting his appeal for an earlier effective retirement date. Respondent has failed to meet this burden. Respondent contends that he did not file for disability retirement when he separated from the District, because he believed that he could continue to work until he was eligible to service retire. He also contends that he was not informed of the rule that required him to submit his application for retirement within nine months of separating from his employment with the District in order for the effective date of retirement to be March 24, 2005. However, respondent admitted that as of March 28, 2005, he knew he could not go back to work. He also admitted that he was fully aware of his option to apply for disability retirement, but he chose not to apply or make an inquiry.

Furthermore, the fact that respondent was not informed of the nine month rule is not grounds to grant respondent's application. Respondent was notified by the District in March 2005, that he may qualify for disability retirement. He was urged to contact CalPERS and was also told he could contact the District if he had questions. The CalPERS disability retirement booklet respondent was provided by the District states that an individual should apply for disability retirement as soon as the individual is unable to perform their job duties and urges individuals to contact CalPERS with any question. Respondent was provided amply information concerning disability retirement. Additionally, respondent had counsel available to assist him as early as June 2004. Respondent chose not inquire into the option of disability retirement until his workers compensation income ended. As a result, the facts and circumstances of this case do not support a finding of mistake, inadvertence, surprise, or excusable neglect.

LEGAL CONCLUSIONS

1. Government Code section 21154 sets forth when a CalPERS member may file an application for disability retirement. In relevant part, it provides:

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....

2. At all times relevant to respondent's application, Government Code section 21252, subdivision (a), set forth the conditions under which a member who has ceased to be employed in state service may apply for retirement as follows:²

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 determined in accordance with Section 20160...** (Bolding added.)

3. As set forth in Government Code section 21252, subdivision (a), because respondent filed his application more than nine months after he ceased to be employed by the District, the determination of whether CalPERS should accept respondent's application must be made in accordance with Government Code section 20160. (*Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559, 567.)

4. Government Code section 20160 governs a request by a member or beneficiary to correct an error. It provides in pertinent part:

(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.

² Government Code Section 21252 was amended effective January 1, 2010.

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.

[¶] ... [¶]

(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).

[¶]...[¶]

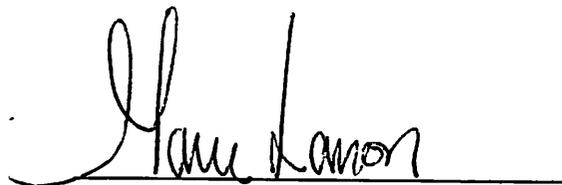
5. Pursuant to Government Code section 20160, respondent was required to make any request, claim or demand to correct any error or omission within a reasonable time after discovery of the right to make the correction, which in no case exceeds six months after discovery of this right. As set forth in Procedural Findings number 1, respondent filed his application on November 29, 2006, approximately 20 months after he was first provided notice that he may be eligible for disability retirement.

6. As set forth in the Factual Findings, respondent did not meet his burden of establishing his right to correction under Government Code section 20160. Respondent did not establish that he made any error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect. Additionally, respondent's failure 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 Government Code section 20160. Accordingly, respondent's request for an earlier effective date of disability retirement must be denied

ORDER

Respondent Walter G. Howell's application for an earlier effective date of disability retirement is denied.

Dated: December 18, 2013


MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings