ATTACHMENT E

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 Application of: GEORGE A. PUGA, Respondent, and CITY OF POMONA, Respondent.	Case No. 8269 OAH No. 2013050746

PROPOSED DECISION

Administrative Law Judge Amy Yerkey, State of California, Office of Administrative Hearings, heard this matter on October 10, 2013, in Orange, California.

Rory Coffey, Senior Staff Counsel, represented Petitioner Anthony Suine, Chief of the Benefit Services Division of the California Public Employees' Retirement System (PERS).

Richard LePore, Attorney at Law, represented George A. Puga (Respondent).

No appearance was made by or on behalf of Respondent City of Pomona (City).

The matter was submitted on October 10, 2013.

FACTUAL FINDINGS

1. George Puga was employed as a Water Technician with the City for approximately ten years. By virtue of his employment, Respondent was a local miscellaneous member of CalPERS subject to Government Code section 21150.[1] Respondent has the minimum service credit necessary to qualify for retirement.

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[1] Government Code section 21150 provides: "Any member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED Nov. 13 20 13
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2. On August 7, 2003, Respondent signed an application for disability retirement, which requested a retirement effective "upon expiration of benefits," which was April 26, 2000. In filing the application, disability was claimed on the basis of an orthopedic (back) condition.

3. CalPERS requested medical reports and information concerning Respondent's medical condition. It also sought information relating to his late filing of the disability retirement application to determine if he made a mistake in not filing for disability retirement at or near the time he separated from employment. After review of these reports and information, CalPERS determined that Respondent's late application could not be excused by reason of a mistake under Government Code section 20160.

4. By letter dated November 15, 2004, CalPERS notified Respondent that his application for disability retirement had been approved on the basis of his orthopedic (back) condition. CalPERS approved Respondent's disability retirement effective August 1, 2003, the first date in the month his disability retirement application was received.

5. By letter dated May 18, 2007, CalPERS further advised Respondent that it had not found grounds to grant an earlier effective date of retirement, and informed him of his right to appeal this determination. Respondent filed an appeal by letter dated June 21, 2007.

6. CalPERS filed a Statement of Issues on May 17, 2013. The appeal is limited to the issue of "whether respondent Puga 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 April 26, 2000."

7. Respondent testified at the hearing. He became disabled and sought therapy for approximately two to three years, with the intention of returning to work. At some point, Respondent's doctor, and the City doctor determined that he was so disabled that he could not return to work. Based on Respondent's disabled condition, the City determined that it did not have a suitable alternate position available for Respondent, and could not make a reasonable accommodation. By letter dated December 4, 2002, the City informed Respondent that effective November 5, 2002, Respondent would be officially separated from City service.

8. Respondent acknowledged that in December 2002, the City provided him with information on how to apply for disability retirement. (Ex. 9) He admitted he knew that he could file his disability application as soon as December 2002, but he thought he had nine months to file it. He explained that he wanted to file his application right away, but he had

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credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 or Section 21077."

difficultly obtaining medical records. Respondent did not elaborate on this explanation, nor did he provide any evidence to support his claim. He further explained that he eventually hired an attorney to assist him in filing his disability application.

9. Respondent is correct that he had nine months to file his disability application, which ran from the discontinuation of service. (Gov. Code § 21252.) Since Respondent's date of discontinuation of service is November 5, 2002, Respondent had until August 5, 2003 to timely file his application such that it would be deemed submitted on the last day for which salary was payable. (*Id.*) Respondent's application dated August 7, 2003, is therefore untimely. Respondent argued that his retirement application should be deemed timely because he "was informed and believe that based on the holidays . . . which are all legal holidays, which the State of California observes and Cal[PERS] also observes by being closed, I was within the 9 month period." (Ex. 8, p.3.) This argument is without merit. Alternatively, Respondent argued that even if the holidays are not excluded from the calculation of time, he was only two days late. Respondent failed to provide a valid reason why his application was late.

10. Respondent has the burden of presenting documentation or other evidence to CalPERS establishing that he made an error or omission that was a result of mistake, inadvertence, surprise or excusable neglect. Respondent has failed to meet this burden. Although some consideration was given to Respondent's contention that he had difficulty obtaining medical records, the facts and circumstances of this case do not support a finding of mistake, inadvertence, surprise, or excusable neglect, especially given that he had legal representation.

LEGAL CONCLUSIONS

1. Government Code section 20160 governs requests by CalPERS members or beneficiaries 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.

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).

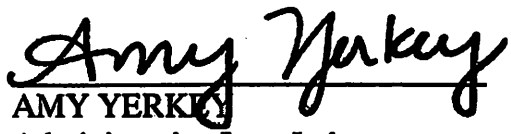
2. Respondent was required to make any request, claim or demand to correct any error or omission within a reasonable time after discovery of the right to make the correction, which in no case exceeds six months after discovery of this right. (Gov. Code, § 20160, subd. (a)(1).) Here, Respondent filed his application on August 7, 2003, well after he was first provided notice of his right to apply for disability retirement in December 2002.

3. Respondent also did not meet his burden of presenting documentation or other evidence establishing his right to correction under Government Code section 20160, subdivisions (a) and (b). It was not established that he made any error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect as those terms are used in section 473 of the Code of Civil Procedure. Accordingly, Respondent's request for an earlier effective date of disability retirement should be denied.

ORDER

Respondent George A. Puga's application for an earlier effective date of disability retirement is denied.

DATED: November 8, 2013



AMY YERKEY
Administrative Law Judge
Office of Administrative Hearings