

ATTACHMENT A
THE PROPOSED DECISION

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues
Against:

NELLIE DIAZ,

Respondent,

BALDWIN PARK UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. 2013-0281

OAH No. 2013120723

PROPOSED DECISION

This matter came on regularly before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, at Los Angeles, California, on December 11, 2014.

Petitioner, California Public Employees' Retirement System (Petitioner or CalPERS) was represented by Cynthia A. Rodriguez, Senior Staff Attorney.

Respondent, Nellie Diaz (Respondent), appeared and was represented by Mark Ellis Singer, Attorney at Law.

No appearance was made by or on behalf of Respondent, Baldwin Park Unified School District (BPUSD or district).

Oral and documentary evidence was received. The record was held open to and including February 17, 2015, for the parties to submit post-hearing briefs according to a briefing schedule. The "Closing Brief of Respondent" was timely filed and marked as Respondent's Exhibit "O" for identification. Petitioner filed its "Closing Argument" three days late. No request for an extension of time to file the brief was received by the Office of Administrative Hearings. Accordingly, Petitioner's brief was neither marked for identification nor considered. The "Reply Brief of Respondent" was timely filed and marked as Respondent's Exhibit "P" for identification. On February 17, 2015, the record was closed and the matter was submitted for decision.

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CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Mar. 10, 2015

C. Bodily

The evidence submitted to the Administrative Law Judge during the hearing included personally identifiable information relating to Respondent and other individuals, including but not limited to, their addresses, telephone numbers, Social Security numbers, and medical information. That information was deleted from the official record after the decision was written.

FACTUAL FINDINGS

1. Respondent is a former employee of the BPUSD. As such, she was a local miscellaneous member of CalPERS. During the relevant time period, Respondent accrued the minimum service credit necessary to qualify for retirement benefits.
2. Respondent began her employ with BPUSD in 1990 as a substitute in the Food Service Department. Beginning in 1998, she worked extra evening hours as a custodian for the district, and she became a full-time custodian in 2000.
3. Respondent suffered several injuries while working for BPUSD, the main injury occurring in April 2005, to the right shoulder and neck. That injury occurred while she was lifting a heavy lid to a dumpster.
4. Respondent's last date of work for BPUSD was July 21, 2005, when she terminated her employment relationship due to ongoing pain. In 2006, following a course of physical therapy, Respondent underwent surgery of the right shoulder and subsequent surgery on her neck. She underwent low back surgery in 2007.
5. Respondent filed a claim with the Workers' Compensation Appeals Board for workers' compensation benefits. That claim was settled in approximately April 2010. Neither the filing date nor the termination date of the claim was disclosed by the evidence.
6. During the relevant time period, Respondent held a disability insurance policy issued by American Fidelity Insurance Company. On October 24, 2007, a representative from that carrier contacted CalPERS without Respondent's knowledge or consent and requested that CalPERS send an application for disability retirement to Respondent. The application was sent the same day to Respondent's address on file with CalPERS.
7. In 2009, Respondent's physician informed her that she was no longer able to work. On October 25, 2009, Respondent sent an e-mail to CalPERS requesting assistance in filling out a disability retirement application she had requested. Thereafter, CalPERS personnel placed several calls to Respondent, but Respondent did not answer the telephone and did not return the messages CalPERS personnel left for her.

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8. On May 1, 2010, Respondent filed a Disability Retirement Election Application with CalPERS. In July 2010, she filed additional documentation to support her application. However, during the same month, CalPERS cancelled Respondent's application because it had not received from Respondent required copies of her job description and the physical requirements of her job. CalPERS informed Respondent that she could submit another disability retirement application with the required documentation, and faxed a blank Physical Requirements form to her.

9. Respondent submitted a second application for disability retirement to CalPERS on August 20, 2010. CalPERS rejected that application because Respondent failed to provide medical records to establish continuous disability from the date of last employment through the date of her application. Respondent attempted to comply with that requirement, but the holders of the records were not always prompt or cooperative, and various CalPERS employees gave her disparate advice.

10. On December 16, 2011, Respondent filed a third Disability Retirement Election Application with CalPERS. In so doing, she went directly to a CalPERS representative for assistance in completing the application. On February 12, 2012, CalPERS granted the application with an effective date of December 1, 2011, the first day of the month in which the application was filed.

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11. Respondent subsequently requested an earlier effective date of November 1, 2009 for her disability retirement. CalPERS sought additional information from Respondent and BPUSD. On November 14, 2012, CalPERS denied Respondent's request for an earlier effective date. In a letter of that date, CalPERS wrote in part:

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.

After careful review of the information in your file, the evidence did not establish that you made a correctable mistake at the time you separated from employment.

During your leave of absence from February 8, 2006 to May 3, 2006,¹ your employer states you were advised on several occasions regarding your retirement paperwork and disability retirement options.

On October 25, 2007, you were mailed a disability retirement application.

On May 20, 2010, you applied for disability retirement.

On September 7, 2010 and September 10, 2010, you resubmitted your application because your package was missing a job description and physical requirements of position form.

On January 31, 2011, your application was cancelled due to inability to establish continuous disability.

On December 16, 2011, you reapplied for disability retirement

Based upon review of your case, the evidence suggests that you had knowledge of the application process and, therefore, were unable to establish that a correctable mistake was made.

(Exhibit 10.)

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¹ The evidence did not establish that Respondent was on a leave of absence in 2006. It established that she terminated her employment with BPUSD on July 21, 2005.

12. Respondent denies being advised of her disability retirement options by BPUSD personnel, and she denies receiving an application for disability retirement around October 2007. In her Reply Brief, she argues “There is no evidence as to where documents were sent or what numbers were called.” (Exhibit P, page 1, lines 26-27.) That argument is not convincing. According to CalPERS’ Touch Point Report, in October 2007, an application for disability retirement was sent to Respondent at her address of record with CalPERS. (Exhibit 13, page 22.) No evidence was offered to prove that her address was anything other than that address. Therefore, she is presumed to have received the application. In addition, Respondent’s telephone number listed in CalPERS’ Touch Point Report (*id.* at page 12), is the same telephone number Respondent listed in her three applications and other documents she sent to CalPERS (Exhibits C, D, H, J, and M), and it is the same number printed on her personal check. (Exhibit G.)

LEGAL CONCLUSIONS

1. Cause exists to grant Respondent an earlier effective date of August 1, 2010, for her disability retirement pursuant to Government Code sections 20160, 21154, and 21252 as set forth in Factual Findings 1 through 12, and Legal Conclusions 2 through 17.

The Fiduciary Relationship Between CalPERS and its Members

2. Respondent correctly points out that a public employee pension plan creates both a contractual relationship between the employee and the employer, and a fiduciary relationship between the plan administrator and the pensioner. Respondent argues that CalPERS failed to exercise its fiduciary obligations to her when it failed to grant disability retirement benefits from the last date her salary was payable, and when it failed to assist her by timely notifying her of her disability retirement options, by failing to effectively assist her in curing the defects in the first two applications, and by canceling the first two applications.

3. Although it is true that CalPERS has a fiduciary relationship with its members, it is also true that CalPERS and its programs are governed by a statutory scheme established by the Legislature. CalPERS cannot serve its members if such service exceeds the scope of its statutory authority. The evidence in this case established that CalPERS acted within the scope of its authority and, in so doing, did not violate its fiduciary duties to Respondent.

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Determining the Effective Date of Disability Retirement under Government Code section 21252

4. The effective date of a disability retirement is determined by a two-step test set forth in Government Code section 21252, subdivision (a). That subdivision 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.

5. CalPERS takes the position that, pursuant to Government Code section 21252, because Respondent filed her applications for disability retirement more than nine months after she left state service, and because the only application CalPERS approved was dated December 16, 2011, the effective date of her disability retirement is December 1, 2011. Respondent cites the same statute and asserts that, because she was physically incapacitated to perform her duties from the date she discontinued state service, the effective date of her disability retirement should be deemed to have been the last day for which her salary was payable, specifically July 21, 2005. Both parties are incorrect for disparate reasons. Respondent misconstrued Government Code section 21252. CalPERS correctly construed that statute but, as is more fully described below, misconstrued a different statute which resulted in an incorrect effective date.

6. Government Code section 21252, subdivision (a) is written in the conjunctive, thus making it a two-part test. First, the application must be submitted within nine months after the date the member discontinued his or her state service. In addition, based on the word "and" strategically placed between the two requirements, if the member is seeking disability retirement, he or she must have been physically or mentally incapacitated to perform his or her duties from the last date of state service to the date the application was filed. If one of the two requirements is not met, the effective date is the first day of the month in which the application was filed.

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The Effect of Government Code section 21154

7. Respondent argues that an applicant is not limited to filing for disability retirement under the second requirement set forth in Government Code section 21252, but instead has four opportunities to file an application for disability retirement under Government Code section 21154. That statute provides in pertinent part:

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

8. Respondent argues that she timely filed her application for disability retirement under the fourth condition set forth in Government Code section 21154. The language in that condition is similar to that in the second requirement of Government Code section 21252, subdivision (a), and the two statutes must be construed together. In *California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1582, the Court stated:

The fundamental goal of statutory construction is to ascertain the intent of the Legislature to effectuate the purpose of the law. To determine that intent, we must look first to the statutory language itself, giving words their usual and ordinary meaning. (Citations.) We are not authorized to insert qualifying provisions and exceptions which have not been included by the Legislature, and may not rewrite a statute to conform to an intention which does not appear in the statutory language. (Citations.) Nevertheless, a statute should not be read in isolation; instead, statutes on the same subject must be construed together, to harmonize and give effect to each, if possible. (Citation.) Finally, the contemporaneous administrative construction of statutes by the administrative agency charged with their enforcement and interpretation is entitled to great weight, unless clearly erroneous or unauthorized. (Citation.)

9. It is true that a member is permitted to file his/her application at any time listed in Government Code section 21154. However, that statute describes only the times when the application may be filed. It does not determine the effective date, and it does not serve as an exception or exemption to Government Code section 21252. For the effective date to be the last date for which salary was payable, the member must file the application within nine months of the final date of state service.

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Equitable Tolling

10. Citing *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, Respondent argues that her filing date was equitably tolled while she pursued her workers' compensation claim, and that the tolling of the filing date entitles her to an effective date of July 21, 2005, the final date her salary was payable. The argument is not persuasive for the following reasons.

11 First, the doctrine of equitable tolling is not applicable in this action because it applies only to statutes of limitations. (*Id.* at 922.) In *Collier, supra*, a city firefighter was injured on the job. He postponed filing for disability retirement until his workers' compensation action was resolved. By the time that occurred, the statute of limitations for filing for disability retirement had run. Applying the doctrine of equitable tolling, the court reasoned that "a plaintiff should not be barred by a statute of limitations unless the defendant would be unfairly prejudiced if the plaintiff were allowed to proceed." (*Id.* at 923.) In the instant case, Respondent was never barred from applying for disability retirement benefits. In fact, her application was approved. The sole issue is the date from which she should receive her benefits.

12. Secondly, Respondent does not satisfy the criteria for equitable tolling. The *Collier* court described a three-prong test to determine whether equitable tolling overcomes a statute of limitations: "(1) timely notice to the defendant in filing the first claim, (2) lack of prejudice to defendant in gathering evidence to defend against the second claim, and, (3) good faith and reasonable conduct by the plaintiff in filing the second claim." (*Id.* at 924.)

13. In *Collier*, the court found that the first prong of the test was met because the City of Pasadena was the employer involved in both the workers' compensation case and the disability retirement case, and the same city attorney's office represented the employer in connection with both claims. The court stated, "Only if the retirement pension board is a completely separate defendant from the City of Pasadena which was contesting the compensation claim could the filing of the first claim [the workers' compensation claim] possibly fail as timely notice." (*Id.* at 927.) In the case *sub judice*, CalPERS was indeed a completely separate entity. It is an entity that not only serves its members from BPUSD, but from a great many other public agencies as well. A member's filing a workers' compensation claim against his or her employer would not necessarily place CalPERS on either actual or constructive notice such that CalPERS would begin to gather evidence in connection with a potential retirement disability application. Accordingly, Respondent's filing of her workers' compensation claim fails as timely notice to CalPERS. Because Respondent fails at the first prong of the three-pronged test, it is unnecessary to address the second and third prongs.

14 Finally, as referenced above, the evidence did not disclose the specific filing and termination dates of Respondent's workers' compensation claim. Therefore, even if the doctrine of equitable tolling were viable in this action, it could not be applied because the length of tolling could not be determined.

Applicability of Business and Professions Code section 20160

15. Under certain circumstances, the board has discretion to correct a member's errors or omissions. Those circumstances are set forth in Government Code section 20160, which states:

(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 corrections 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).

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(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.

16. Respondent's final date of paid service was July 21, 2005. She did not file her first application for disability retirement until May 1, 2010. At that time, she failed to provide CalPERS with her job description and physical requirements of the job. This was information easily available to her, and her failure to provide it did not satisfy the criteria for relief under Government Code section 20160, subdivision (a).

17. Respondent filed her second application for disability retirement on August 20, 2010. In connection with that application, CalPERS found that she had failed to provide medical records that would establish continuous disability from the date of last employment. Respondent attempted to cure that defect, but her attempts were thwarted by the inaction, delay, and uncooperativeness of the entities that held and controlled those records. This was an unexpected setback that Respondent did not, and could not, anticipate or control. Her inability to provide the required records to CalPERS was due to surprise as that term is contemplated in Government Code section 20160, subdivision (a), and Respondent is entitled to relief on that basis. Pursuant to Government Code section 21252, subdivision (a), the effective date of Respondent's disability retirement will be August 1, 2010.

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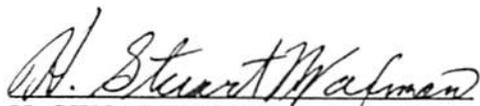
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ORDER

CalPERS shall reassign the effective date of Respondent, Nellie Diaz's disability retirement to August 1, 2010 forthwith.

Dated: February 27, 2015

A handwritten signature in cursive script, reading "H. Stuart Waxman".

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings