

ATTACHMENT A

THE PROPOSED DECISION AFTER REMAND

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

ROBERT. R. RUHR,
Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS CENTINELA STATE
PRISON,
Employer.

CASE NO. 2014-0096

OAH NO. 2014030366

PROPOSED DECISION AFTER REMAND

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California on December 3, 2014.

Robert R. Ruhr, respondent, represented himself.

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

There was no appearance on behalf of the California Department of Corrections Centinela State Prison.

The issue at hearing was: Did Mr. Ruhr make a correctable mistake that would allow him to submit a new application for industrial disability retirement after his previously submitted application was canceled?

After receiving evidence on that issue, the matter was submitted and a proposed decision was issued.¹ The proposed decision concluded, "CalPERS correctly determined that

¹ The proposed decision is attached hereto as Exhibit A and incorporated by reference.

Mr. Ruhr's 2012 application for industrial disability was untimely, and CalPERS properly denied Mr. Ruhr's application on that basis. Accordingly, Mr. Ruhr's appeal is denied."

At the board meeting on February 10, 2015, the board remanded the matter for the taking of additional evidence. The parties were given an opportunity to submit written briefs and this proposed decision after remand was issued.

FACTUAL FINDINGS

1. Mr. Ruhr was employed as a correctional officer until he retired. On September 21, 2009, Mr. Ruhr met with a CalPERS agent at a regional office and signed an application for Service Pending Industrial Disability Retirement.
2. Mr. Ruhr failed to include a Physician's Report on Disability with his retirement application. Although CalPERS asserted that its practice would have been to notify Mr. Ruhr in February 2010 that his application had been canceled, it had no documentation to support that claim. None of the proffered evidence was sufficient to establish that CalPERS notified Mr. Ruhr that his initial application was incomplete or canceled. Moreover, Mr. Ruhr's actions in 2011, inquiring about the status of his disability application, supported Mr. Ruhr's position that he was never notified that his packet was incomplete or canceled.
3. On June 17, 2011, Mr. Ruhr contacted CalPERS to inquire about the status of his disability application. He was informed that it had been canceled in 2010 due to his failure to submit a complete application packet. Thus, until June 17, 2011, Mr. Ruhr was unaware of the error/omission of an incomplete application packet. His error/omission was excusable because he reasonably believed that all required documents were submitted. Accordingly, upon learning of his error/omission, he was entitled to the relief available under Government Code section 20160. However, as that section clearly provides, the correction of the error/omission must occur "within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months." As such, Mr. Ruhr had six months from June 17, 2011, to submit a complete application packet.
4. On June 20, 2011, CalPERS sent Mr. Ruhr a new application and an informational booklet.
5. More than one year later, on August 16, 2012, Mr. Ruhr submitted his second disability retirement application. During its review of the second application, CalPERS determined that the second application was also incomplete and that it had been submitted too late.
6. On April 12, 2013, CalPERS sent Mr. Ruhr a letter advising that CalPERS had received his "request to change from service to disability retirement" and informed him that the Government Code did not allow a change in status after retirement unless "an exception

can be made if due to excusable inadvertence, oversight, or mistake of fact or law on the part of the claimant.” In its letter CalPERS asked Mr. Ruhr five questions that he answered on April 29, 2013. CalPERS’s questions and Mr. Ruhr’s responses were as follows:

Question No 1:

CalPERS: You originally submitted an application on 09/21/09 which was canceled due to CalPERS not receiving all the required forms/information. Please explain why you did not comply with the notification informing you that your application would be canceled if the appropriate documents were not submitted.

Mr. Ruhr’s Reply: I was never notified of any additional forms until six months later when I called and by then CalPERS had already canceled the application.

Question No. 2:

CalPERS: Did any physician instruct you to stop working in your former position because of permanent disability? 2a. If no, when did your doctor determine that you are incapacitated for your former job duties?

Mr. Ruhr’s Reply: Yes, the surgeon had told me that I would not be able to go back to work. That it was a permanent disability.

Question No. 3:

CalPERS: Did you advise your employer that you had to retire because of a disability? 3a. If no, why did you not do so?

Mr. Ruhr’s Reply: Yes I informed the back to work coordinator shortly after I was released from the hospital.

Question No. 4:

CalPERS No. 4: How did you learn of the right to apply for reconsideration that is found under Government Code section 20160? 4a. On what date did you become aware that you could submit a request to correct the mistake?

Mr. Ruhr's Reply: I was not aware of any right to resubmit other than by making sure that CalPERS received all pertinent documents.

Question No. 5:

CalPERS No. 5: Did you file a workers' compensation claim at any time? If so, you must send the Workers' Compensation Carrier Request form found in *A Guide to Completing your CalPERS Disability Retirement Election Application*, to your workers' compensation carrier.

Mr. Ruhr's Reply: Yes, I notified workers compensation before the back surgery and all other complications were treated. As such, workers compensation has most all forms needed to process the claim.

7. On October 15, 2013, CalPERS notified Mr. Ruhr that his disability retirement application was denied because he failed to establish that he made a correctable mistake in a timely manner pursuant to Government Code section 20160. Mr. Ruhr appealed that decision and this hearing ensued.

8. Excerpts of the Pub-35 booklets given to Mr. Ruhr outlined the application process, notifying members that an incomplete application package would result in CalPERS canceling the application. Members were advised that if the application was canceled, and they still believed they were eligible for a disability retirement, they would need to submit a new application package to start the process over again. The publication further advised members of their right to appeal if their application was denied. Nothing in those excerpts referenced Government Code section 20160.

9. Mr. Ruhr testified that he was unaware that his first application was canceled. He acknowledged that when he learned of the cancellation, it took him 14 months to file a second application. He explained that the 14-month delay was due to his medical condition (cardiac surgery) and the new computer system CalPERS installed. He testified that he was unable to meet with a CalPERS representative because CalPERS was not setting appointments during the new system installation and that he got a recording advising that no appointments were being set when he called. He testified that he did not want to submit the second application until he could meet with a CalPERS representative because he wanted to make sure he completed his second application correctly.

10. Based upon the evidence submitted at the hearing, it was concluded that Mr. Ruhr's failure to submit a complete application the first time was excusable and that he was entitled to submit a second application packet. However, CalPERS's denial of that second application packet was upheld because Mr. Ruhr did not submit a new application packet within six months of June 17, 2011, the date he discovered his error/omission of not

submitting a complete application. Mr. Ruhr waited 14 months, well beyond the six-month deadline imposed by Government Code section 20160, to submit his second application. Thus, he could not prevail on a Section 20160 claim to support his late submission to correct his original error/omission. Additionally, based upon the evidence submitted, Mr. Ruhr failed to demonstrate the elements necessary to establish estoppel. Accordingly, the proposed decision denied Mr. Ruhr's appeal.

11. At the board meeting on February 10, 2015, the board remanded the matter to ALJ Matyszewski to take additional evidence on two points. The parties were given an opportunity to submit written briefs addressing those two points, after which ALJ Matyszewski issued this proposed decision after remand. The board's two questions and the parties' replies were as follows:

Board's Question No. 1: Whether when CalPERS staff sent Mr. Ruhr the second application, he was informed of the six-month deadline, alternatively, whether he was told that the second application would be administered under Section 20160 of the PERL and its attendant requirements.

Mr. Ruhr's Reply to Question No. 1: I met with a CalPERS representative and filled out the forms and signed everywhere I was told to sign.² I also gave the form to the doctor to fill out and submit. After I was rejected I asked the doctor if he had in fact submitted the form. His answer was that he had. When I called CalPERS a month after I submitted the forms I was informed that my application looked to be complete and was being processed. I was never told there was a deadline of any kind.

CalPERS's Short Answer to Question No. 1: Yes, Pub-35 informs all members of the necessary forms, deadlines for filing IDR applications, information required from treating physicians or employers, and provides all forms in the Pub-35 booklet itself.

Board's Question No. 2: What, if any, explanation did Mr. Ruhr provide in his April 29, 2013, letter to CalPERS, and whether or not any such explanation satisfies Section 20160.

Mr. Ruhr's Reply to Question No. 2: As far as not being timely; part of it was due to having several minor heart attacks the summer of 2011. In October of 2011, I had a triple bypass. It took several months to get over the operation. As far as I knew the application was being processed. During the last contact I had with CalPERS, I was told everything looked good and was being processed. There was no mention of there being a problem with the application and that the process could take up to a year to process.

² By the time Mr. Ruhr met with CalPERS representative, it was 14 months after he was told his first application was canceled. No evidence was introduced that CalPERS informed Mr. Ruhr of the six month deadline or if his second application would be administered under Section 20160.

CalPERS's Short Answer to Question No. 2: No, none of respondent's explanations satisfy Government Code section 20160 ("The Mistake Statute").

LEGAL CONCLUSIONS

Government Code section 20160

1. Government Code section 20160, subdivision (a), provides:

(a) 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.

(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.

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

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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Analysis After Remand

3. Mr. Ruhr made an error/omission in his 2009 application by not including a Physician's Report on Disability. In June 2011, Mr. Ruhr was informed that his application had been canceled due to this error/omission. Based upon the evidence introduced, Mr. Ruhr's original error/omission was excusable, and he was entitled to the relief afforded by Government Code section 20160.

However, once Mr. Ruhr learned of his error/omission, he had only six months to correct it under Section 20160. Although Mr. Ruhr was not told in June 2011 of the six-month limitation and was unaware that his second application was subject to that limitation - and it was clear from his testimony, his April 29, 2013, letter, and his recent correspondence, that Mr. Ruhr was unaware that his second application was subject to the six-month limitation set forth in Section 20160 - Mr. Ruhr's lack of knowledge about that matter does not help him.

While a mistake of fact usually is a defense, a mistake of law usually is not. It is commonly said that ignorance of the law is no excuse. (*People v. Meneses* (2008) 165 Cal.App.4th 1648, 1661-1662, citations omitted.) Government Code section 20160 establishes a clear, firm, six-month time limit within which a member must correct an error/omission. No evidence or authority was introduced at this hearing that supported a deviation from that six-month limitation. When Mr. Ruhr submitted his second application 14 months after learning of his error/omission, he did so eight months too late.

ORDER

CalPERS correctly determined that Mr. Ruhr's 2012 application for an industrial disability was untimely, and CalPERS properly denied Mr. Ruhr's 2012 application on that basis. Accordingly, Mr. Ruhr's appeal is denied.

Dated: June 8, 2015

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

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

In the Matter of the Statement of Issues
Against:

ROBERT. R. RUHR,
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and

CALIFORNIA DEPARTMENT OF
CORRECTIONS CENTINELA STATE
PRISON,
Employer.

CASE NO. 2014-0096

OAH NO. 2014030366

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California on December 3, 2014.

Robert R. Ruhr, respondent, represented himself.

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

There was no appearance on behalf of the California Department of Corrections Centinela State Prison.

The matter was submitted on December 3, 2014.

ISSUE

Did Mr. Ruhr make a correctable mistake that would allow him to submit a new application for industrial disability retirement after his previously submitted application was cancelled?

DEFAULT

As to the California Department of Corrections Centinela State Prison, on proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default pursuant to section 11520.

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. Mr. Ruhr was employed by California Department of Corrections Centinela State Prison as a correctional officer until he was retired for service effective January 30, 2010.

3. By virtue of his employment, Mr. Ruhr was a state safety member of CalPERS subject to the provisions of Government Code section 21151.¹

4. On September 21, 2009, Mr. Ruhr met with a CalPERS agent at a regional office and signed an application for Service Pending Industrial Disability Retirement.

5. Mari Cobler, Retirement Program Specialist II, in the CalPERS Benefits Service Division, testified about the application process. She explained that at the 2009 meeting, Mr. Ruhr would have been given documents about the process, including pamphlets advising him that his failure to submit a complete application packet, including documents from his doctors, would result in his application being cancelled.

6. Mr. Ruhr failed to include a Physician's Report on Disability with his retirement application. Consequently, Ms. Cobler testified that CalPERS would have notified Mr. Ruhr in February 2010 that his application had been cancelled. However, CalPERS has no documentation to support that claim. The Customer Touch Point Report (CTP) has no entry of such notification to Mr. Ruhr, and there are no letters in Mr. Ruhr's file indicating he was notified that his application was incomplete or that it was cancelled. Although there are CTP entries that Mr. Ruhr's employer was advised in January 2010 that the packet was incomplete, this did not establish notice to Mr. Ruhr. All Ms. Cobler could produce at hearing was a copy of a form letter that "would have been sent" to Mr. Ruhr in the ordinary course of business. None of this evidence was sufficient to establish that CalPERS notified Mr. Ruhr that his initial application was incomplete or cancelled. Moreover, Mr. Ruhr's actions in 2011, inquiring about the status of his disability application, supported Mr.

¹ Government Code section 21151 provides that a safety member incapacitated for the performance of a duty due to an industrial disability shall be retired for disability.

Ruhr's position that he was never notified his packet was incomplete or cancelled. However, that was not the issue at hearing; the issue at hearing involved Mr. Ruhr's actions in 2011 through 2013.

7. On June 17, 2011, Mr. Ruhr contacted CalPERS to inquire about the status of his disability application. He was informed it had been cancelled in 2010 due to his failure to submit a complete application packet.

8. On June 20, 2011, CalPERS sent Mr. Ruhr a new application and an informational booklet.

9. On August 16, 2012, Mr. Ruhr submitted his second disability application. During its review, CalPERS determined that this application was also incomplete and was submitted late.

10. On April 11, 2013, CalPERS requested that Mr. Ruhr advise why his application was late and provide other information regarding his application.

11. On April 29, 2013, Mr. Ruhr wrote a letter responding to CalPERS's inquiry.

12. On October 15, 2013, CalPERS notified Mr. Ruhr that his disability retirement application was denied because he failed to establish that he made a correctable mistake pursuant to Government Code section 20160. Mr. Ruhr appealed that decision and this hearing ensued.

13. Mr. Ruhr testified that he was unaware of the fact that his first application was cancelled. He acknowledged that when he did learn it was cancelled, it took almost one year for him to file a second application, but he claimed this was due to his medical condition and the new computer system CalPERS installed. He testified that he was unable to meet with a CalPERS representative because they were not setting appointments during the new system installation and that when he called he got a recording advising that no appointments were being set. He testified he did not want to submit the second application until he could meet with a CalPERS representative to make sure he completed his second application correctly.

14. An ordinarily reasonably prudent person in Mr. Ruhr's position would have inquired concerning any time limitations involved with submitting a new application and certainly would not have waited 11 months to submit it.

15. Mr. Ruhr erred in not submitting a new application packet within six months of the June 17, 2011, date when he was advised that his 2009 application had been cancelled due to a material omission of information and that he needed to submit an entirely new, complete, disability retirement packet.

LEGAL CONCLUSIONS

Burden of Proof

1. Mr. Ruhr 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. Mr. Ruhr made a mistake in his 2009 application by not including a Physician’s Report on Disability. In June 2011, Mr. Ruhr was informed that his application had been cancelled due to his mistake 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”), Mr. Ruhr had six months to correct the mistake 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. Mr. Ruhr contends that he should be exempted from the six month rule because he was unable to meet with a CalPERS representative because of the new CalPERS computer system being installed. While his desire for such a meeting was understandable, it does not exempt him from the mandates of Government Code section 20160, subdivision (a)(1).

5. CalPERS correctly asserts that estoppel does not apply in the present instance. 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 that a member's failure "to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute" a correctable error or omission.

Mr. Ruhr acknowledged his failure to timely submit his second application. His testimony regarding why he did so was insufficient to justify the late application. No evidence introduced at hearing met the elements necessary to establish estoppel.

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ORDER

CalPERS correctly determined that Mr. Ruhr's 2012 application for industrial disability was untimely, and CalPERS properly denied Mr. Ruhr's application on that basis. Accordingly, Mr. Ruhr's appeal is denied.

Dated: December 31, 2014



MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings