

**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 of:

DEBBIE HINOJOSA,

Respondent,

and

FILLMORE UNIFIED SCHOOL  
DISTRICT,

Respondent.

Case No. 2013-1053

OAH No. 2015020296

**PROPOSED DECISION**

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in Los Angeles on July 29, 2015. Complainant Public Employees' Retirement System was represented by Preet Kaur, Staff Counsel. Respondent Debbie Hinojosa represented herself. The Fillmore Unified School District was not represented and did not make an appearance.

At the outset of the hearing, complainant's motion to amend the Statement of Issues by interlineation was granted as follows: on page 2, paragraph III, line 9, the phrase "since that date" was deleted and the date of "October 10, 2012" inserted in its place. Respondent did not object to the motion.

During the hearing, complainant presented Exhibits 1 – 6, 9, and 11 – 13, which were admitted into evidence, and the testimony of Nicole Monique Herrera, Retirement Program Specialist II. Respondent testified and identified complainant's Exhibit 10 as the letter that she sent to CalPERS on October 10, 2010. Exhibit 10 was admitted into evidence.

As a matter of fairness and due process, the Administrative Law Judge on his own motion also admits complainant's Exhibits 7 and 8 into evidence pursuant to

**CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM**

FILED August 26 2015

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Government Code section 11513, subdivision (d), to supplement and explain the testimonial and documentary evidence.

Oral and documentary evidence and oral argument having been received, the Administrative Law Judge submitted this matter for decision on July 29, 2015, and finds as follows:

### FACTUAL FINDINGS

1. On March 19, 2014, the Statement of Issues, Case Number 2013-1053, was made signed for and on behalf of complainant Board of Administration, California Public Employees' Retirement System, State of California (CalPERS) by Anthony Suine in his official capacity as Chief, Benefit Services Division.

2. From in or about 1989 through February 23, 2010, Debbie Hinojosa (respondent) was employed by the Fillmore Unified School District. She was a food service worker or classified employee of the school district and worked at an elementary school in a half-time position. She performed duties as a grounds keeper for one hour per day and as a food service worker for three hours per day. By virtue of her employment, respondent was or is a local miscellaneous member of CalPERS subject to the provisions of Government Code section 21150. Based on her years of service credit, respondent qualified for a service retirement.

3. On or about January 29, 2009, respondent was involved in an accident while performing duties for the school district and suffered a back injury. Subsequently, she was required to undergo back surgery. Due to her injury, respondent was unable to return to work at the school district. Her last day of actually working or performing her job duties was the day of her injury, January 29, 2009. However, respondent received leave benefits and differential pay from the school district. She also filed a claim for workers compensation insurance benefits. From her workers compensation insurance claim, respondent received temporary and permanent disability benefits or payments.

4. (A) On February 24, 2010, the school district informed respondent that she had used all of her available paid benefits, or that all of her available paid benefits had expired, as of February 23rd. The school district further informed respondent that her name would be placed on a re-employment or re-hire list for 39 months pursuant to the Education Code. During this 39-month period, if her doctor authorized her release to return to work, respondent was eligible to return to work in the next vacancy in her job classification pursuant to the labor agreement between her employee association and the school district. However, respondent never returned to work at the school district.

(B) On March 24, 2010, the school district informed respondent that, because she was not notified that she was receiving Family Medical Leave Benefits during the 100 days that she was on differential pay, the school district was placing her on Family Medical Leave for another 12 weeks from February 23, 2010, through May 25, 2010. The school district further informed respondent that her medical benefits would cease on the first day of the second month following her “separation date,” which was June 1, 2010, and that information about continuing medical coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) would be mailed to her later.

5. (A) On July 2, 2010, respondent called CalPERS and asked about COBRA benefits. A CalPERS analyst told respondent that she had to direct her questions about COBRA, or any application for COBRA benefits, to her employer.

(B) On July 13, 2010, CalPERS analyst Kevin B. Nguyen spoke to respondent and explained what benefits may be available to her under COBRA. On July 13, 2010, respondent also asked about estimates if she were to apply for service retirement and disability retirement. Nguyen caused a service retirement estimate and disability retirement estimate to be mailed to respondent at her address of record.

(C) After July 13, 2010, CalPERS did not receive a service retirement or disability retirement application from respondent.

6. (A) Over two years later, in or about October 2012, a recruitment representative from the classified employees union at the school district spoke to respondent about applying for disability retirement. On or about October 3, 2012, the union representative or another person called and informed CalPERS that respondent was a CalPERS member who needed assistance with her disability retirement application.

(B) On October 3, 2012, Renzo Vergara, a CalPERS representative or retirement specialist, called respondent and left a message to call him. Respondent returned Vergara’s call and told him that she could not drive to the CalPERS regional office in Glendale due to her medical condition.

(C) On October 10, 2012, Vergara went to respondent’s home in Fillmore to help her complete her disability retirement application. Respondent completed a Disability Retirement Election Application, requesting a service retirement pending determination of a disability retirement (application). On her application, respondent wrote that her last day on the payroll of the school district was February 23, 2010, and that her specific disability was a lower back injury or orthopedic back condition. Respondent also submitted a letter, requesting that CalPERS allow her to “backdate” her retirement two and one-half years to February 23, 2010.

(D) Respondent's husband was present when Vergara came to his home to help his spouse and both he and respondent signed the application. Vergara verified their identities, witnessed their signatures, and signed the application as the CalPERS representative. Vergara informed respondent what other documents were needed for CalPERS to process her application. Vergara returned to CalPERS' regional office in Glendale, made copies of respondent's application, sent her a copy, and forwarded the original application to CalPERS' offices in Sacramento.

7. In her October 10, 2012 letter, respondent stated, in part, that she was only recently made aware of her eligibility to apply for CalPERS retirement benefits. Respondent asserted that, while she was injured, no one told her that she could collect a disability retirement allowance from CalPERS. Respondent requested that CalPERS allow her to "backdate" her retirement or disability retirement application because she was "uninformed and would have submitted any and all documents to CalPERS had [she] been aware that [she] had these benefits."

8. (A) On October 20, 2012, CalPERS began processing respondent's application for service retirement pending disability retirement. On November 20, 2012, respondent called CalPERS and asked about the status of her application. A CalPERS representative explained to respondent that it could take several months to complete the processing or adjudication of her application. From October 20, 2012, through on or about August 26, 2013, respondent submitted, and CalPERS obtained and reviewed, documents in support of her application, including records from her workers compensation insurance case and physician reports.

(B) On December 17, 2012, CalPERS sent a questionnaire to respondent, asking her certain questions for purposes of determining whether her disability retirement should be effective earlier on February 24, 2010. CalPERS indicated that it received her application on October 20, 2012. On January 17, 2013, respondent filed a reply. She stated that a doctor had told her to stop working as a food service worker because of a permanent disability, she did not tell the school district that she had to retire because of a disability because she knew that she could perform her regular work duties, and she did not contact CalPERS for information regarding disability retirement before she stopped working. Respondent also replied that she was not aware of any retirement benefits before she stopped working and became aware that she could submit an application for disability retirement on October 9, 2012.

(C) On December 17, 2012, CalPERS sent a questionnaire to the school district. The school district replied that respondent had not indicated that she was retiring because she was too disabled to continue working. According to the school district, respondent stated that the reason she stopped working was due to a workers compensation injury. There was an industrial injury claim pending when respondent stopped working. The school district stated that it was unknown what information or counseling was provided to respondent about applying for a disability retirement.

(D) On August 26, 2013, CalPERS determined that respondent's application for disability retirement should be approved.

9. (A) In a letter dated August 26, 2013, CalPERS informed respondent that it had found that she is substantially incapacitated for the performance of her usual duties as a food service worker for the school district due to her orthopedic or back condition and that it had approved her application for disability retirement. CalPERS indicated that respondent's disability retirement would be effective immediately.

(B) CalPERS further notified respondent that the effective date of her retirement could not be earlier than the day following the last day of sick leave with compensation or earlier than the first day of the month in which her application was received. Respondent was told that her retirement effective date would be either the day after the expiration of her sick leave credit, or, if she filed her application within nine months of discontinuance of service, then her application would be deemed filed on the last day for which she received her salary.

10. (A) In a separate letter dated August 26, 2013, CalPERS denied respondent's request for an earlier retirement date. Respondent had requested a retirement date on the date of separation from employment from the school district, or February 24, 2010. CalPERS informed respondent that, if she made a mistake in not applying for disability retirement earlier due to excusable inadvertence, oversight, or mistake of fact or law, her mistake could be corrected under Government Code section 20160. CalPERS indicated that it had determined that respondent did not make a "correctable mistake" by not applying for disability retirement when she separated from her employment based on the following information in her file: on July 13, 2010, respondent contacted CalPERS and CalPERS sent her a service retirement estimate and disability retirement estimates; on January 9, 2012, a disability retirement estimate was sent to her; and on October 10, 2012, respondent applied for service retirement pending disability retirement.

(B) It was not established from the Customer Touch Point Report (Exh. 9) or any other evidence, testimonial or documentary, that, on January 9, 2012, respondent requested, or that CalPERS sent her, a disability retirement estimate. No such action or event was evident in the Customer Touch Point Report. There was no evidence supporting or corroborating this statement in CalPERS' letter denying respondent's request for an earlier retirement date. Rather, as set forth in Finding 5(B) above, the evidence showed that CalPERS sent a service retirement estimate and disability retirement estimate to respondent on July 13, 2010.

11. On September 17, 2013, respondent filed an appeal of CalPERS' denial of her request for an earlier retirement date for her disability retirement. In her appeal letter, respondent admitted that, when her paid leave benefits expired and the school district placed her on a 39-month rehire list, she did not apply for a disability

retirement because she had hoped to be able to return to work. When her leave benefits were exhausted, respondent stated that she was taking multiple medications and did not know that she was eligible for disability retirement. She added, "I do not remember requesting the estimates you mentioned in your letter of August 26, 2013." Respondent asserted that her employing school district should have told her that she was eligible to apply for disability retirement and filed a disability retirement application for her.

12. Respondent has been receiving disability retirement benefits or allowance since October 10, 2012. She testified that she did not apply for a service or disability retirement within nine months of her last day of paid service with the school district because she was not aware of her right to a disability retirement. She stated that she was disabled due to her back injury, had major back surgery, and was in pain. Respondent further testified that she did not ask for any retirement estimates and did not receive any retirement estimates in July 2010. She conceded, however, that the Customer Touch Point Report was correct in memorializing the October 10, 2012 visit at her home by the CalPERS representative. Respondent testified in a sincere manner.

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Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

### LEGAL CONCLUSIONS

1. Grounds do not exist to grant respondent's request for an earlier retirement date for purposes of her disability retirement under Government Code sections 20026 and 21150 in that the preponderance of the evidence did not establish that respondent made a mistake, which was the result of inadvertence, mistake, surprise, or excusable neglect, that was correctable under Government Code section 20160, and that she was entitled to an effective retirement date retroactive to February 24, 2010, based on Findings 1 – 12 above.

2. A member of CalPERS shall be retired for disability if he or she is incapacitated for the performance of duty and credited with five years of state service. (Gov. Code, § 21150, subd. (a).) A CalPERS member may file an application for disability retirement. (Gov. Code, § 21152.) If the medical examination and other available information show to the satisfaction of CalPERS that the member is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, CalPERS shall immediately retire him or her for disability. (Gov. Code, § 21156.) "Disability" and "incapacity for performance of duty" as a basis of retirement mean disability of permanent or extended and uncertain duration. (Gov. Code, § 20026.)

3. Government Code section 21252 provides that a member's written application for retirement, if submitted to CalPERS within nine months after the date the member discontinued her state service, and, in the case of retirement for disability, if the member was physically or mentally incapacitated to perform of her duties from the date the member discontinued state service to the time the written application for retirement was submitted to CalPERS, shall be deemed to have been submitted on the last day for which salary was payable. On the other hand, 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 a CalPERS employee designated by the Board of Administration.

4. Government Code section 20160, subdivision (a), provides, in pertinent part, that, subject to subdivisions (c) and (d), the Board of Administration of CalPERS may, in its discretion and upon any terms it deems just, correct the error or omissions of any 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 Code of Civil Procedure section 473; and

(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 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.

Subdivision (c) provides that the duty and power of the Board of Administration to correct mistakes shall terminate upon the expiration of obligations of CalPERS to the party seeking correction of the error or omission, as those obligations are defined by section 20164.

Subdivision (d) of Government Code section 20160 provides that the party seeking correction of an error or omission has the burden of presenting documentation or other evidence to the Board of Administration establishing the right to correction pursuant to subdivisions (a) and (b).

5. Discussion—In this matter, CalPERS has determined that respondent is substantially incapacitated for performance of her duties as a food service worker for a school district due to an orthopedic or back condition and is therefore entitled to a disability retirement. Respondent's application for disability retirement was approved on August 26, 2013.

The issue is what should be the effective date of her retirement for disability retirement purposes. Respondent was discontinued from service or from the payroll of the school district on or about May 25, 2010, but she did not file her application for disability retirement with CalPERS for over two years until October 10, 2012. Because she submitted her application to CalPERS more than nine months after her discontinuance from service with the school district, CalPERS has determined that the effective date of her application and her retirement under Government Code section 21252, subdivision (a), is the first day of the month (October 2012) when her application was received by the CalPERS employee who assisted her with completion of the application. Respondent has been receiving disability retirement allowance or benefits effective from October 10, 2012.

Respondent contends that her retirement date should be earlier on February 24, 2010, when she purportedly separated from her job at the school district. She asserts that she did not submit her disability retirement application within nine months of her last day on the payroll of the school district because she did not know that she was eligible for or had the right to apply to CalPERS for a disability retirement. She contends that the school district did not inform her of this right and that she did not even know about a service retirement until October 2012 when a representative from the classified employee association helped her with an application. Respondent asserts she did not become aware of a disability retirement until the CalPERS employee came to her house to help complete her application. Respondent ostensibly argues that her failure to timely apply for a disability retirement was a mistake due to inadvertence or a mistake and should be corrected to allow her to have an earlier retirement date.

Unfortunately, the clear preponderance of the evidence demonstrated that respondent did, in fact, know or was informed about her eligibility for disability retirement in July 2010. The Customer Touch Point Report showed that, on July 3, 2010, respondent spoke with CalPERS and asked about retirement estimates. CalPERS then sent both a service retirement estimate and a disability retirement estimate to respondent. While respondent testified that she did not receive those estimates, other evidence supported the conclusion that the information in the Customer Touch Point Report was, in fact, a correct history of respondent's contacts with CalPERS and that CalPERS did send the retirement estimates to her.

First, the Customer Touch Point Report showed that, on July 2 and 13, 2010, respondent asked CalPERS about health insurance coverage under COBRA. Respondent would have very likely inquired about COBRA in July 2010 because her

medical benefits with the school district ceased on June 2010. Second, respondent conceded that the Customer Touch Point Report correctly noted the visit of the CalPERS representative to her home on October 10, 2012. Third, in her appeal letter, she did not deny receiving the estimates. Rather, respondent replied that she did not remember receiving the service and disability retirement estimates in July 2010.

Because the evidence demonstrated that the Customer Touch Point Report is a correct record showing that respondent asked about retirement estimates and that CalPERS sent her a service retirement and disability retirement estimates in July 2010, a reasonable inference may be drawn that respondent was aware or made aware of her right to apply for both a service retirement and a disability retirement in July 2010. The weight of the evidence thus suggests that respondent opted not to apply for service or disability retirement after receiving the estimates because she hoped to return to work and was receiving benefits from her workers compensation claim or other sources. Respondent's failure then to apply for a disability retirement after July 2010 and within nine months of her discontinuance of service with the school district was not an error or omission made as a result of mistake, inadvertence, surprise, or excusable neglect and that her failure cannot be corrected pursuant to Government Code section 20160. Therefore, respondent is not entitled to an earlier effective retirement date.

In addition, the evidence demonstrated that respondent's discontinuance from service with the school district was May 25, 2010, and not February 23, 2010. In her Disability Retirement Election Application, respondent wrote that her last day on the payroll of the school district was February 23, 2010. However, the school district extended her Family Medical Leave for 12 extra weeks from February 23, 2010, until May 25, 2010, because the school district did not notify respondent that she was receiving Family Medical Leave benefits during the 100 days that she was on differential pay. The school district considered May 25, 2010, as respondent's separation date or last date of employment.

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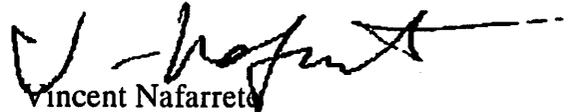
Wherefore, the following Order is hereby made:

### ORDER

1. The application or request of respondent Debbie Hinojosa for an earlier effective retirement date is denied, based on Conclusions of Law 1 – 5 above, jointly and for all. The Statement of Issues, Case Number 2013-1053, and the determination of the California Public Employees' Retirement System to deny respondent's request for an earlier effective retirement date is affirmed.

2. California Public Employees' Retirement System shall correct its file and records to reflect that respondent's discontinuance of service, or separation date, from the Fillmore Unified School District is May 25, 2010.

Dated: August 25, 2015

A handwritten signature in black ink, appearing to read "V. Nafarrete", with a long horizontal stroke extending to the right.

Vincent Nafarrete  
Administrative Law Judge  
Office of Administrative Hearings