ATTACHMENT E

THE PROPOSED DECISION

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BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Appeal of the Decision Not to Accept Late Application for Industrial Disability Retirement of: CARL THOMAS, and DEPARTMENT OF FORESTRY AND FIRE PROTECTION, Respondents.	CASE No. 2013-0028 OAH No. 2013090141

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California on November 3, 2014, and April 14 and June 8, 2015.

Christopher Phillips, Staff Attorney, represented Anthony Suine, Chief, Benefit Services Division.

There was no appearance by or on behalf of respondent California Department of Forestry and Fire Protection.

Respondent Carl Thomas represented himself.

The matter was submitted on June 8, 2015.

FACTUAL FINDINGS

1. The Department of Forestry and Fire Protection (respondent Department of Forestry and Fire Protection) employed Carl Thomas (respondent Thomas) as a fire captain. By virtue of his employment, respondent Thomas is a safety member of the California Public Employees Retirement System (CalPERS).

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2. On September 20, 2010, CalPERS received respondent Thomas's service retirement election application. On the date that CalPERS received his application, respondent Thomas was 55 years old and had 29.2 years of service. He retired from service, effective November 2, 2010, and has been receiving his retirement allowance since that date.

3. On October 19, 2011, CalPERS received respondent Thomas's disability retirement election application based on his left hip, low back, left knee and right ankle conditions.

In a letter to respondent Thomas, dated November 30, 2011, CalPERS advised him that his request to change from service to industrial disability retirement had been received and requested additional information regarding the circumstances surrounding his retirement and the reason(s) for the delay in filing his application for industrial disability retirement.

4. Petitioner alleged the following facts.

- By letter to respondent Department of Forestry and Fire Protection, dated November 30, 2011, CalPERS requested information regarding respondent Thomas's retirement circumstances.

- On December 16, 2012, CalPERS received a copy of its inquiry letter, dated November 30, 2011, in which respondent Department of Forestry and Fire Protection noted its response.

No testimonial or documentary evidence was offered to establish the foregoing. Therefore, these facts were not established.

5. By letter, dated December 29, 2011, CalPERS sent a second letter to respondent Thomas, requesting information regarding the circumstances surrounding his retirement and the reasons for the delay in filing his industrial disability retirement application.

By letter dated December 22, 2011, respondent Thomas responded to CalPERS' request for information regarding his disability.

CalPERS received a second letter from respondent Thomas, dated February 8, 2012, with additional information from him.

6. After reviewing information concerning respondent Thomas's late filing for industrial disability retirement, CalPERS determined that respondent Thomas failed to demonstrate that the delay was a correctable error or omission as a result of inadvertence, mistake, surprise or excusable neglect.

7. By letter, dated April 13, 2012, CalPERS notified respondent Thomas of its determination and advised him of his appeal rights.

Respondent filed a timely appeal and requested a hearing.

8. The appeal is limited to the issue of whether respondent Thomas should be allowed to submit a late application for disability retirement pursuant to Government Code section 20160 because he made "an error or omission" that was the result of inadvertence, mistake, surprise or excusable neglect, which would entitle him to an industrial disability retirement, retroactive to November 2, 2010.

9. Prior to filing his application for service retirement, respondent Thomas spoke with at least two CalPERS representatives. These representatives testified regarding the procedures representatives follow after a discussion with a member. Contemporaneous with or immediately after a meeting with a member, a CalPERS representative summarizes the conversation in the CalPERS computer system. The CalPERS representative cannot meet with another member until the notes are recorded. Once the notes are included in the CalPERS system, the notes cannot be changed. A summary of conversations between CalPERS representatives and CalPERS members is documented in the "Customer Touch Point Report" (report), a printed document. Respondent Thomas's report is included as part of the record in this case.

Some of the counselors with whom respondent Thomas spoke testified in this hearing.

10. On September 8, 2010, respondent Thomas spoke to Diana Behren, a CalPERS representative. The "bulk of her duties" are to assist members with retirement counseling based on their identified needs. Behren had no independent recollection of respondent Thomas but instead relied on her notes in the report. At respondent Thomas's request, she requested service retirement and industrial disability retirement estimates. In addition, Behren reviewed a Form 369D[1] and all forms with respondent Thomas.

She explained to respondent Thomas that he could elect to file for service retirement or service pending disability or industrial disability retirement. If he elected to file an application for service pending disability or industrial disability retirement, he would be required to complete the Disability Retirement Election Application and check the box "Service Pending Disability Retirement" or "Service Pending Industrial Disability Retirement". In addition, she explained the time frames and that, if he applied for service pending disability or industrial disability, he needed to submit all forms to the CalPERS disability unit within 30 days. If he failed to do that, the disability part of the application could be cancelled. If the application was cancelled, he could write a letter of explanation for the delay or reapply. If he elected to file an application for disability or industrial disability retirement, it could take six months or longer to process the application.

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[1] Form 369D is a publication, a step-by-step guide to complete paperwork for disability and industrial disability retirement.

11. According to the report, on September 15, 2010, respondent Thomas spoke to Jesus Uranga, who provided respondent Thomas with a copy of a booklet entitled "A Guide to Completing Your CalPERS Disability Retirement Election Application", commonly referred to as "Pub-35"[2]. Uranga explained service retirement versus industrial disability retirement, service pending industrial disability retirement, the forms he needed to complete, the application process, and his options. Further, Uranga explained how to complete the applications, the time frames to process the applications, and that, when any part of the application is submitted, he had 30 days to submit a completed application (including all required documentation).

12. On October 21, 2010, Behren spoke with respondent Thomas with his wife present. Respondent Thomas submitted his application for service retirement, to be effective on November 2, 2010. He was aware that he could change his mind prior to the issuance of the first warrant.

13. According to the report, respondent Thomas's next contact with a CalPERS representative was on August 31, 2011, when he spoke to Andrea Talamantez, now known as Andrea Minchaca. He inquired about industrial disability retirement. Talamantez explained to him that he should have applied for industrial disability retirement at the time he applied for his service retirement. Respondent Thomas told her that he had. She provided him with Pub 35 and explained that he must submit a letter explaining the reason he did not apply at the time he filed his application for service retirement. She went over the application and the industrial disability retirement forms with respondent Thomas.

14. Respondent Thomas submitted his Disability Retirement Election Application, having marked the box "Industrial Disability Retirement", dated October 14, 2011. This application includes Uranga's signature.

15. In his letter, dated October 19, 2011, respondent Thomas explained that he went to CalPERS six weeks prior to his retirement "to file my civil service retirement." The CalPERS representative, with whom he met, asked what type of retirement he wanted. Respondent Thomas stated: "he was not sure because of the uniqueness of his case" and stated that he would be filing for workers' compensation after November 2, 2010, because of the injuries he sustained nine months prior and for accumulated injuries sustained during his employment by the fire department. He explained that he wanted to use his accumulated sick leave because he would not be able to work during the upcoming fire season due to injuries, and the CalPERS representative gave respondent Thomas the necessary paperwork for his retirement.

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[2] A copy of "Pub 35" is Exhibit 12 in this case. It includes the information discussed by the CalPERS representatives with respondent Thomas, consistent with the testimony of the CalPERS representatives. However, the date of this publication is 2011, subsequent to the date that respondent Thomas filed his application for service retirement.

In his letter, respondent Thomas stated that he assumed that the application given to him would "reflect his pending disabilities", since at the time it had not been explained to him that there were different requirements and procedures "for a regular civil service requirement and those of a disability requirement." Further, he stated that, when he had not heard from CalPERS he contacted the Sacramento office to inquire about his application for disability retirement. At that time, he learned that he applied for service retirement and not disability retirement. He assumed that CalPERS, workers' compensation, and respondent Department of Forestry and Fire Protection worked together in the retirement process for state workers. He learned that he needed to "refile a Disability Retirement Application with CalPERS along with a letter explaining the reason for the delay."

16. Respondent Thomas answered questions from CalPERS, including a question about how he learned to apply for reconsideration under Government Code[3] section 20160, in a letter, dated February 2, 2012. Among other things, he said that, in September 2011, a friend told him the difference between applying for CalPERS disability and workers' compensation and told him that he might benefit from a CalPERS disability retirement versus a CalPERS service retirement.

17. Respondent Thomas submitted a letter, dated May 7, 2012. Among other things, he reiterated that "one of the reasons that prevented (him) from filing for the PERS [sic] disability in a timely manner was getting the required forms for a disability retirement completed." In addition, he stated that he did not intend to suggest in his letter, dated October 19, 2011, that CalPERS representatives had not told him about the application process; instead, he intended to state that he did not know anything about the process before he met with the CalPERS representative.

Further he stated, in part:

> On November 2, 2010, I retired from Cal Fire and, subsequently, filed a disability claim with the state of California (worker's compensation), for on the job injuries which [sic] I received while fighting a wild land [sic] fire, and for accumulative [sic] injuries I received over my thirty-year firefighting career. I did not file a disability retirement application with PERS [sic] after meeting with CalPERS representatives because the requirements for the application state that failure to complete all sections of the application will result in either a rejection of the application or a delay in the determination process. I did not have the physician's report on the disability from completed because I had not, yet, seen a physician who specialized in my disabling condition. I wasn't able to get a physician to complete the form until October 11, 2011.

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[3]Hereinafter, all reference is to the Government Code unless otherwise stated.

In the balance of the letter, respondent Thomas described his efforts to complete the workers' compensation process and that he filed his application for industrial disability retirement on October 19, 2011, as soon as possible after he obtained the documentation necessary to file the application.

18. In a letter to CalPERS, dated December 27, 2012, respondent Thomas noted, in part:

> I was informed by a state representative that I could not apply for a change in retirement status until all of the required documents in the disability retirement package were completed. Unfortunately, the process took longer than anticipated which, then, caused the delay in getting my disability retirement package to you in a timely manner.[4]

19. In the hearing, respondent Thomas testified regarding the reasons for the delay in submitting his application for industrial disability retirement. He said that fire season was about to begin. He believed that he had sustained work related injuries that accumulated over 30 years as well as work-related injuries within nine months prior to filing his application for service retirement. He believed that these injuries would prevent him from working. He wanted respondent Department of Forestry and Fire Protection to be able to "hire behind him". So, he decided to retire. He went to the CalPERS regional office in San Bernardino to discuss his options. Initially, respondent Thomas intended to file an application for industrial disability retirement. However, it was his understanding that if he did not submit all documents that needed to be attached to his application within 30 days that his application would be "kicked out of the system". As he had not initiated the process to establish that he had suffered work related injuries, he did not believe he could provide the documentation within 30 days. As a result, he filed an application for service retirement, completed the process to establish that he had sustained industrial disabilities, and then filed the application for disability retirement. He testified that he had to make the decision quickly; he was confused; that was the reason that he returned to CalPERS before filing his application.

Respondent Thomas testified that he had to go for service retirement because he "had to get a pay check." He acknowledged that a CalPERS representative explained service retirement pending a determination on an application for disability retirement. He was concerned about this option because the CalPERS evaluation for disability could take six months to a year.

20. Respondent Thomas filed an application for service retirement because he did not believe he could work during the upcoming fire season due to industrial related injuries. He did not file an application for service retirement pending disability retirement because he

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[4] This letter is among letters included in Exhibit D. However, during the hearing, there was reference to this same letter as Exhibit F.

did not believe he could submit the necessary documents within 30 days from the date that he filed the application. As such, he was concerned about the disability portion of the application taking too long to be processed or being "kicked out" or cancelled. He needed to receive a paycheck immediately after retirement.

21. Respondent knew that if he elected to change his application for service retirement pending disability retirement he must do so before the first warrant was issued, less than 30 days after filing the application for service retirement.

Respondent Thomas learned the policies and procedures about service retirement versus service retirement pending industrial disability retirement from the CalPERS representatives. This determination is based on his understanding that the documentation for disability retirement must be filed within 30 days of filing of the application; further he understood that the CalPERS disability evaluation process could take six months or longer while the CalPERS service retirement process would be much quicker.

As discussed in Finding 15, respondent Thomas was confused about the roles of CalPERS, workers' compensation, and his employer in the application process. However, insufficient evidence was offered to establish that this impacted the filing of his application for industrial disability retirement in a timely manner.

Respondent Thomas concluded that he should file his application for disability retirement after he gathered the documentation necessary to establish his application for industrial disability retirement; he did not obtain the information to file an application for industrial disability retirement until October 2011. He filed this application immediately thereafter.

22. Respondent Thomas made an informed decision when he decided to file an application for service retirement, dated September 20, 2010.

A reasonable person who was aware that he could file a service pending industrial disability retirement application but that he could not submit the documentation of his industrial disability within 30 days of the date of the filing of the application would have inquired about what he should do. There is no evidence that respondent Thomas made such an inquiry. Respondent Thomas's failure to make that inquiry does not constitute an error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect within the meaning of Code section 20160.

LEGAL CONCLUSIONS

1. Code section 20026 states:

> "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and

uncertain duration, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

2. Government Code section 20160 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 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.

3. Respondent Thomas made an informed decision when he elected to file an application for service retirement. He did not make an error or omission that is correctable under this Code section 20160. Therefore he is not entitled to apply for an industrial disability retirement retroactive to November 2, 2010.

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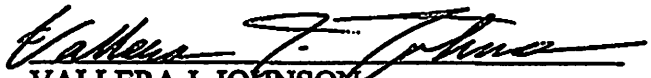
ORDER

Carl Thomas's request to file a Disability Retirement Election Application based on industrial disability retirement is denied.

DATED: July 8, 2015



VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings