

**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 Disability Retirement of:

Case No. 2014-0890

PHILIP M. THORMAN,

OAH No. 2014110204

Respondent,

and

NEVADA IRRIGATION DISTRICT,

Respondent.

**PROPOSED DECISION**

Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, heard this matter on July 9, 2015, in Sacramento, California.

Senior Staff Counsel Rory J. Coffey, represented the California Public Employees' Retirement System (CalPERS).

Philip M. Thorman (respondent) appeared and was represented by Patrick H. Dwyer, Attorney at Law.

There was no appearance by or on behalf of respondent Nevada Irrigation District. At the hearing, CalPERS established that respondent Nevada Irrigation District was properly served with the Notice of Hearing. This matter proceeded as a default against Nevada Irrigation District pursuant to Government Code section 11520.

The record remained open to allow submission of Respondent's Supplemental Memorandum in Support of Claim for Earlier Date of Retirement, received August 10, 2015, and marked as Exhibit D; CalPERS' Post-Hearing Brief, received August 21, 2015, and marked as Exhibit 21; and Respondent's Reply to CalPERS' Post-Hearing Brief, received August 27, 2015, and marked as Exhibit E. The record was closed, and the matter submitted for decision August 28, 2015.

## FACTUAL FINDINGS

### *Procedural History*

1. Respondent worked for the Nevada Irrigation District (NID) for approximately twelve years through January 15, 2012, when injuries prohibited him from working. Respondent was a local miscellaneous member of CalPERS subject to Government Code section 21150 with the minimum service credit to qualify for retirement.<sup>1</sup>

2. On September 19, 2013, respondent signed and filed an application for disability retirement (application) with CalPERS. He did not specify a “last day on payroll” or “retirement effective date” on the application. Instead, the fields were left blank. CalPERS approved respondent’s application, with an effective date September 1, 2013, the first day of the month in which the application was received.

3. On April 30, 2014, respondent requested an effective retirement date of January 16, 2012. CalPERS denied this request because no correctable mistake was made that would justify changing respondent’s retirement date to January 16, 2012. Respondent appealed and the Statement of Issues was made and filed by Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS

### *Issue for Determination*

4. The sole issue on appeal is whether respondent made a mistake which resulted from inadvertence, mistake, surprise, or excusable neglect correctable by Government Code section 20160, which would have entitled him to an effective retirement date retroactive to January 16, 2012.<sup>2</sup> Respondent asserted two bases for his request: (1) He was unaware that he could have applied for disability retirement prior to September 2013, as he believed he could not have applied prior to being deemed permanently disabled by his employer; and (2) had he known that by waiting until September 2013 to apply for disability retirement, his effective retirement date would be the first day of the month in which he applied, he would have applied sooner.

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<sup>1</sup> Government Code section 21150 provides: “Any member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 or Section 21077.”

<sup>2</sup> In his Memorandum in Response to CalPERS’ Statement of Issues on Appeal (Exhibit A), respondent claimed the “refusal of CalPERS to ... process the original application [for disability retirement] submitted by NID” on respondent’s behalf, was also an issue on appeal. There was no evidence that NID submitted a separate application for disability retirement on respondent’s behalf.

*Events Leading to Respondent's Request*

5. Respondent underwent multiple medical treatments in 2012 and 2013, including surgeries in January and May 2012. Complications with these treatments prompted respondent to contact CalPERS in January 2012 to “research his disability [retirement] options,” and to ask them to provide him with disability retirement estimate. CalPERS prepared and mailed respondent a disability retirement estimate. Respondent received at least two disability retirement estimates between January 2012 and May 2013.

6. In April 2012, respondent's coworkers encouraged him to apply for disability retirement benefits. Co-workers told him that “anytime [he is] off work and on disability that is pending [he] could at least apply for [disability retirement] as it takes a very long time to be accepted or not. If [he] was [approved to return] to work [he] could easily decline the disability [retirement].” Respondent did not apply for disability retirement at this time because he was unsure whether he should follow his coworkers' guidance. He also did not apply for disability retirement at this time because he was “afraid of being labeled as a bad employee,” and hoped his condition would improve sufficiently to permit him to return to work.

7. On June 12, 2012, respondent wrote to CalPERS' Employer Services Division regarding his purchase of five years' service credit. He asked what his retirement pension would be if he retired at that time and what it would be if he retired at age 50. He also asked “to know the procedure if I'm able to use the Disability Retirement benefits.”

8. In October 2012, pursuant to his request for information from CalPERS, respondent received the December 2012 CalPERS Publication 35, “A Guide to Completing Your CalPERS Disability Retirement Election Application” (Publication 35). Publication 35 included the following information:

[redacted] . . . [redacted]

You—or someone on your behalf such as your employer—may file a ***Disability Retirement Election Application*** for your retirement. You should apply for disability or industrial disability retirement as soon as you believe you are unable to perform your usual job duties because of an illness or injury that is expected to be permanent or last longer than six months.

(Bold and italics in original.)

[redacted] . . . [redacted]

If you have a workers' compensation claim, you should not wait until your condition is “permanent and stationary” under

workers' compensation requirements to submit your application for disability or industrial disability retirement.

[¶] . . . [¶]

If you are applying for disability or industrial disability retirement, a retirement date is not necessary to process your application. You may select a specific date, leave it blank, or write in "expiration of benefits."

[¶] . . . [¶]

Respondent used the forms and other materials within Publication 35 to eventually file his application, but did not recall reading the aforementioned portions of the publication.

9. In October 2012, respondent's podiatrists recommended that he "look into permanent disability retirement," due to ongoing pain in his feet. Respondent took no action in response to his podiatrist's suggestion because he was not sure whether he wanted to apply for disability retirement at the time and was also unsure whether he would ever return to work.

10. On September 4, 2013, NID informed respondent that it could not provide him with a reasonable accommodation that would allow him to successfully perform his job duties in light of his work restrictions. Respondent applied for disability retirement later that month, which was approved, effective September 1, 2013.

11. In April 2014 respondent learned that typically an employee's retirement date is the day after the employee's last paid date of service. As a result, he requested an effective retirement date of January 16, 2012, the day after his last day on pay status with NID.

12. Mari Cobbler has worked for CalPERS since 2006 and is a Retirement Program Specialist II. As part of her job duties she reviews member appeals and gathers information to determine if a change in status should occur, based on a member's claim. In preparation for hearing Ms. Cobbler reviewed respondent's CalPERS file.

13. Ms. Cobbler clarified that a member's last day on pay status does not automatically equal a member's effective retirement date. The last day on pay status is determined by the member's employer. This date is important when determining a member's effective retirement date because, assuming the member timely applies for disability retirement and that the application is approved, the effective retirement date is usually the day after a member's last day of paid status with their employer. If a member's retirement application is received more than nine months after their last day on pay status, and if the application is approved, the effective retirement date would be the first day of the month the application is received—rather than the day after the member's last day on pay status.

14. Ms. Cobbler explained that members are not required to specify, or have determined, their effective retirement date in order to apply for disability retirement. Members do not have to be deemed permanent and stationary or permanently disabled by their physician or employer to apply for disability retirement. Members can apply for disability retirement as soon as they have reason to believe they can no longer do the job or can no longer do the job for six months or longer.

### *Discussion*

15. At hearing, respondent claimed he did not file his application until September 2013 because he could not ascertain his “effective date” of disability prior to then. According to respondent he had to specify an “effective date” of disability on his application, and that date was not determined until NID concluded, in September 2013, that he was permanently disabled and could not return to work. Respondent also asserted that he is entitled to an earlier effective date of retirement of January 16, 2012, because he was not aware that applying more than nine months after his last day on pay status would affect his effective retirement date.

16. Respondent has the burden of presenting evidence establishing that in filing his application he made an error or omission that resulted from mistake, inadvertence, surprise, or excusable neglect, which would warrant granting his appeal for an earlier effective retirement date. Respondent has failed to meet this burden.

17. Although he last worked for NID in January 2012, respondent claimed he did not file for disability retirement until September 2013, because he had not been deemed permanently disabled by NID and, therefore, could not determine his effective date of retirement. However, respondent did not have to be permanently disabled or specify an effective retirement date to apply for disability retirement.

18. Respondent argued that CalPERS failed to inform him that he “must file an application for permanent disability [retirement] as soon as he thought he might have been permanently disabled.” He also asserted CalPERS failed to notify him that by failing to file for disability retirement within nine months of his last day on pay status he “would not be granted disability [retirement] from the true effective date of his retirement ... .” There is no requirement that respondent “must” file for disability retirement at any time. He has not asserted grounds to appeal CalPERS’ determination. As early as January 2012, respondent discussed his disability retirement options with CalPERS and requested a disability retirement estimate; in April 2012, his coworkers encouraged him to apply for disability retirement; in June 2012, respondent asked CalPERS about the procedure for using disability retirement benefits and wanted to know what his pension would be if he resigned at his current age rather than retired at age 50; in October 2012, he received Publication 35, which specified that he should file for disability retirement as soon as he believed he could not perform his job duties, and should not wait until his condition was “permanent and stationary;” and, in that same month, respondent’s podiatrist also recommended he apply for disability retirement.

19. Despite numerous indications that respondent knew he could file for disability retirement as early as January 2012, he waited until September 2013 to apply because he was unsure whether he should follow the guidance of his coworkers and podiatrist, was “afraid of being labeled as a bad employee,” and he remained hopeful that his condition would improve to a degree that would allow him to return to work. Respondent’s decision to wait until September 2013 to apply for disability retirement was an informed and considered choice. Accordingly, respondent’s request for an earlier effective date of disability retirement must be denied.

### LEGAL CONCLUSIONS

1. Government Code section 21154 sets forth when a CalPERS member may file an application for disability retirement. In relevant part, it provides:

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 or motion....

2. Government Code section 21252, subdivision (a), sets forth the conditions under which a member who has ceased to be employed in state service may apply for retirement as follows:

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 ... .**

(Bolding added.)

3. Government Code section 20160 governs a request by a member or beneficiary to correct an error. It provides in pertinent part:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

[¶] ... [¶]

(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).

[¶] ... [¶]

4. As set forth in the Factual Findings, respondent failed to meet his burden of establishing that he delayed filing his application based on an error or omission that resulted from mistake, inadvertence, surprise, or excusable neglect that would warrant relief pursuant to Government Code section 20160. Accordingly, respondent's request for an earlier effective date of disability retirement must be denied

**ORDER**

Respondent Philip M. Thorman's application for an earlier effective date of disability retirement is denied.

DATED: September 28, 2015

DocuSigned by:  
*Ed Washington*

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**ED WASHINGTON**  
Administrative Law Judge  
Office of Administrative Hearings