

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues
Against:

REBECCA J. GILLMORE,

Respondent,

CONEJO RECREATION AND PARK
DISTRICT,

Respondent.

Agency Case No. 2011-0922

OAH Case No. 2015020340

PROPOSED DECISION

John E. DeCure, Administrative Law Judge, Office of Administrative Hearings, heard this matter on September 22, 2015, in Los Angeles, California.

Preet Kaur, Staff Attorney, represented Anthony Suine (Complainant), Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Rebecca J. Gillmore (Respondent Gillmore) was not present or represented at the hearing, despite having been properly served with the date, time, and location of the hearing.

Shelly Howell, a Human Resources Supervisor employed by Conejo Recreation and Park District (Respondent Conejo), was present at the hearing. Ms. Howell wished to limit her participation to observing the hearing in the event that Respondent Conejo would choose to provide evidence to rebut Respondent Gillmore's contentions.

Agency counsel for CalPERS elected to prove up the case on CalPERS' behalf. Oral and documentary evidence was received and argument was heard. The record was closed and the matter was submitted on September 22, 2015.

FACTUAL FINDINGS

1. Complainant made the Statement of Issues while acting in his official capacity.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED October 5, 2015

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2. By virtue of her employment, Respondent Gillmore was a local miscellaneous member of CalPERS membership subject to Government Code section 21150, subdivision (a). She was employed by Respondent Conejo as a Registration/Publicity Coordinator who was required, under general supervision, to plan, organize, and perform a variety of computer-related and publicity tasks in the Information Services Unit. Her essential duties and responsibilities included:

- Preparing, coordinating, and distributing a seasonal brochure, including a website, and preparing related promotional material;
- Operating computer equipment to enter, compile and analyze data related to recreational activities, including mail-in registration, activity rosters, activity receipts, and refunds, and preparing related reports;
- Preparing daily revenue reports and balances with actual revenues collected;
- Reviewing data, verifying accuracy, analyzing data, maintaining records and preparing status reports on activities and participation;
- Assisting in the administration and maintenance of the local area network and Internet, registration of software including adding users, updating and conversion of software, and training new users of registration software; and
- Making recommendations for upgrades to Internet registration software and coordinating its daily use by the public and staff.

Respondent Gillmore was also responsible for composing news releases, preparing marketing flyers, assisting with public relations strategies and campaigns, ordering and maintaining equipment, computer supplies and registration materials, and driving to attend meetings. (Exhibit 15.)

3. Respondent Gillmore's Registration/Publicity Coordinator position was comprised of various physical movements and activities that were either constant (over 6 hours per day), frequent (3-6 hours per day), or occasional (up to 3 hours per day). Constant movements and activities included: sitting, bending (neck), twisting (neck), fine manipulation, simple grasping, repetitive use of hand(s), keyboard use, and computer-mouse use. Frequent activities included: sitting, standing, walking, bending (neck and waist), twisting (neck and waist), reaching (above and below shoulder), pushing and pulling, fine manipulation, and simple grasping. Occasional activities included: standing, walking, crawling, kneeling, climbing, squatting, reaching (above and below shoulder), pushing and pulling, power grasping, lifting/carrying 0-25 pounds, walking on uneven ground, driving, working with heavy equipment, and exposure to excessive noise. Movements and activities never performed included: running; lifting/carrying more than 25 pounds; exposure to extreme temperature, humidity, or wetness; exposure to dust, gas fumes, or chemicals; working at heights; operation of foot controls or repetitive movement; use of special visual or auditory protective equipment; and working with bio-hazards (e.g.: blood-borne pathogens, sewage, hospital waste). (Exhibit 16.)

4. Respondent Gillmore retired from service effective March 27, 2010, with the minimum service credit necessary to qualify for retirement. She has been receiving a CalPERS service retirement since that date.

5. On June 16, 2010, Respondent Gillmore filed a CalPERS Disability Retirement Election Application. On the face page of her application, Respondent Gillmore checked a box indicating that she was applying for "Service Pending Industrial Disability Retirement," which was incorrect because her miscellaneous employee status and history of employment made her ineligible to apply for, or receive, industrial disability retirement benefits. Therefore, CalPERS treated her application as one seeking service retirement benefits pending approval of disability retirement benefits, because these were the benefits a person of her employee status, and in her position, could be eligible to receive.

6. In her application, Respondent Gillmore described her specific disability as occurring due to a stressful work environment caused by her employer. Respondent Gillmore claimed that she suffered from extreme fatigue and pain, was frequently unable to work a regular 40-hour working week, and was using sick leave benefits as soon as she earned them. She stated that after three years of talks and meetings with her employer to try to come to an amicable agreement, her doctor "took me out of work" due to her ongoing condition. (Exhibit 3.)

7. CalPERS sent Respondent Gillmore to three specialists for evaluation of her alleged "substantial incapacitation" from the performance of her job duties, a condition which, if established, would have entitled her to disability benefits. Robert Schorr, M.D. evaluated Respondent Gillmore's neurological functioning and condition. Stephen Wilson, M.D. provided a psychiatric evaluation of Respondent Gillmore. David Silver, M.D. evaluated Respondent Gillmore's rheumatologic condition and psychiatric history. Each evaluator also made an extensive review of Respondent Gillmore's medical history, and reviewed her required job description, duties, and work history. None of these three evaluations established that Respondent Gillmore suffered from a substantial incapacitation entitling her to disability benefits. CalPERS thereby based its denial of Respondent Gillmore's disability application on her inability to show that she had suffered a substantial incapacitation that was work related.

8. On April 26, 2011, CalPERS informed Respondent Gillmore that it had denied her disability retirement application. Respondent Gillmore timely appealed CalPERS' denial decision on June 10, 2011, and the Statement of Issues ensued.

9. Respondent Conejo presented no evidence at the hearing and took no position as to whether CalPERS should have denied or approved Respondent Gillmore's application for disability retirement benefits.

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LEGAL CONCLUSIONS

1. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476.)

2. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, the court considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found “the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence.”

3. In the absence of a contrary statutory provision, an 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. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

4. Government 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.

5. Government Code section 21150, subdivision (a) states in pertinent part:

A 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 . . .

6. Government Code section 21152 states in relevant part:

Application to the board for retirement of a member for disability may be made by: [¶] . . . [¶]

(d) The member or any person in his or her behalf.

7. Government Code section 21153 states:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or

to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

8. Government Code section 21154 states in pertinent part:

The application shall be made only (a) while the member is in state service, or . . . (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence. . . . On receipt of an application for disability retirement of a member . . . the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. . . .

9. Government Code section 21156, subdivision (a)(1) states in relevant part:

If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability . . .

10. In *Dillard v. City of Los Angeles* (1942) 20 Cal.2d 599, 602, the court stated:

Pension laws should be liberally construed and applied to the end that the beneficent policy thereby established may be accorded proper recognition. (Citations.)

11. In order to be eligible for disability retirement, an applicant must have a “substantial inability” to perform his/her “usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.) “Substantial inability” requires more than only difficulty in performing the tasks common to one’s profession. In *Hosford v. Board of Administration of the Public Employees’ Retirement System* (1978) 77 Cal.App.3d 854, a case involving a state traffic officer with the California Highway Patrol, who held the rank of Sergeant, the applicant established that he could run, but inadequately, and that his back would probably hurt if he sat for long periods of time, or apprehended a subject escaping on foot over rough terrain or over and around obstacles. The court found that this was insufficient to support a finding of disability. The court stated:

Hosford argues that the "Typical Physical Demands" document requires that he be able to perform these functions "safely and effectively." Both terms are highly subjective. Even officers in top physical condition may suffer injuries in performing these tasks, and effectiveness certainly cannot be equated with brute strength. Each officer must be expected to have an awareness of his own limitations in facing emergency situations.

(*Id.* at 862-863.)

12. In this case, CalPERS made significant medical inquiries to determine whether Respondent Gillmore had a substantial inability to perform her usual duties sufficient to support a finding of disability. Those inquiries found otherwise. (Factual Finding 7.)

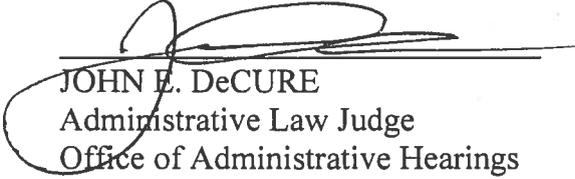
13. Respondent Gillmore had the burden of establishing by a preponderance of the evidence that CalPERS improperly rejected her disability benefits application in April 2011. Having presented no evidence, she failed to meet her burden of proof.

WHEREFORE, THE FOLLOWING ORDER is hereby made:

ORDER

The application of Respondent Rebecca J. Gillmore's for disability retirement benefits is denied.

Date: OCT. 1, 2015


JOHN E. DeCURE
Administrative Law Judge
Office of Administrative Hearings