

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:

LUZ O. LOPEZ,

Respondent,

and

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. 2013-0793

OAH No. 2015020075

PROPOSED DECISION

Administrative Law Judge Angela Villegas (ALJ), State of California, Office of Administrative Hearings, heard this matter on October 27, 2015, in Los Angeles, California.

Preet Kaur, California Public Employees' Retirement System (CalPERS) Staff Attorney, represented complainant CalPERS.

Respondent Luz O. Lopez (respondent) represented herself.

Also present was interpreter Anabel Munguia.

Despite proper notice of the hearing, no appearance was made by or for respondent Los Angeles Unified School District (LAUSD).

Evidence was received. The record was held open until November 10, 2015, for respondent to submit, by November 3, 2015, a letter she received from her doctor, and for complainant to lodge any objection by November 10, 2015. No supplemental filing was received.

The record was closed, and the matter was submitted for decision, on November 10, 2015.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED *16 Nov 2015*
Angela Villegas

FACTUAL FINDINGS

1. CalPERS filed the Statement of Issues in its official capacity. Respondent did not file a Notice of Defense, but had, via earlier correspondence, requested a hearing. (See Factual Finding 13.)

2. Respondent was employed as a housekeeper by respondent LAUSD. By virtue of that employment, respondent became a member of CalPERS. In 2003, injuries respondent had sustained on the job caused her to seek treatment, and she began to be concerned they might prevent her from working at some point.

3. On November 9, 2004, respondent contacted CalPERS to ask for information about retirement, and was noted to be "considering" a disability retirement. (Ex. 10.) Respondent asked for and was given two retirement-pay estimates, one for disability retirement and one for service retirement, assuming a retirement date of January 31, 2005. The CalPERS representative ordered disability and service retirement election packages for respondent, and brochures entitled "Planning Your Service Retirement," "Welcome to Retirement," and "Retired Financial Planning." On November 12, 2004, a CalPERS representative called and confirmed respondent had received the disability retirement application.

4. At some point, respondent sought Workers' Compensation benefits and had a Workers' Compensation case that did not resolve until January 2012. (See Factual Finding 13.) Respondent asked her Workers' Compensation attorney about applying for Social Security, and the attorney told her she had to wait until the Workers' Compensation case was over. Respondent assumed she also had to wait until that time to apply for CalPERS disability retirement. Respondent was, and remains, confused with regard to the different requirements of Social Security, Workers' Compensation, and CalPERS. Nevertheless, respondent did not expressly ask whether she had to wait before applying for CalPERS disability retirement, and no one expressly told her she had to wait.

5. On January 10, 2008, CalPERS sent respondent another disability retirement application in response to her request. On June 5, 2008, CalPERS ordered a new retirement estimate and a service retirement application for respondent, and enrolled her in a retirement class. On October 28, 2008, CalPERS enrolled respondent in a "Plan Your Retirement" class, and sent her an estimate and a disability retirement application package.

6. When respondent inquired with CalPERS about retirement, she was not sure she would be unable to return to work, and she hoped to be able to continue working.

7. (a) Notwithstanding the communications between respondent and CalPERS, the evidence did not disclose exactly what information CalPERS gave respondent. CalPERS' informational brochures were not among the evidence presented, and respondent could not recall the entirety of their content. What she did remember was that they covered

various technical requirements for service retirement. She did not remember being advised that she could seek disability retirement sooner than she did.

(b) According to credible testimony from CalPERS Retirement Program Specialist II, Nicole Herrera, informational materials provided with disability retirement applications also indicate that the member should apply for disability retirement as soon as the member knows he or she can no longer perform the job. The application itself (ex. 3), however, contains no such information.

8. On February 8, 2012 respondent applied (Application) for service pending disability retirement, requesting an effective date of February 1, 2012. (Ex. 3.) The claimed disability was orthopedic (issues with hands, arms, legs, back, and waist). According to the Application, respondent's last day on payroll was June 16, 2005. That indication notwithstanding, respondent's last day on LAUSD payroll was February 11, 2006.

9. At some point after initiating her Application, respondent learned from a CalPERS employee that she could request an earlier retirement date. She then requested that her disability retirement have an effective date of February 11, 2006.

10. Respondent was retired for service effective February 1, 2012.

11. CalPERS approved respondent for disability retirement based on her orthopedic conditions, effective February 1, 2012. CalPERS notified respondent of the approval of her Application in an April 18, 2013 letter (ex. 4), which further indicated, "Your file has been carefully reviewed in conjunction with your request to have your disability retirement become effective earlier than the first day of the month in which CalPERS received your application. . . . [¶] Your request for an earlier retirement date is addressed under separate cover." (*Id.*)

12. In the separate letter, also dated April 18, 2013, CalPERS stated,

The information in your file did not establish that you made a correctable mistake at the time you separated from employment. Therefore, your request for an earlier retirement date is respectfully denied. You had knowledge of applying for disability retirement and upon a change in circumstance you subsequently submitted an application for disability retirement.

(Ex. 5.)

13. In May 2013, respondent sent CalPERS a letter appealing the determination that she was not entitled to an earlier retirement date. (Ex. 6.) Respondent's letter explained the reasons for her appeal as follows:

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(a) She had an open Workers' Compensation case "that did not close for many years until January 12, 2012[.]" and "[i]t was not until that case closed in my favor that I knew I could retire with disability and I filed for this promptly in February of 2012[.]" (Ex. 6.)

(b) She had not been informed by LAUSD "of the need to file retirement with disability even when a case is open and pending for many years[.]" (*Id.*)

(c) The letter informing her of the right to appeal arrived belatedly.

14. (a) On August 8, 2012, CalPERS sent letters to respondent and LAUSD. The letter to respondent informed her that her file was under review "in regard to having your disability retirement become effective February 12, 2006" (ex. 7), and asked respondent to answer questions about the cessation of her employment and her application for disability retirement. The letter to LAUSD sought LAUSD's understanding of respondent's reasons for leaving employment, the existence of a Workers' Compensation claim, and any information given to respondent regarding disability retirement. (Ex. 8.)

(b) LAUSD did not respond to the letter. Respondent did respond to the letter sent to her, indicating she had been instructed by a physician "to stop working as a Housekeeper because of permanent disability" (ex. 9), but not stating when. Respondent did not indicate on what date she had learned she could apply for disability retirement.

LEGAL CONCLUSIONS

1. Respondent established entitlement to relief from the effect of her late Application for disability retirement, and to have her Application treated as if it were filed on February 11, 2006.

2. Under Government Code section 21252, subdivision (a), a CalPERS member's application for retirement is "deemed to have been submitted on the last day for which salary was payable," but only if the application is submitted within nine months of the date on which the member left government service. If the application is submitted later than that, then the effective date of the application is "the first day of the month in which the member's application is received" by CalPERS. (*Id.*) The application date determines when retirement becomes effective. (*Id.*)

3. In this case, respondent seeks to have her Application for disability retirement treated as if it had been submitted early enough to be deemed filed on her last day for which salary was payable, February 11, 2006,¹ even though she did not actually submit her

¹ Because respondent was granted disability retirement, there can be no dispute that she was "incapacitated to perform . . . her duties" (Gov. Code, § 21252, subd. (a)) when she left service. (Factual Finding 11.)

Application until February 8, 2012—approximately six years after she left her job with LAUSD. (Factual Findings 8 and 11-14.)

4. Government Code section 20160, subdivision (a), gives the CalPERS Board of Administration discretion to “correct the errors or omissions of any active or retired member,” “upon any terms it deems just,” if the following requirements are met:

(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” Government Code section 20160. (Gov. Code, § 20160, subd. (a).)

5. The burden of establishing the right to correction is on the party seeking it. (Gov. Code, § 20160, subd. (d).)

6. Respondent’s request to correct her error was made immediately upon her discovery of the right to make the request. (Factual Finding 9.) Thus, the request for correction was timely under Government Code section 20160, subdivision (a)(1). Likewise, the correction of the error will not afford respondent with any status, right, or obligation not otherwise available under the statutes governing CalPERS.

7. In belatedly submitting her Application for disability retirement, respondent made two mistakes. First, she inferred from her attorney’s advice about waiting until the conclusion of her Workers’ Compensation case to apply for Social Security benefits that she must also wait to apply for disability retirement.² (Factual Findings 4 and 13.) This was a mistake of law on respondent’s part. Second, she did not know whether she was

² For the purposes of this Decision, it is assumed that this was a mistake. The issue whether respondent actually had to wait until the conclusion of her Workers’ Compensation case to apply for disability retirement was not presented. Both parties assumed she did not.

incapacitated or whether she would be able to return to work. (Factual Findings 2-6 and 14.) Respondent's lack of certainty about her disability³ was a mistake of fact on her part.

8. The question presented in this case is whether either (or both) of those mistakes is "correctable" under Government Code section 20160. If so, then respondent's Application can be treated as if it were timely under Government Code section 21252, subdivision (a), such that it relates back to her last day on payroll. Thus, the question presented is primarily a legal one, as to whether respondent's mistakes were excusable within the meaning of Code of Civil Procedure (CCP) section 473.

9. CCP section 473, subdivision (b), provides for relief from "a judgment, dismissal, order, or other proceeding taken against [a party] through his or her mistake, inadvertence, surprise, or excusable neglect."⁴ To warrant relief under CCP section 473, "the acts which brought about the default must have been the acts of a reasonably prudent person under the same circumstances." (*Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58.)

10. A mistake of fact or law may justify relief, depending on whether the mistake is excusable. When the mistake is one of law, "the determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law." (*Tammen, supra*, at p. 476 [citation omitted]. Accord *State Farm Fire & Casualty Co. v. Pietek* (2001) 90 Cal.App.4th 600, 611 (*State Farm*); *Torbitt, supra*, at p. 866.) Where a legal issue is "complex and debatable," a mistake of law warrants relief. (*State Farm, supra*.)

11. Statutes governing pensions and retirement must "be liberally construed in favor of the applicant." (*Gibson v. San Diego* (1945) 25 Cal.2d 930, 935. See *Porter v. Bd. of Retirement of Orange County Employees' Retirement System* (2013) 222 Cal.App.4th 335, 348 [acknowledging rule of liberal construction].)

12. A member's mistake as to the legal ramifications of his election of disability retirement over service retirement has been held to constitute grounds for correction of the mistake. (*Rodie v. Bd. of Admin. of the Public Employees' Retirement System* (1981) 115 Cal.App.3d 559 (*Rodie*), 567, 568-570.) *Rodie* was decided under the predecessor statute to Government Code section 20160, the language of which was broader than the present

³ Under Government Code section 20026, "disability" and "incapacity for performance of duty" "mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion."

⁴ The CCP section 473 standard is also equivalent to the standard for determining whether an application for a late government claim is supported by a showing of mistake, inadvertence, surprise, or excusable neglect; therefore, cases construing the late-claim statute also apply. (E.g., *Tammen v. County of San Diego* (1967) 66 Cal.2d 468 (*Tammen*), 475-476; *Torbitt v. State of California* (1984) 161 Cal.App.3d 860 (*Torbitt*), 864.)

statute.⁵ Nevertheless, in holding the member's mistake a sufficient basis for relief, the court recognized the "obvious prophylactic purpose" of the statute (*Rodie, supra*, at p. 564) and the policy of liberal interpretation.

13. In light of the foregoing, respondent's mistake as to her legal right to apply for disability retirement when she left LAUSD was reasonable, and may be corrected under Government Code section 20160, subdivision (a).

14. Navigating Social Security, Workers' Compensation, and the state's retirement system can be confusing to a reasonable person, especially a layperson. The systems are complex and the available information is not always reliable. Respondent's confusion as to her obligations under these various systems (Factual Finding 4) was understandable.

15. Moreover, respondent's failure to make inquiries to clear up the confusion does not make her confusion unreasonable. (Factual Finding 4.) A reasonable person in respondent's position need not have made further inquiries. Respondent understandably inferred that, if she had to wait to apply for Social Security (as her attorney had advised her), she would also have to wait to apply for disability retirement. Most people do not have access to the kind of legal advice that respondent would have needed to obtain a clear answer as to whether or not she was required to wait for the conclusion of her Workers' Compensation matter before applying for disability retirement.

16. Indeed, despite complainant's evidence that its retirement brochures, which were provided to respondent in 2004 and 2008, urge applicants to file for disability retirement as soon as possible (Factual Finding 7), no statute actually requiring members to do so was cited to, or found by, the ALJ. Although Government Code section 21252, subdivision (a), spells out the consequences of filing a retirement application more than nine months after leaving government service, it does not address what a member should do if he or she has a pending Workers' Compensation case and/or is uncertain whether he or she will be able to return to work. (Factual Findings 2-6.) In such murky waters, respondent's obligations as to when to apply for disability retirement were "complex and debatable."

17. Because respondent's mistake of law as to when she was obligated to apply was excusable, it satisfies the requirements of CCP section 473, subdivision (b), and constitutes a correctable mistake under Government Code section 20160, subdivision (a).

18. Given the conclusion that respondent's mistake of law can be corrected, there is no real need to analyze her mistake of fact as to the existence of a disability. Nevertheless, that mistake too constitutes grounds for relief.

⁵ The predecessor statute was Government Code section 20180 (*Welch v. State Teachers' Retirement System* (2012) 203 Cal.App.4th 1, 28), which allowed for relief based on "inadvertence, oversight, mistake of fact, mistake of law, or other cause[.]" (*Rodie, supra*, at pp. 561, fn. 2, and 564.)

19. In *Button v. Board of Administration of the Public Employees' Retirement System* (1981) 122 Cal.App.3d 730 (*Button*), the court determined that precisely this type of mistake—as to whether a disability existed on the date of departure from government service—was correctable under the predecessor statute to Government Code section 20160. (*Button, supra*, at pp. 733 and 735-738.)

20. Respondent was unsure whether she was disabled as of her departure from government service. (Factual Findings 3-14.) This mistake satisfies the requirements of CCP section 473, subdivision (b), and thus is also correctable under Government Code section 20160, subdivision (a).

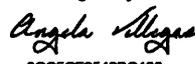
21. Once an error or omission has been corrected, “the status, rights, and obligations” of the member must be “adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time[,]” unless doing so is impossible, impracticable, or contrary to the purposes of the statutes governing CalPERS, in which case the adjustments are made “as of the time that the correction actually takes place[.]” (Gov. Code, § 20160, subd. (e).)

22. Since respondent carried her burden of demonstrating that her Application for disability retirement was late because of excusable mistakes, there are grounds for the Board of Administration to exercise its discretion to correct respondent’s error. (Gov. Code, § 20160, subd. (a).) Respondent’s Application should therefore be treated as if it were filed within nine months of the date on which she left LAUSD, and should be “deemed to have been submitted on the last day for which salary was payable”: i.e., February 11, 2006. (Gov. Code, § 21252, subd. (a).) Correcting respondent’s error in this manner is just (Gov. Code, § 20160, subd. (a)), and is neither impossible, nor impracticable, nor contrary to the purposes of the statutes governing CalPERS. (Gov. Code, § 20160, subd. (e).)

ORDER

Respondent’s appeal is granted. Her application for service pending disability retirement is deemed submitted as of February 11, 2006.

Dated: November 12, 2015

DocuSigned by:

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ANGELA VILLEGAS
Administrative Law Judge
Office of Administrative Hearings