

**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 Disability  
Retirement of:

Case No. 2014-0339

MEDENE PRESLEY,

OAH No. 2014100191

Respondent,

and

DEPARTMENT OF CORRECTIONS,  
CALIFORNIA STATE PRISON SOLANO,

Respondent.

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on March 23, 2016, in Sacramento, California.

John Shipley, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Medene Presley (respondent) represented himself.

There was no appearance by or on behalf of the Department of Corrections, California State Prison Solano (CDCR).

Evidence was received, the record was closed, and the matter was submitted for decision on March 23, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

*April 14, 2016*

*Rathiel E. Schrey*

## ISSUE

Should CalPERS accept respondent's application for industrial disability retirement (IDR) for review on the merits?<sup>1</sup>

## FACTUAL FINDINGS

1. Respondent was employed by CDCR as a Correctional Officer. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.<sup>2</sup>
2. Respondent service retired effective July 1, 2010.
3. On July 9, 2010, CalPERS received a Disability Retirement Election Application (2010 Application) from respondent. On his 2010 Application, respondent identified the application type as "Service Pending Industrial Disability Retirement." Respondent sought IDR on the basis of orthopedic and internal injuries.
4. The Statement of Issues in this matter alleged that, on August 20, 2010, respondent's 2010 Application was "cancelled for failure to submit a completed Worker's Compensation Carrier Request Form (BSD-92)." Prior to 2013, CalPERS never sent anything in writing to respondent to notify him that his 2010 Application was cancelled, the reasons for the cancellation, the actions available to him to correct or challenge the cancellation, or the deadlines by which he had to take such actions.
5. Although there were no written communications between CalPERS and respondent before 2013 about his 2010 Application, respondent had several oral interactions with CalPERS representatives about it. These oral interactions were reflected in a Customer Touch Point Report. A summary of these interactions as described in the notes that CalPERS representatives included in the Customer Touch Point Report is set forth below:

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<sup>1</sup> The Statement of Issues identified the question for determination in this matter as "whether [respondent] made a mistake correctable by Government Code section 20160, that would allow him to submit a new application for IDR after the previous cancellation of his original application." At the hearing, CalPERS agreed that the question for determination could be broadened to the issue set forth above.

<sup>2</sup> Government Code section 21151, in relevant part, provides:

- (a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

(a) On August 25, 2010, respondent went to CalPERS seeking a status update on his 2010 Application. Respondent requested "notice via the mail to advise him of the remaining processing time and expected determination time frame." The Customer Touch Point Report for that date stated, "Please send mbr a letter. Thank you." CalPERS did not send respondent the written notice he requested.

(b) A note was included in the Customer Touch Point Report dated August 26, 2010, which stated:

When member calls please let her [*sic*] know that we don't have the Workers Compensation Carrier Request form. The system will automatically cancel the application after 45 days of receiving the initial application. If that happens she [*sic*] will have to send in all required documents again to reapply for IDR. Closed inquiry.

There was no indication in the Customer Touch Point Report that there were any communications between CalPERS and respondent between August 26 and December 30, 2010, which transmitted this message to him.

(c) The next note in the Customer Touch Point Report was dated December 30, 2010. That note stated:

Member was in to find out status of his IDR application (he is retired for service pending IDR). I informed him of the 8-26-2010 ctp note (IDR canceled because Workers comp request form [wasn't] submitted) and member said that he thought [he'd] turned in everything needed and he never received any communication from calpers indicating otherwise. CTP note of 8-25-10 indicates that member inquired at that time and [wasn't] informed that a document was still unreceived. I checked DMS and [didn't] see any correspondence informing member of pending cancellation or need to submit specific document. Member requests that his IDR app be reinstated for determination but he will begin getting his docs ready to resubmit if necessary. He was informed that he should submit updated medical report and doctors medical information and update signatures and dates on all documents including app signature being witnessed by calpers rep or notarized. Please call member if resubmittal is necessary or not.

(d) A note dated January 3, 2011, stated:

I called the member, but his voice mail box was full. If the member does call back regarding his application. He needs to submit all the documents including an updated Physician's report and any additional medical records. Please tell him that his Physical Requirement form needs his employer and his signature. Please tell him that he has 30 days to submit his records from the first IDR documents CalPERS received.

There was no indication in the Customer Touch Point Report that this message or the 30-day deadline referred to in it were ever communicated to respondent.

(e) The next note about respondent's 2010 Application in the Customer Touch Point Report was dated May 31, 2011. That note stated:

Retiree filed SR pending IDR last year. SR granted; IDR canceled in 9/2010 apparently with no WC reports submitted to us. Both he & his attorney called SCIF for WC reports but he states that WC staff said they needed doc from ER. Reviewed IDR process and gave him new booklet suggesting he contact attorney to re-file IDR.

(f) A note on June 13, 2011, stated:

Member came into SRO with questions regarding SP/IDR, explained to member that app had been canceled, explained that new app would need to be submitted, explained time frames to submit all supp docs, that PERS would not send notification of cancellation if all supp docs are not received.

The Customer Touch Point Report did not describe the "time frames" the CalPERS representative explained to respondent.

(g) A note on July 30, 2012, stated that respondent came into CalPERS with "questions regarding his cancelled IDR benefit." The CalPERS representative explained the "process to re launch IDR app" and all "supp docs that are required, time frames to submit all docs." There is nothing in the Customer Touch Point Report to describe the "time frames" the CalPERS representative explained to respondent.

(h) A similar note was included in the Customer Touch Point Report dated September 24, 2012. Respondent came into CalPERS for "general counseling on IDR application," and was informed of the "time frame for submitting documents." Once

again, the Customer Touch Point Report does not describe the “time frame” the CalPERS representative explained to respondent.

6. On October 17, 2012, respondent and his wife submitted a new Disability Retirement Application (2012 Application) to CalPERS. That application included all the forms required by CalPERS for a complete IDR application.

7. On April 4, 2013, CalPERS wrote a letter to respondent regarding his 2012 Application. That letter stated:

Your request to change from service to industrial disability retirement has been received. In general, the Government Code does not allow a change in status after the person’s membership ceases when they retire or refund their contributions. An exception can be made if due to excusable inadvertence, oversight, or mistake of fact or law on the part of the claimant. However, no exception can be made for a mistake caused by the claimant’s neglect of a legal duty, error in judgment or change in the claimant’s circumstances.

The April 4, 2013 letter stated further that CalPERS was “collecting more specific information to determine if a correctable mistake was made,” and requested that respondent respond to certain questions set forth in the letter.

8. By letter dated April 23, 2013, respondent responded to CalPERS’ April 4, 2013 letter. In his letter, respondent stated:

First of all, I think it’s important that you know that I initially filed for IDR on July 9, 2010, within two weeks of my retirement date. I had to submit a second application for IDR in 2012, as that was when I learned that CalPERS had canceled [my] first application, without advising me.

I have been advised that because my initial application was filed within 120 days of my retirement, I should not have to request a Gov Code Section 20160 exception. However, you seem to be asking me questions, so I’ll happily reply.

In his April 23, 2013 letter, respondent responded to each of the questions asked by CalPERS in its April 4, 2013 letter. In response to a question asking about whether respondent had contacted CalPERS before filing for IDR, respondent stated:

Yes, I did contact CalPERS before I ceased working. At that time, I was advised by a CalPERS representative to apply for service retirement, and once retired I could then file for

industrial disability retirement. So eight days after my effective date of retirement, I submitted my application for industrial disability retirement.

In response to a question asking about how respondent learned of “the right to apply for reconsideration that is found under Government Code section 20160,” respondent stated that he found out that day (April 23, 2013) when he went to CalPERS and a CalPERS representative provided him a copy of Government Code section 20160. He also stated that he was “under the impression” that he had filed his application for IDR timely on July 9, 2010, and that when he contacted CalPERS in 2012 to find out the status of his application, he was told it had been cancelled by CalPERS because “CalPERS had not received documents from workers’ compensation.” Respondent asserted that “CalPERS never notified me that my application was canceled, until I contacted CalPERS in 2012 for a status of my application.” Respondent stated further that he was “not aware” that he was filing for reconsideration under Government Code section 20160. He believed that he had not made a mistake. Instead, he believed that “CalPERS made a mistake by not advising me it needed documents from workers compensation.”

9. On November 1, 2013, CalPERS sent a letter to respondent, denying respondent’s request to “change [his] retirement status from service to industrial disability retirement.” CalPERS stated further that respondent had not established that he had made a “correctable mistake” under Government Code section 20160. CalPERS notified respondent of his right to appeal from CalPERS’ denial. Respondent timely appealed.

10. At the hearing, respondent testified that he did not file his 2012 Application until October 17, 2012, because he was waiting for something in writing from CalPERS regarding his 2010 Application and which documents CalPERS had not received. He understood that CalPERS sometimes took a while before responding to IDR applications, so he waited to hear from them. When his workers’ compensation attorney told him to ask CalPERS about his IDR application, he went to CalPERS and a CalPERS representative told him he should reapply. Respondent asserted that no one at CalPERS told him that he had a time deadline by which he had to file a second IDR application after CalPERS cancelled his first one.

11. CalPERS argued that, in accordance with Government Code section 21453, respondent was required to submit his 2012 Application within 30 days after he was verbally told by a CalPERS representative that his 2010 Application had been cancelled. It argued further that, because respondent missed the 30-day deadline set forth in Government Code section 21453, the six-month deadline set forth in Government Code section 20160, the mistake statute, then applied. CalPERS asserted that, because respondent missed the time deadlines set forth in both Government Code sections 21453 and 20160, his 2012 Application was not timely. CalPERS’ arguments are addressed in the Legal Conclusions below.

## LEGAL CONCLUSIONS

1. Government Code section 21453, in relevant part, provides:

An election, revocation, or change of election shall be made within 30 calendar days after the making of the first payment on account of any retirement allowance or, in the event of a change of retirement status after retirement, within 30 calendar days after the making of the first payment on account of any retirement allowance following the change in retirement status. "Change in retirement status" includes, but is not limited to, change from service to disability retirement, from disability retirement to service retirement, from nonindustrial disability retirement to industrial disability retirement, or from industrial to nonindustrial disability retirement.

2. Government Code section 20160, in relevant part provides:

(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.

3. CalPERS argued that respondent's 2012 Application was a request for a change in his retirement status from service retirement to IDR, and as such, it should have been filed within the 30-day deadline set forth in Government Code section 21453. CalPERS' argument was not persuasive.

4. Respondent service retired effective July 1, 2010. He submitted his 2010 Application to CalPERS on July 9, 2010. Respondent's 2010 Application was therefore submitted well within the 30-day deadline set forth Government Code section 21453.

5. Without any notice to respondent, CalPERS unilaterally cancelled his 2010 Application. When respondent later inquired about his IDR, he was orally informed by a CalPERS representative about the earlier cancellation of his 2010 Application. Respondent never sought to change his timely July 9, 2010 request for IDR. He has continuously maintained from that date forward that he should be granted IDR.

6. It was CalPERS' unilateral cancellation of respondent's 2010 Application, and not an election by respondent to change his retirement status, that caused respondent to file his 2012 Application. A CalPERS representative told respondent that his 2010 Application had been cancelled long after the 30-day deadline set forth in Government Code section 21453 had passed. A cancellation of a timely-submitted IDR application is not included in the definition of "change in retirement status" that would trigger the application of Government Code section 21453. In addition, there is nothing in Government Code section 21453 to suggest that the submission of a subsequent IDR application after receiving oral notification of CalPERS' cancellation of a timely-submitted application was the type of change in status that the statute was intended to address. Furthermore, there was no evidence that the CalPERS representative who first told respondent that his 2010 Application had been cancelled ever informed him, either orally or in writing, that he had 30 days from that oral notification to reapply for IDR. There was also no evidence that any of the other CalPERS representatives with whom respondent had interactions ever told him that a 30-day deadline applied or the event that triggered that deadline. The Customer Touch Point Report shows that respondent was reasonably diligent in pursuing his IDR application after filing it timely in July 2010. There was no mention of Government Code section 21453 in the Statement of Issues or any of the exhibits CalPERS submitted at the hearing. In fact, it was only after the administrative law judge asked CalPERS to identify the mistake it believed respondent had made that CalPERS asserted that Government Code section 21453 applied in this case.

7. In sum, CalPERS did not establish that the 30-day deadline set forth in Government Code section 21453 applied in this matter. Consequently, it failed to establish that respondent's failure to comply with that statutory deadline was a mistake that may be addressed by the application of Government Code section 20160.

8. Government Code section 21154, in relevant part, provides that a disability retirement 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.

9. Respondent submitted his 2010 Application within four months after discontinuing state service. Thus, respondent filed his 2010 Application within the deadline set forth in Government Code section 21154, subdivision (c).

10. In the letters respondent sent to CalPERS that were admitted into evidence, respondent asserted he was continuously incapacitated from performing the usual duties of a Correctional Officer from the time he ceased working for the state until the time he filed his

2012 Application. Respondent testified that, at all times since he left state service, he has been incapacitated from working as a Correctional Officer. Respondent's assertions are sufficient to establish that his 2012 Application was timely under Government Code section 21154, subdivision (d).

11. When all the evidence is considered, CalPERS failed to prove that it acted in accordance with applicable law when it refused to accept respondent's 2012 Application. Respondent established that his 2012 Application should be accepted by CalPERS and reviewed on the merits to determine whether he should be granted IDR.

### ORDER

The appeal of respondent Medene Presley is GRANTED. CalPERS shall review respondent's 2012 Application to determine whether his request for industrial disability retirement should be granted.

DATED: April 11, 2016

DocuSigned by:  
*Karen Brandt*  
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KAREN J. BRANDT  
Administrative Law Judge  
Office of Administrative Hearings