

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of Accepting the Late
Application for Disability Retirement of

MARGARET M. WISE,

Respondent.

and

MT. DIABLO UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. 2016-0141

OAH No. 2016041069

PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on June 6, 2016, in Oakland, California.

Cynthia A. Rodriguez, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Thomas Biskobing, Attorney at Law, represented respondent Margaret M. Wise, who was present.

There was no appearance by or on behalf of respondent Mt. Diablo Unified School District.

The matter was submitted for decision on June 6, 2016.

ISSUE

Should CalPERS allow respondent to file her application for disability retirement benefits?

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED June 27, 2016

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FACTUAL FINDINGS

1. Anthony Suine, Chief of the Benefit Services Section of CalPERS, filed the statement of issues in his official capacity.
2. Margaret Wise (respondent) worked at the Mt. Diablo School District for approximately 10 years. By virtue of her employment, respondent was a local miscellaneous member of CalPERS. From January 5, 2009, until October 28, 2014, she was assigned to the position of campus supervisor. On September 9, 2011, respondent was responding to a fight on campus when a student stepped in front of her, causing her to trip and fall. Respondent sought treatment for injuries sustained and was medically separated from the position effective October 29, 2014.
3. The CalPERS Customer Touch Point Report (CTPR) documents a telephone conversation between respondent and a CalPERS counselor on October 15, 2014. The counselor explained that there was a six to nine month processing time for disability retirement applications and a 45 to 90-day processing time for service retirement applications. The counselor documented having advised respondent that she was able to file a service retirement pending disability application if she was planning on disability retirement. Respondent does not recall this advice.
4. On December 30, 2014, applicant and her husband, Kevin Wise, visited the Walnut Creek Regional Office of CalPERS to discuss respondent's retirement options. The CTPR documents that the CalPERS counselor provided respondent and her husband blank disability retirement application and a blank service retirement application "if the [service retirement] is more beneficial." The counselor reiterated that the service retirement processing time frame was 45 to 90 days, and the disability retirement application timeframe was six to nine months. Respondent submitted requests for estimates of a service retirement and a disability retirement.

Respondent recalls the counselor discouraging her from filing a disability retirement application because it took longer to process and required more documentation. Because respondent had been through a lengthy process to obtain her workers' compensation benefits after her injury, she was reluctant to start the cumbersome process unless there was a significant difference in the benefit. She decided to await receipt of the estimates before making a decision.
5. On March 12, 2015, CalPERS mailed a benefits estimate for her service retirement to respondent.
6. On April 14, 2015, respondent and her husband visited the CalPERS Walnut Creek office to ask about the disability retirement estimate, which she had still not received. Because she had not received any income since October 2014, and would be eligible for benefits on her birthday, June 20, 2015, she was anxious to start the process. The CTPR notes document respondent's visit and that she submitted a service retirement application with a

requested effective date of June 20, 2015. Respondent was instructed to mail a copy of her marriage certificate, which she did following the meeting.

Respondent and her husband testified credibly that the counselor reiterated the complicated process for applying for disability retirement. They recall the counselor advising them that the difference would only be \$20 to \$30 per month. Respondent was still undergoing medical treatment for her injury and did not feel mentally prepared for another lengthy and difficult process, so they decided to apply for a service retirement with the understanding that the difference in benefits was minimal.

7. On April 16, 2015, respondent received the estimate of her disability retirement benefits from CalPERS. She was surprised to learn that the difference was significant; the disability retirement benefits would constitute an increase in her benefits of more than \$300 more per month. If respondent had received both estimates before applying, she would have filed for disability retirement.

8. Respondent immediately called CalPERS to withdraw her application for service retirement and to file a disability retirement application. The CTPR documents that respondent called CalPERS on April 16, 2015; the counselor documented advising her that based on the estimate, disability retirement would be beneficial to her. The counselor mailed respondent a guide to completing a disability retirement application, and advised her that she would receive it in seven to 10 days. The CTPR also documents that the counselor advised respondent that the disability retirement process timeframe was six to nine months after CalPERS received all of the required documentation.

Respondent recalls the counselor advising her that she could not withdraw her service retirement application because it was "in process" and that she could not file her new application until after she received her first service retirement warrant.

9. On April 21, 2015, CalPERS sent a letter to respondent regarding her service retirement application. The letter acknowledged receipt of respondent's service retirement application effective June 20, 2015. It provided instructions regarding her health plan. The letter also stated that if respondent was unable to work due to illness or injury, she might be entitled to receive disability retirement. The letter stated further:

To request a service pending disability retirement, you must complete a Disability Retirement Election Application. Please note that your retirement date cannot be earlier than the day following your last day on pay status.

CalPERS will send you a letter providing the date of your first retirement check, the amount you can expect to receive, and important income tax information. This letter is usually sent after you have separated from employment but before you receive your first retirement benefit check. Changes to the benefit option election you make, beneficiary you

designate, or the retirement date your request, cannot be made after you receive your first full retirement benefit check.

Respondent understood this letter to be a form letter following up on her service retirement application. Based on her conversation with the CalPERS counselor on April 16, 2016, she believed that because her service retirement application was being processed, she was unable to file her disability retirement application until after her first warrant was received. In fact, respondent's understanding and the CalPERS letter were incorrect; respondent was allowed to request a change from service retirement to disability retirement within 30 calendar days after receiving her first service retirement warrant, but not later. (Gov. Code, § 21453.)

10. Respondent testified credibly that if she had known she was required to complete the application within 30 days of her first warrant, she would have done so. Respondent was continuing to receive medical care for her injury at the time and was preparing for her upcoming surgery in September 2015. Respondent has undergone three surgeries, the last being a fusion of her ankle.

11. Respondent received her first service retirement warrant on July 6, 2015.

12. In mid-July, respondent began to complete the disability retirement application. She requested that the Mt. Diablo School District complete its portion of the application. On August 10, 2015, the Mt. Diablo School District sent a letter to CalPERS enclosing respondent's authorization to release information signed July 29, 2015, a report of separation and advance payroll information, the physical requirements of the position, personnel actions and medical reports.

13. On August 14, 2015, respondent's workers' compensation carrier, LWP Claims Solutions, Inc., sent documentation to CalPERS concerning respondent's application for disability retirement. The documentation included an authorization to release information signed by respondent on July 21, 2015.

14. On October 21, 2015, respondent and her husband visited the Walnut Creek office of CalPERS to submit the balance of the application for disability retirement. Because respondent had received her first service retirement warrant on July 6, 2015, her disability retirement application was not filed within 30 days of receipt of her first service retirement warrant, and was therefore late.

15. Respondent was under the impression that she was unable to file the application until all of the documents, including documents from the school district and the workers' compensation carrier had been gathered. After learning that the district and the workers' compensation carrier would submit the documents directly to CalPERS, respondent brought her portion of the application to the CalPERS office to submit. The CTPR documents that respondent advised the counselor they met with that she had not been advised of the timeframe for filing the disability retirement application.

16. On October 27, 2015, CalPERS sent a letter to respondent requesting that she provide her medical records from June 2012 to the present.

17. The CalPERS Board of Administration is authorized, in its discretion and upon any terms it deems just, to correct the errors or omissions of any active or retired member under certain circumstances. (Gov. Code, § 20160.) On October 27, 2015, in an effort to determine whether respondent's late application should be accepted due to an error or omission, a CalPERS counselor sent a late application questionnaire to respondent.

On November 3, 2015, respondent called CalPERS. The CTPR documents that respondent advised a counselor that she had not been counseled properly, that she had been discouraged from applying for disability retirement, and that the estimate she received after applying for service retirement shows disability retirement paying substantially more. She asked why she had to complete the late application questionnaire. The counselor advised respondent that it was normal procedure and to return the document with a letter explaining why the original application was for service retirement rather than disability retirement or service retirement, pending disability retirement.

18. On November 12, 2015, respondent submitted her explanation to CalPERS. She stated, in part, that "it was always my intent to apply for disability retirement" after being medically separated from her work. She explained that she had been through a great deal with the workers' compensation claim, and after being advised by CalPERS counselors that the disability retirement application was lengthy and complicated, and that the difference in benefit amount was not substantial, she applied for service retirement; however, receiving the disability retirement estimate, she immediately contacted CalPERS to change the application she had submitted two days earlier, to a disability retirement application.

19. After reviewing respondent's letter of explanation, CalPERS determined that respondent had been aware of her right to file a disability application, had been advised that she was required to file a request for a change in status before the first warrant was issued in the April 21, 2015 letter, and had failed to make proper inquiries that would normally be made by a reasonable person. Thus, on December 24, 2015, CalPERS sent respondent a letter advising her that her application for disability retirement was rejected. Respondent appealed and this hearing followed.

LEGAL CONCLUSIONS

1. Government Code section 21453 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. . . .

Here, because respondent's first payment on her service retirement was paid on July 6, 2015, she was required to apply to change her status from service retirement to disability retirement no later than August 5, 2015. (Factual Finding 11.)

2. Government Code section 20160, subdivision (a), authorizes PERS to correct the errors or omissions of any active or retired member, provided 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.

Government Code section 20160, subdivision (d), provides that the party seeking correction of an error or omission has the burden of presenting documentation or other evidence establishing the right to correction. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 500.)

3. Respondent contends that her disability requirement application should be accepted because she was surprised by the difference in monthly benefits after being counseled that it would only be a \$20 to \$30 difference, and she erred in filing the application beyond the 30-day deadline due to incorrect advice given to her by a CalPERS representative on April 16, 2015.

CalPERS contends that respondent has not met her burden of establishing that her delay in filing the application was due to mistake, inadvertence, surprise or excusable neglect. CalPERS argues that after having received the April 21, 2015 letter advising her that any

changes needed to be made before she received her first service retirement warrant, a reasonable person would have contacted CalPERS for clarification.

4. For purposes of Government Code section 20160, mistake is to be defined in a manner that is consistent with its application in Code of Civil Procedure 473. Code of Civil Procedure 473 is a remedial statute that is strongly favored by the courts and liberally applied to carry out the policy of permitting trial on the merits. (*Ramsey Trucking Co. v. Mitchell* (1961) 188 Cal.App.2d Supp. 862.) Granting relief from errors in order to permit trial on the merits is therefore favored. Cases that have considered the issue of whether to grant relief from erroneous retirement elections have generally permitted such relief, which is consistent with the purpose of Code of Civil Procedure 473.

In *Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559, Rodie, the chief of police for the City of Reedley, applied for disability retirement in 1973 following open heart surgery. He also applied for federal disability benefits, which were approved in 1974. In 1977, Rodie discovered that federal benefits do not reduce the amount of service benefits, and that his benefits would be higher (due to the absence of reduction) if he selected a service retirement. Rodie sought and was denied relief from his prior disability retirement election. On appeal, the court held, as a matter of law, that an employee's mistaken election of a disability retirement over a service retirement to which he was also entitled could be corrected under Government Code section 20180 (now Government Code section 20160). The court noted that established policy required liberal interpretation of pension statutes in favor of the applicant (see *Cavitt v. City of Los Angeles* (1967) 251 Cal.App.2d 623, 626), and that it could discern no reason to treat an employee's mistaken choice between two types of retirement to which he was entitled by reason of past services differently from any other mistake depriving the employee of benefits to which he was fairly entitled. The court reasoned the employee's mistake was in performing the action (making a retirement election) incorrectly and that he was entitled to relief.

In *Button v. Board of Administration* (1981) 122 Cal.App.3d 730, an investigator for a district attorney's office applied for and received a service retirement in 1973. In 1976 the investigator suffered a mild heart attack. In 1977, the Workers' Compensation Appeals Board determined that his injury was cumulative and arose out his employment with the county. The investigator then sought to convert his service retirement to a disability retirement, but CalPERS denied his request. On appeal, the court agreed with the investigator's contention that if he actually was disabled when he retired, then his and respondent CalPERS's belief that he was not disabled was a mistake of fact that was correctable under Government Code section 20180 (now Government Code section 20160). In reaching its decision the *Button* court rejected the contention that the investigator's mistake was one of judgment or negligence. It noted the established policy of liberally interpreting pension statutes in favor of the applicant and concluded that it was "unreasonable to attribute to the Legislature an intention to preclude an otherwise eligible employee from receiving a disability pension on the sole ground that his disabling condition was not diagnosed as such at the time of retirement." (*Id.*, at 737-738.) The court remanded the case for a determination of whether the investigator was disabled when he retired.

In *Hittle v. Santa Barbara County Employees Retirement Association* (1985) 39 Cal.3d 374, Hittle, a heavy truck operator, was counseled that if he did not provide for the disposition of his retirement contributions, the money would revert to the retirement system after five years. He was advised of two options: 1) withdrawal of his funds, or 2) to make a deferred retirement election. A notation on one form stated, "If you have filed or intend to file for disability retirement you should not withdraw the above contribution." Hittle requested a refund and received \$187.49. Two and one-half years later, Hittle learned that he may have been eligible for disability retirement when he withdrew his contributions. His request to redeposit his contributions was refused. The Supreme Court concluded that there was no substantial evidence to support the conclusion that the retirement system adequately informed Hittle of the existence of the right to apply for disability retirement. The Supreme Court noted that the right to a pension is among those rights clearly favored by the law and pension legislation should be liberally construed and applied to the end that the beneficent results of the legislation be achieved. The Supreme Court stated further, "Experience tells us that an informed individual would not knowingly choose a reimbursement of \$187.49 in retirement contributions rather than seek to obtain an annual allowance of one-half of his regular compensation for the remainder of his life."

The facts in this case parallel those in *Rodie, Button and Hittle*. When respondent took a service retirement she had not yet received the CalPERS estimate of her disability retirement benefits. (Factual Findings 5 through 7.) After discovering the disparity between service and disability retirement benefits, she contacted CalPERS the same day to request a change in status. (Factual Findings 7 and 8.) This call is documented in CalPERS's CTPR. It is unlikely that respondent would have intentionally chosen a retirement that provided her with \$300 per month less in benefits.

After learning of the difference in benefits, she promptly began the process of gathering information for the disability retirement application. (Factual Findings 8, and 12 through and 14.) Respondent clearly intended to apply for disability retirement as of April 16, 2015, but misunderstood the deadlines; this error is correctable under Government Code section 20160. The fact that respondent failed to seek additional clarification following receipt of the April 21, 2015 letter does not change this result because she was under the mistaken belief that she could not do so based on her conversation with a CalPERS representative on April 16, 2015. (Factual Findings 9 and 10.)

The evidence established that respondent mistakenly believed she had a right to file her application for disability retirement any time after the service retirement application was processed. Respondent attempted to change her status to disability retirement within a reasonable time after she discovered the discrepancy in the amount of the monthly benefit. (Factual Findings 7, 8, 10, and 12 through 15.) Moreover, she gathered information to accompany the disability retirement application while undergoing medical care and surgery on her ankle. (Factual Findings 6 and 10.)

If respondent actually was disabled when she retired, then she was entitled to either a service retirement or a disability retirement. Granting the correction would therefore not provide respondent a status, right or obligation which would not otherwise be available.

5. After considering all of the evidence, it is determined that the late filing of respondent's application for disability retirement was due to mistake within the meaning of Government Code section 20160, that it was filed within a reasonable time after discovery of the right to make the correction and that correction of the mistake will not provide respondent a status, right or obligation which would not otherwise be available.

ORDER

Respondent Margaret A. Wise's appeal is granted.

DATED: June 21, 2016

DocuSigned by:

Jill Schlichtmann

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JILL SCHLICHTMANN
Administrative Law Judge
Office of Administrative Hearings