

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Statement of Issues
Against:

DANIEL A. PFAU,

Respondent,

and

CITY OF ALHAMBRA,

Respondent.

Case No. 2014-0717

OAH No. 2015010239

PROPOSED DECISION

This matter was heard before Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, on April 7, 2016, in Glendale.

Michael J. Hui, Deputy Attorney General, represented the California Public Employees' Retirement System (PERS). Dann L. Duncan, Attorney at Law, represented Daniel A. Pfau (Respondent). Traci I. Park and Scott M. Nenni, Attorneys at Law, Burke, Williams & Sorensen, LLP, represented the City of Alhambra (City).

Oral and documentary evidence was received. PERS presented the testimony of Nicole Herrera and exhibits 1 through 4. The City presented the testimony of Richard M. Bacio and exhibits City-1 through City-4, City-6, City-8, and City-16. Respondent testified on his own behalf and presented no exhibits.

At the conclusion of the hearing, the record was held open for the parties to simultaneously file closing briefs by April 29, 2016, and reply briefs by May 13, 2016. Respondent was permitted to file a separate reply brief in response to each closing brief filed by PERS and the City. All parties timely filed their closing briefs and reply briefs, which were marked as follows: PERS's closing brief and reply brief were marked as exhibits 5 and 6; the City's closing brief and reply brief were marked as exhibits City-18 and City-19; and Respondent's closing brief and reply briefs were marked as exhibits A,

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

July 8, 2016
Kathie L. Schuch

B and C. The record was closed and the matter was submitted for decision on May 13, 2016.

ISSUE

Whether PERS correctly rejected Respondent's application for disability retirement as untimely under Government Code section 20160.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Statement of Issues was filed by Anthony Suine, in his official capacity as Chief of the Benefit Services Division for PERS.
2. Respondent was employed by the City as a police sergeant. By virtue of this employment, Respondent was a local safety member of PERS subject to Government Code section 22151. On December 30, 2008, Respondent signed a service retirement election application. Respondent service retired from his employment with the City effective December 31, 2008.
3. On October 23, 2013, almost five years after his service retirement from the City, Respondent signed an application for service pending disability retirement (Disability Application). PERS received the Disability Application on November 5, 2013. After reviewing the Disability Application, PERS determined that it could not accept the application because it was untimely under Government Code section 20160. PERS notified Respondent and the City of this determination. Subsequently, Respondent requested an administrative hearing to appeal PERS's decision to reject the Disability Application as untimely. This hearing ensued.

Respondent's Employment with the City

4. Respondent was employed with the City Police Department for 31 years, from March 10, 1977, to December 30, 2008. His last day of employment with the Police Department was December 30, 2008. Respondent's service retirement became effective on December 31, 2008. By letter dated January 12, 2009, PERS notified Respondent that his monthly service retirement allowance was \$7,669.29.
5. Respondent filed workers' compensation claims during his employment with the City. He was represented by counsel with regard to those claims. As of December 11, 2013, Respondent had three workers' compensation claims pending, with two of the claims having been filed between 2010 and 2013. According to Respondent, his workers' compensation case has not yet been adjudicated to finality.

In the Disability Application, Respondent indicated having a workers' compensation claim based on an injury dating back to March 10, 1997.

PERS's Determination on Disability Application

6. PERS distributes a publication entitled "A Guide to Completing Your CalPERS Disability Retirement Election Application" (hereafter, Publication 35). (Exh. 4.) Publication 35 contains all of the forms required for a disability retirement application and explains how such applications are processed. Publication 35 instructs that applicants "should apply for your disability or industrial disability retirement as soon as you believe you are unable to perform your job duties because of an illness or injury that is expected to be permanent or expected to last longer than six months." (Exh. 4, p. PERS-135.)

7. PERS's process for a disability retirement application for local safety members, such as Respondent, is generally summarized as follows: PERS reviews the disability application and supporting documentation to decide whether the application should be accepted by PERS. If PERS determines the application should be accepted, PERS notifies the applicant's employer and forwards the application to the employer, and it is the employer who makes the determination of whether the applicant is substantially disabled from his or her usual job duties to qualify for a disability retirement. (Exh. 4, p. PERS-142.) There is no disability determination by the employer if PERS determines the application should be rejected.

8. Publication 35 addresses the situation where the applicant for disability retirement also has a workers' compensation claim. Such applicants are advised to apply for disability retirement "as soon as you believe you are unable to perform the usual duties of your position with your current employer because of an illness or injury that is expected to be permanent or last longer than six months. [¶] 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." (Exh. 4, p. PERS-145.)

9. Nicole Herrera is a PERS Retirement Specialist II. She conducted the review of Respondent's Disability Application to determine whether it should be accepted by PERS. Based on her review, Herrera determined that PERS could not accept the Disability Application. At the time the Disability Application was submitted to PERS in October 2013, Respondent had already been on service retirement from the City since December 31, 2008. Consequently, the only way for Respondent to change his status from a service retirement to a disability retirement would be pursuant to Government Code section 20160.

10. Government Code section 20160 authorizes PERS to correct errors or omissions of any retired member only if three requirements are met. First, the request for correction must be made "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." Second, the error or omission was the result of mistake, inadvertence, surprise or excusable neglect. Third, the correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under the applicable law.

11. When a member contacts PERS, the PERS staff must document the contact by entering a note in the Customer Touch Point (CTP) computer system. The note is entered by the PERS staff during or immediately after the contact with the member. CTP notes cannot be changed after they are entered into the CTP system. A new CTP entry must be made to correct any errors or mistakes in previously entered notes. CTP notes are retained in each member's electronic file, from which a hard-copy report of the notes can be generated. A Customer Touch Point Report (CTP Report) was presented at the hearing showing contacts between Respondent and PERS staff from approximately January 2002 to July 2014. (Exh. 3.)

12. The CTP Report for Respondent has an entry that, on November 12, 2009, Respondent contacted PERS by telephone asking about the status of an application for disability retirement that he claimed to have filed with PERS. PERS staff informed Respondent that PERS had no application for disability retirement on file for him. PERS staff told Respondent that a disability retirement application would be sent to him, and also explained that the City (as his employer) would determine whether he qualified for a disability retirement. Publication 35, which contained all forms needed for a disability retirement application, was thereafter sent to Respondent.

13. Despite being notified on November 12, 2009, that PERS had no record of a pending disability retirement application for him, and that he was sent Publication 35, which contained a disability retirement application, and was advised to file the application as soon as possible, Respondent did not submit the Disability Application to PERS until four years later, on November 5, 2013. Based on these circumstances, PERS concluded the Disability Application was untimely under Government Code section 20160.

City's Process for Retirement Requests

14. Richard M. Bacio has worked for the City since 1993. He has been the Assistant City Manager and Personnel Director since 2001. As Personnel Director, he is familiar with the City's retirement process as well as PERS's requirements.

15. The City's process for a service retirement request is generally summarized as follows: The employee notifies his or her supervisor and department head that he or she plans to retire. The department issues a Personnel Action form, signed by the department head, which shows the employee's date of retirement. The employee separates from employment with the City.

16. The City's process for a disability retirement for a local safety member, such as Respondent, is generally summarized as follows: The City's process does not begin unless PERS first notifies the City that it has accepted an application for disability retirement from the employee. Once the City is notified that PERS has accepted the employee's application, the City then begins its process of determining whether the employee has a disability that qualifies the employee for a disability retirement, based on a review of the medical evidence. (See, Gov. Code, § 21154.) If PERS does not accept the disability retirement application, the City does not conduct a disability review or make a disability determination.

17. Bacio's duties as Personnel Director include conducting medical reviews to determine whether an employee has a qualifying disability for a disability retirement. If PERS rejects an employee's disability retirement application, Bacio does not conduct a disability review.

18. Respondent's request for retirement in 2008 was processed as a service retirement. The Personnel Action form indicated that Respondent was separating from employment with the City on December 30, 2008, based on a "service retirement." (Exh. City-4.) The Personnel Action form was signed in or about December 2008 and January 2009 by Respondent's department head, the City's director of finance, Bacio (as the acting city manager), and the city clerk. A copy of the signed Personnel Action form was provided to Respondent. In addition, Respondent completed a Notice of Voluntary Termination of Employment form on December 23, 2008, on which he indicated that he "wished to voluntarily terminate my employment, effective December 30, 2008," and that his reason for leaving was "retirement." (Exh. City-2.) Respondent signed this form and submitted it to his supervisor.

19. Bacio first learned of Respondent's plan to retire when he saw the Personnel Action form. According to Bacio, Respondent never contacted him about the Personnel Action form, retirement planning, questions about the process, or to request guidance on the difference between service retirement versus disability retirement. After Respondent retired in 2008, Respondent did not contact Bacio to discuss changes to his service retirement or to report a mistake in his initial application.

20. Since PERS had rejected Respondent's Disability Application as untimely, the Disability Application was not forwarded to the City to make a disability determination. Bacio first learned that Respondent wanted a disability retirement when PERS sent a letter dated November 13, 2013, to the City requesting background information regarding Respondent. The letter stated that Respondent was requesting to change his retirement status from service to industrial disability retirement. By his letter dated December 11, 2013, Bacio responded to PERS stating, among other things, that Respondent "did not indicate he was retiring due to a work-related disability," and he included a copy of the Personnel Action form as proof that

Respondent had service retired. (Exh. City-6.) The letter also stated that the City objected to the Disability Application as untimely.

21. At the time he filed his application for service retirement in 2008, Respondent was working in full duty, without restrictions, as a Traffic Sergeant. He had been off work for a three year period, but returned to full duty effective October 24, 2007. (Exh. City-1.) He worked continuously, in full duty, through 2008.

Discovery of Right to Request Correction

22. Respondent contends that the first time he discovered the right to correct or change his status from service to disability retirement was in June 2013. According to Respondent, in June 2013, he retained Mr. Dunn as his counsel for his workers' compensation case. Mr. Dunn, at that time, advised Respondent that he should also apply for disability retirement. Respondent completed the Disability Application on October 23, 2013, which Respondent contends was within six-months of his attorney advising him to do so. Respondent also argues that he was never notified of the six-month requirement of Government Code section 20160 until being informed by his attorney in 2013. Therefore, as argued by Respondent, the Disability Application was timely made within the six-month period prescribed by Government Code section 20160.

23. Respondent's contention that June 2013 was when he first discovered the right to correct his retirement status is not persuasive, because it ignores the evidence of Respondent's November 12, 2009 telephone call to PERS. Respondent does not dispute that he spoke by telephone with PERS staff on November 12, 2009. He testified that he was "surprised" when told by PERS staff that there was no pending disability application on file for him. During the call, PERS staff indicated that a disability application would be sent to him. At the time of the November 12, 2009 telephone call, Respondent had been on service retirement for 11 months. The only credible conclusion to be drawn from these circumstances is that Respondent first discovered the right to correct his status from service to disability retirement on November 12, 2009. Any advice Respondent may have subsequently received from his attorney in June 2013 cannot refute this conclusion.

24. Respondent contends he was never notified by PERS or the City of the six-month time limit to request a correction under Government Code section 20160, and that the first time he was apprised was by Mr. Dunn in June 2013. Section 20160 contains no provision that supports Respondent's contention. The statutory language is clear that the six-month period runs from the date of discovery of the right to correct. There is no provision requiring notice to the member of the requirements of section 20160.

25. Thus, the six-month period under Government Code section 20160 began to run on November 12, 2009, not in June 2013. Since the Disability

Application was signed by Respondent on October 23, 2013, and received by PERS on November 5, 2013, the Disability Application was untimely under section 20160.

Error Resulting From Mistake or Inadvertence

26. Respondent contends that his service retirement in 2008 was in error and the result of mistake and inadvertence. At the time of his retirement in 2008, Respondent had on-going workers' compensation claims against the City. Respondent contends that he was advised by the City that he needed to have a final adjudication of industrial disability in his workers' compensation case before he could request a disability retirement. His understanding was that once his workers' compensation case was completed, the City would contact PERS and he would be given disability retirement. It is this understanding that Respondent also relies on to explain the four year delay from the time of his November 12, 2009 telephone call to PERS and the submission of the Disability Application in October-November 2013.

27. According to Respondent, he relied on representations made by Darlena Kirkland, who identified herself as the liaison between Respondent and the City regarding his workers' compensation case. Although Respondent thought that Kirkland worked for the City, all correspondence he received from her was on the letterhead of a company called AdminSure. Respondent testified that he now knows that Kirkland had no authority to bind the City. Respondent testified that his first conversation with Kirkland occurred in November 2008, during which she told him that his workers' compensation case had to be completed before he could request disability retirement. Respondent testified that, over the next few years, he had 15 to 20 conversations with Kirkland, with the last one occurring in 2013. Respondent testified that he spoke with Kirkland after his November 12, 2009 telephone call with PERS. According to Respondent, Kirkland told him not to worry, that she had spoken to Bacio, and Bacio told her that Respondent's disability retirement would be taken care of with the workers' compensation findings.

28. Respondent failed to present sufficient evidence to establish the statements of Kirkland on which he claimed to rely in making his retirement decisions. Respondent presented only his own uncorroborated hearsay testimony. Kirkland did not testify at the hearing. No documentation was presented confirming any of the statements purportedly made by Kirkland to Respondent. Further, Respondent did not make any attempt to confirm with PERS any of the statements he claimed were made by Kirkland. Respondent testified that the only time he contacted PERS about disability retirement was the November 12, 2009 telephone call.

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LEGAL CONCLUSIONS

1. Government Code section 20160 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.

[¶] . . . [¶]

(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).

2. Respondent, as the party seeking correction of an error, did not meet his burden of presenting documentation or other evidence establishing the right to correction under Government Code section 20160, subdivision (a). Specifically, it was not established that Respondent requested correction of his status from service to disability retirement within six-months after discovery of the right to correct, which occurred on November 12, 2009. The Disability Application was not filed until four

years after that date and clearly beyond the six-month period prescribed by section 20160, subdivision (a)(1). Further, it was not established that Respondent's service retirement in 2008, or his four-year delay in filing the Disability Application, was the result of error, mistake, or inadvertence. The paperwork he completed in 2008 reflected his intent to service retire, which was also consistent with his earlier deposition testimony that his plan was to service retire when he reached 90 percent of his City salary. Respondent's uncorroborated hearsay testimony was insufficient to establish any statements purportedly made to him by Kirkland or anyone else from the City. In addition, Respondent's reliance on any statements purportedly made by Kirkland, who was an employee of a third-party AdminSure, regarding a disability retirement with PERS was not reasonable. Respondent failed to make any reasonable inquiry to PERS to confirm Kirkland's purported statements or to confirm his own understanding of the disability retirement process for local safety members.

3. Based on the foregoing, Respondent did not establish a right under Government Code section 20160, subdivision (a), to change or correct his retirement status from service to disability retirement. PERS correctly rejected the Disability Application as an untimely request for correction under section 20160. Respondent's appeal shall be denied. (Factual Findings 1-28.)

ORDER

Respondent's appeal is denied. PERS's decision to reject Respondent's Disability Application received on November 5, 2013, as untimely under Government Code section 20160 is affirmed.

DATED: June 27, 2016



ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings