

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:

Case No. 2015-0550

DIANA FLORES,

OAH No. 2015081071

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS – SUBSTANCE ABUSE
TREATMENT FACILITY AND STATE
PRISON – CORCORAN,

Respondent.

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on July 12, 2016, in Fresno, California.

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

Diana Flores (respondent) represented herself.

There was no appearance by or on behalf of the California Department of Corrections - Substance Abuse Treatment Facility and State Prison - Corcoran (CDCR).

Evidence was received, the record was closed and the matter was submitted for decision on July 12, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED July 27 20 16

Maureen Rankin

ISSUE

Should the effective date of respondent's disability retirement be changed from June 1, 2014, to March 1, 2013, because respondent's failure to timely file her disability retirement application was the result of inadvertence, mistake, surprise or excusable neglect?

FACTUAL FINDINGS

1. At the hearing, CalPERS established that CDCR was properly served with the Notice of Hearing. Consequently, this matter proceeded as a default hearing against CDCR under Government Code section 11520.

Respondent's Retirement Applications

2. Respondent was employed as an Accounting Technician for CDCR. On June 23, 2014, respondent submitted a Service Retirement Election Application (Service Retirement Application) to CalPERS. In her Service Retirement Application, respondent stated that her last day on the payroll was March 1, 2011.

3. On July 22, 2014, respondent submitted a Disability Retirement Election Application (Disability Retirement Application) to CalPERS. In her Disability Retirement Application, respondent designated her effective date of retirement as "Exp of Benefits."

Communications and Correspondence between CalPERS and Respondent and CDCR

4. On August 12, 2014, CalPERS sent respondent a letter regarding her request that her disability retirement "become effective upon the expiration of [her] employment benefit," instead of on the first day of the month CalPERS received her Disability Retirement Application. In the letter, CalPERS asked respondent to respond to the following questions: (1) when did her doctor determine that she was incapacitated from performing her duties; (2) did she inform CDCR that she had to retire because of a disability; (3) did she contact CalPERS regarding disability retirement before she stopped working; and (4) when did she become aware that she could submit an application for disability retirement. CalPERS also requested an updated Physician's Report on Disability.

5. By letter dated August 20, 2014, respondent submitted her responses to CalPERS' August 12, 2014 letter. She stated that she had been off work for three years and five months. Sanjay Chauhan, M.D, the qualified medical examiner (QME) in her workers' compensation case, placed so many restrictions on her, which her employer could not accommodate, that CDCR's Business Services Manager told her to "go home." She did not tell CDCR that she was retiring because of her disability. She stated that she was not aware that she could disability retire, although her doctor had mentioned it. She stated further that her doctor told her to apply, but she thought "he was talking about Social Security Disability." On June 17, 2014, she became aware that she could disability retire when a CalPERS employee told her to apply for disability retirement.

6. In reviewing respondent's request for an earlier disability retirement date, CalPERS asked CDCR to respond to the following questions: (1) did respondent indicate she was retiring because she was too disabled to continue working; (2) what reason did respondent give for stopping work; (3) was respondent terminated for cause; (4) at the time respondent stopped working, had she filed an industrial injury/illness claim; and (5) what information or counseling was respondent given regarding disability retirement.

7. By letter dated August 22, 2014, CDCR responded to CalPERS questions.¹ In its response, CDCR stated that respondent indicated to an early intervention counselor that she was not able to continue working due to her "excruciating pain" from a work-related injury. Respondent was not terminated for cause. She service retired effective May 31, 2014. At the time of respondent's separation from state service, she was off work due to a work-related injury. The date of respondent's injury was September 9, 2010, and respondent filed a workers' compensation claim. On January 15, 2013, a CDCR Return-to-Work (RTW) Coordinator sent an Options Letter to respondent, which included information regarding State Disability Insurance (SDI), Service Retirement, and Industrial Disability Retirement (IDR). On February 14, 2013, a CDCR Personnel Specialist sent respondent an Options Letter, which included information regarding SDI. On March 13, 2013, an employee from California Consulting Services spoke to respondent about CalPERS, IDR benefits, Disability Retirement benefits, health insurance benefits after retirement, future medical treatment, and permanent disability awards.

8. On March 4, 2015, CalPERS sent respondent two letters. The first March 4, 2015 letter notified respondent that her Disability Retirement Application had been approved, and that she had been found to be substantially incapacitated from the performance of her usual duties based upon her orthopedic (neck and bilateral shoulders) condition. CalPERS' first March 4, 2015 letter stated:

Your disability retirement will be effective immediately, unless you remain on the payroll to the extent of your unused sick leave. In this case, your retirement will not become effective until the day after the expiration of your sick leave credit. Subject to the regular requirements of the law and/or local rules or ordinances governing the use of sick leave, the effective date of your retirement cannot be earlier than the day following the last day of sick leave compensation or earlier than the first day of the month in which the application is received. The retirement effective date would be either the day after the

¹ CDCR's August 22, 2014 letter was received in evidence as administrative hearsay, and has been considered to the extent permitted by Government Code section 11513, subdivision (d), which, in relevant part, provides, "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

expiration of your sick leave credit or if the application is filed within nine months of the discontinuance of service, the application shall be deemed filed on the last day for which salary was payable.

9. Although CalPERS' first March 4, 2015 letter did not specify the effective date of respondent's disability retirement, at hearing, Mari Cobbler, a CalPERS Retirement Program Specialist II, testified that CalPERS determined that the effective date of respondent's disability retirement was June 1, 2014, which was the first day of the month in which she submitted her Service Retirement Application and the effective date of her service retirement.

10. CalPERS' second March 4, 2015 letter addressed respondent's request for an earlier retirement date. In the second March 4, 2015 letter, CalPERS denied respondent's request, stating that respondent had failed to establish that Government Code section 20160 could be used to correct her error "due to excusable inadvertence, oversight, or mistake of fact or law." CalPERS stated that, "No exception, however, can be made for a mistake caused by the claimant's neglect of a legal duty, error in judgment, or change in circumstances." CalPERS asserted that respondent had not made a correctable mistake in light of the following facts: (1) respondent's employer provided respondent Options Letters with disability benefits information on January 1 and February 14, 2013; (2) respondent received consultation from California Consulting Service on March 13, 2013, which included information about CalPERS disability benefits; (3) respondent contacted CalPERS for disability information on March 14, 2013; and (4) respondent received consultation from CalPERS staff on service and disability benefits on April 10, 2013. In the second March 4, 2015 letter, CalPERS notified respondent that she could appeal from CalPERS' determination.

11. On March 12, 2015, respondent submitted her appeal from CalPERS' denial of her request for an earlier retirement date.² In her appeal letter, respondent stated that she was injured at work, and was off work on workers' compensation beginning on February 15, 2011. Because her doctors found that she was permanently disabled, she had no choice but to retire in July 2014. Respondent also stated that she was a 56-year-old woman who was "forced to retire" and that she could not work due to her injury.

Exhibits Submitted at Hearing

12. At the hearing, in support of its denial of respondent's request for an earlier disability retirement date, CalPERS submitted: (1) a Customer Touch Point Report, which reflected the communications respondent had with CalPERS; (2) copies of estimates that

² Respondent's handwritten letter bore the date of "March 12, 2014." It was date stamped as having been received by CalPERS on March 19, 2015. At hearing, respondent conceded that the date she handwrote on her letter was incorrect, and the correct date was March 12, 2015.

CalPERS had generated for respondent in 2013, estimating her monthly retirement benefits if she service, disability, or industrial disability retired; and (3) a Disability Retirement Election Application booklet.

13. The Customer Touch Point Report included contacts that respondent had with CalPERS staff about retirement. There were two notes in the report dated March 14, 2013, both designated in the category type of "Disability." The first March 14, 2013 note stated, "Mbr calling for info on DR...transferred." The second note stated, "Assisted mbr with questions on SR pending DR. Mailed DR appl." A note dated April 10, 2013, designated in the category type of "Participant Education and Training," stated, "Mbr submitted SR and DR est- made mbr copies. Went over SR ap and answered mbrs DR questions. Referred mbr to Soc Sec r/soc sec disability. Explained online info to mbr."

14. On April 29, 2013, CalPERS sent respondent an estimate of her potential future benefits if she service retired. On June 7, 2013, CalPERS sent respondent two estimates, one if she disability retired and the other if she industrial disability retired. These letters all stated, "You have taken an important step in planning your retirement by requesting an estimate of your retirement allowance. You may obtain additional information on all programs administered by CalPERS by logging on to our web site at <http://www.calpers.ca.gov>." The letters also stated, "CalPERS suggests all members attend one of our free Retirement Financial Planning Seminars or Retirement Planning Workshops. The CalPERS website makes it easy and convenient to review dates and locations, and register to attend one of these sessions."

15. Ms. Cobbler testified that the Disability Retirement Election Application booklet submitted by CalPERS was the one in effect when respondent spoke to a CalPERS representative in March 2013. From the note in the Customer Touch Point Report, Ms. Cobbler believed that a copy of this booklet was sent to respondent at that time. During her testimony, Ms. Cobbler pointed to a sentence on page 3 of the booklet, which stated:

You should apply for disability or industrial disability retirement as soon as you believe you are unable to perform your usual job duties because of an illness or injury that is expected to be permanent or last longer than six months.

CalPERS also pointed to a section on page 5 of the booklet about workers' compensation, which stated:

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.

16. At the hearing, in support of her position, respondent submitted: (1) a copy of the January 15, 2013 Options Letter she received from CDCR's RTW Coordinator; (2) stubs showing the disability insurance benefits she received from the Employment Development Department (EDD) from May 4, 2013, to April 14, 2014; (3) Notices of Personnel Actions

issued by CDCR on April 27, 2011, February 16, 2012, February 13, 2013, and November 24, 2015; (4) a Qualified Comprehensive Medical-Legal Re-Evaluation issued by Dr. Chauhan, the QME in respondent's workers' compensation case, dated September 16, 2015; and (5) Explanations of Benefits issued by State Compensation Insurance Fund (SCIF) to respondent on January 8, March 26, May 7, May 20, June 28, October 22, and November 7, 2013.

17. The January 15, 2013 Options Letter CDCR sent to respondent stated that the RTW office had been notified that respondent was receiving treatment for a workers' compensation injury, and that the Fair Employment and Housing Act required employers to engage in an interactive process with injured or disabled employees. The letter stated further that, "CDCR is committed to returning employees to work and makes every effort to keep staff employed, therefore we are providing this list of options to you to encourage a discussion of those options that are of interest to you." Enclosed with the Options Letter was a "Description of Options," which included a description of available options, including disability retirement and industrial disability retirement as follows:

Disability Retirement (DR) or Industrial Disability

Retirement (IDR): If you are unable to return to work due to your permanent functional limitations, you may apply for DR or IDR with the California Public Employees' Retirement System (CalPERS). DR and IDR are considered a temporary separation from state service. Health benefits are available through CalPERS while you are on retirement status. If, after you are approved for DR or IDR and, at a later date, it is determined you are able to return to work as a Correctional Officer, you will have mandatory return right to reinstatement to the Correctional Officer classification.

While you await the determination of your disability retirement application from CalPERS, you may use your existing leave credits, request FMLA/CFRA leave, or request a medical leave of absence. If you are eligible you may also apply for service retirement pending approval of your DR or IDR. (Bolding in original.)

18. The September 16, 2015 report of Dr. Chauhan stated that: (1) the date of respondent's cumulative trauma/repetitive stress work injury was September 9, 2010; (2) respondent was placed on modified work on January 24, 2011; (3) respondent had not worked since April 13, 2011 (which respondent corrected to February 15, 2011); (3) on March 15, 2013, respondent was permanent and stationary for her right wrist and forearm, and her cervical spine injuries; and (4) on September 15, 2015, respondent became permanent and stationary for her right shoulder injury.

19. The payment stubs respondent submitted showed that she received workers' compensation benefits from SCIF from January to November 2013, and that she received disability insurance benefits from EDD from May 2013 to April 2014.

Testimony at Hearing

20. Mari Cobbler. At the hearing, Ms. Cobbler explained the reasons for CalPERS' denial of respondent's request for an earlier disability retirement date. According to Ms. Cobbler, CalPERS applies Government Code section 21252 when determining the effective date of a member's retirement.³ As Ms. Cobbler explained, a disability retirement date cannot be earlier than the last day a member is paid leave benefits by the member's employer. In accordance with Government Code section 21252, if a retirement application is received within nine months after a member's last day of pay, the application is deemed to have been received as of that last day. If a retirement application is received more than nine months after a member's last day of pay, the application is deemed to have been received as of the first day of the month in which the application was received. But if a member applies for service retirement pending disability retirement, the date of disability retirement will be deemed to be no later than the date the member service retired.

21. In respondent's case, although she stopped working for CDCR in February 2011, CDCR continued to pay her leave benefits after this time. Ms. Cobbler explained that, because CDCR continued to pay respondent leave benefits until February 28, 2013, respondent's last day of pay was determined to be that date. Respondent did not submit her Disability Retirement Application until July 22, 2014. Ms. Cobbler testified that, because respondent submitted her Disability Retirement Application more than nine months after her last day of pay, Government Code section 21252 would provide that the effective date of respondent's disability retirement was July 1, 2014. But because respondent service retired as of June 1, 2014, CalPERS determined that the effective date of respondent's disability retirement was her service retirement date.

22. Ms. Cobbler also explained that CalPERS reviewed whether respondent's request for an earlier disability retirement date could be granted because respondent made an error correctible under Government Code section 20160.⁴ Ms. Cobbler asserted that the documents described in Findings 12 through 17 showed that respondent's failure to submit her disability retirement earlier was not the result of mistake, inadvertence, surprise, or excusable neglect correctible under Government Code section 20160. According to Ms. Cobbler, these documents showed that respondent was aware of her ability to apply for disability retirement in 2013, and that she did not submit her Disability Retirement Application for more than one year after she received information about her ability to apply.

³ The relevant part of Government Code section 21252 is quoted in the Legal Conclusions below.

⁴ The relevant part of Government Code section 20160 is quoted in the Legal Conclusions below.

Ms. Cobbler asserted further that, under Government Code section 20160, in order for respondent to obtain an earlier disability retirement date, she had to submit her Disability Retirement Application within six months of the date she had knowledge of her right to seek disability retirement.

23. Ms. Cobbler also explained that sometimes members intentionally delay submitting applications for retirement in order to maximize the retirement benefits they will receive. Ms. Cobbler asserted that, if a member knowingly waits to submit a retirement application, that member cannot rely upon Government Code section 20160 to obtain an earlier retirement date. Ms. Cobbler believed that given all the information that respondent received about disability retirement in 2013, she chose to wait until July 2014 to submit her Disability Retirement Application.

24. Respondent. At hearing, respondent denied that she knowingly delayed filing her disability retirement application to maximize her retirement benefits. She admitted that she received the Disability Retirement Election Application booklet from CalPERS and that she read it. She also admitted that she received the January 15, 2013 Option Letter from CDCR and the estimates sent by CalPERS in 2013. But she asserted that these documents did not put her on notice that she was able to apply for disability retirement earlier than she did. In particular, she claimed that no one told her there was a time period within which she had to submit her application for disability retirement. She asserted that neither CDCR nor CalPERS gave her sufficient information or counseling for her to determine that she should have applied for disability retirement earlier, and that the first time she was told to apply for disability retirement was when she met with a CalPERS representative at the time she submitted her applications in 2014. Respondent blamed her failure to file her Disability Retirement Application earlier on a “misunderstanding” caused by CDCR’s and CalPERS’ failures to provide her with adequate counseling when they gave information to her about disability retirement in 2013.⁵

25. Respondent also testified that she thought she had to wait to apply for disability retirement until after she had been determined to be permanently disabled in her workers’ compensation case and was no longer receiving disability benefits from SCIF and EDD. She received disability benefits from EDD until April 2014. She was not finally determined to be permanently disabled by Dr. Chauhan until September 2015. She still has not received anything from SCIF approving that she is permanently disabled.

26. Respondent testified further that, after she was injured and left work, she still hoped that she would be able to return to work someday. She claimed that CDCR eliminated her position and did not offer her the type of training offered to other employees to retain employment with CDCR. She blamed CDCR for forcing her to retire before she was ready.

⁵ Respondent also asserted that she had not been given sufficient information about health care benefits before she retired, which resulted in her not having such benefits now. This issue is not within the scope or jurisdiction of this proceeding.

Discussion

27. The burden in this matter was on respondent to establish that her disability retirement date should be March 1, 2013, as she requested. Respondent failed to submit sufficient evidence to meet her burden.

28. Respondent did not submit her Disability Retirement Application within the time frame set forth in Government Code section 21252 to have her disability retirement begin on March 1, 2013, unless she can establish that she made an error correctible under section 20160.

29. Respondent's testimony that she did not knowingly delay applying for disability retirement to maximize her retirement benefits was credible. In addition, respondent's testimony that she was not aware of the time periods set forth in Government Code section 21252 or that she could apply for disability retirement before she was declared permanent and stationary and while she was still receiving disability benefit payments from SCIF and EDD was also credible.

30. But Government Code section 20160, subdivision (a)(3), precludes correcting an error if the requesting member has failed to "make the inquiry that would be made by a reasonable person in like or similar circumstances." In 2013 respondent was given sufficient information about disability retirement to put her on inquiry notice about the time period in which she had to apply for disability retirement to begin receiving disability retirement benefits after she stopped working. The January 15, 2013 Options Letter, the communications she had with CalPERS staff in March and April 2013, the Disability Retirement Application booklet she received in March 2013, the disability retirement and industrial disability retirement estimates she received in June 2013 all provided adequate information to cause a reasonable person in like or similar circumstances to inquire about the time lines for applying for disability retirement. Given all the information respondent received in 2013, respondent's failure to inquire about the time lines for applying for disability retirement at that time precludes her from relying upon Government Code section 20160 to seek an earlier disability retirement date.

31. The blame respondent placed on CalPERS for failing to provide her with sufficient counseling was misplaced. The responsibility was respondent's to make the inquiry that a reasonable person would make given all the information that was provided to her in 2013. By failing to make such reasonable inquiry, respondent is precluded from seeking an earlier retirement date under Government Code section 20160. Consequently, respondent's appeal must be denied.

LEGAL CONCLUSIONS

1. Government Code section 21252, subdivision (a), states when a retirement will become effective based upon the date of a retirement application as follows:

(a) A member's written application for retirement, if submitted to the board within nine months after the date the member discontinued his or her state service, and, in the case of retirement for disability, if the member was physically or mentally incapacitated to perform his or her duties from the date the member discontinued state service to the time the written application for retirement was submitted to the board, shall be deemed to have been submitted on the last day for which salary was payable. The effective date of a written application for retirement submitted to the board more than nine months after the member's discontinuance of state service shall be the first day of the month in which the member's application is received at an office of the board or by an employee of this system designated by the board.

2. As set forth in the Findings, because respondent did not submit her disability retirement application within nine months after CDCR last paid her, respondent's disability retirement date may not be deemed to be the last day for which salary was payable to her under Government Code section 21252.

3. Government Code section 20160 sets forth the conditions under which CalPERS may correct an error or omission made by a member, and 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.

(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.

[¶] ... [¶]

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(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).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are 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. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

4. As set forth in the Findings, given all the information that was provided to respondent in 2013, respondent failed to make "the inquiry that would be made by a reasonable person in like or similar circumstances" about the time deadlines for applying for disability retirement. (Gov. Code, § 20160, subd. (a)(3).) By failing to make such reasonable inquiry, respondent is precluded from seeking an earlier retirement date under Government Code section 20160. Consequently, respondent's appeal must be denied.

ORDER

The appeal of respondent Diana Flores for an earlier disability retirement date is DENIED.

DATED: July 22, 2016

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Karen Brandt
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KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings