

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Reinstatement from
Industrial Disability Retirement and
Overpayment of:

TIMOTHY R. JONES,

Respondent,

and

DEPARTMENT OF STATE HOSPITALS-
COALINGA,

Respondent.

Case No. 2014-1142

OAH No. 2015040637

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on August 25, 2016, in Sacramento, California.

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

There was no appearance by or on behalf of respondents Timothy Jones or the Department of State Hospitals-Coalinga (Department). Respondents were duly served with a Notice of Hearing. The matter proceeded as a default against respondents pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on August 25, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED *September 20 16*

Kathleen E. Schrey

ISSUE

Whether CalPERS is entitled to reimbursement of the overpayments of benefits improperly and mistakenly paid to Timothy Jones (respondent) in the amount of \$77,358.54.¹

FACTUAL FINDINGS

1. Respondent was employed as a Clinical Social Worker by the Department. By virtue of his employment with the Department, respondent was a state safety member of CalPERS. On December 10, 2010, respondent submitted to CalPERS an application for industrial disability retirement (application). In filing the application, respondent claimed a disability on the basis of a major depression with psychotic features (psychological condition). Respondent's application was approved. He was placed on industrial disability retirement effective August 16, 2011.

2. On March 20, 2013, CalPERS's Investigation Unit received a call through the Fraud Tip line from Susan Gorlick, an Adjuster with the State Compensation Insurance Fund (SCIF). Ms. Gorlick stated that since 2011, respondent had been working as a social worker with the Veteran's Administration (VA) Hospital in Fresno, California. Thereafter, Chad Sandry, Supervising Special Investigator with CalPERS was assigned to conduct an investigation to determine if respondent had committed fraud in obtaining industrial disability retirement.

Investigation

3. Mr. Sandry testified at hearing concerning his investigation. Mr. Sandry referenced a Report of Investigation dated September 3, 2014, which detailed the information obtained during the investigation. Mr. Sandry determined based on documentation he received from the Employment Development Department (EDD) that since January 2011, respondent was employed with the VA. Additionally, between 2008 and 2013, respondent was employed by the Community Hospital of Central California (Hospital). The duties respondent performed for the VA was similar to his duties for the Department. Mr. Sandry was not able to obtain information concerning respondent's job duties with the Hospital.

4. Based upon the information gathered concerning respondent's employment with the VA and Hospital, on June 11, 2014, respondent was notified by CalPERS that his industrial disability retirement was under review and he was required to submit to an Independent Medical Evaluation (IME) to determine if he was still substantially incapacitated from his former job duties with the Department. An IME appointment was scheduled for July 2, 2014, with Peter Barnett, M.D. Respondent did not attend the IME.

¹ At hearing, CalPERS amended the Accusation at page 9, lines 2 and 11, to correct the amount owed to CalPERS from \$80,168.06 to \$77,358.54.

5. Dr. Barnett reviewed records provided by CalPERS concerning respondent's industrial disability retirement, including a past IME, Agreed Medical Evaluations and information obtained concerning respondent's employment with the VA and Hospital. Dr. Barnett opined that if respondent had been working full time for the VA and Hospital, "there are no psychiatric problems that would interfere with his performance of his job duties."

6. On September 17, 2014, CalPERS notified respondent by letter that the reevaluation of his industrial disability retirement indicated that he was no longer substantially incapacitated from performance of his job duties with the Department, based on his psychological condition. Respondent was notified that he would be reinstated to his former position with the Department. On October 2, 2014, respondent filed an appeal and requested a hearing.

7. CalPERS determined that for the period of August 16, 2011, through September 2014, respondent received \$126,518.06 in benefits from CalPERS.

Criminal Conviction

8. CalPERS notified the District Attorney in Fresno, California, of the information obtained regarding respondent's employment with the VA and Hospital while receiving industrial disability retirement from CalPERS. On July 1, 2014, criminal charges were filed against respondent in the Superior Court of California, County of Fresno. Specifically, respondent was charged with four counts of insurance fraud, perjury, two counts of grand theft of personal property and presentation of a false claim.

9. On June 1, 2016, respondent plead nolo contendere to insurance fraud, in violation of Insurance Code section 1871.4, subdivision (a)(1), a felony. Respondent stipulated pursuant to Penal Code section 1214, to pay CalPERS \$126,518 in restitution.

Events After June 1, 2016

10. On June 17, 2016, CalPERS sent respondent a letter which stated that "based upon recent information received" it was determined that he was "approved for and paid an industrial disability retirement in error." Respondent was notified that he would be removed from the retirement roll immediately. Respondent was also notified that he would be notified of the amount he owed CalPERS for the retirement benefits he received. Respondent received his last industrial disability retirement payment on August 1, 2016.

11. On July 26, 2016, complainant Anthony Suine, Chief Benefit Services Division for CalPERS, signed and thereafter filed an Amended Accusation against respondent. Complainant alleged that respondent is not disabled or incapacitated from the performance of his job duties for the Department. Complainant also alleged that CalPERS is entitled to reimbursement of overpayment of benefits improperly and mistakenly paid to respondent in the amount of \$77,358.54.

12. On August 8, 2016, respondent withdrew his appeal of the determination that he is no longer disabled or incapacitated from the performance of his job duties for the Department.

13. At hearing, Misty Albertson, a Staff Services Manager in the Retirement Application and Calculation Section for CalPERS, testified that she prepared a spreadsheet of the net industrial disability retirement payments respondent received from CalPERS. The total benefits respondent received for the period of August 16, 2011, through August 1, 2016, was \$203,876.54. As part of respondent's criminal plea, he agreed to reimburse CalPERS \$126,518, which represented the retirement benefits he received from August 16, 2011, through September 2014. Between October 2014 and August 2016, respondent received an additional \$77,358.54.

Discussion

14. When all the evidence is considered, CalPERS is entitled to reimbursement of the overpayments of benefits improperly and mistakenly paid to respondent. Respondent obtained industrial retirement benefits from CalPERS for the period of August 16, 2011, through August 1, 2016. On September 17, 2014, CalPERS determined that respondent was not substantially incapacitated from performance of his job duties with the Department and not entitled to industrial disability retirement. As part of a criminal plea, respondent agreed to pay CalPERS restitution totaling \$126,518, which represented the retirement benefits he received for August 16, 2011, through September 2014. Between October 2014 and August 2016, respondent received an additional \$77,358.54. CalPERS is entitled to reimbursement of that amount as well.

LEGAL CONCLUSIONS

1. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

The board ... may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination The examination shall be made by a physician or surgeon, appointed by the board.... Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency ... where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

2. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

3. Pursuant to Government Code sections 21192 and 21193, on September 17, 2014, CalPERS informed respondent that the re-evaluation of his industrial disability retirement indicated that he was no longer substantially incapacitated from performance of his job duties with the Department, based on his psychological condition. (Finding 6) On August 8, 2016, respondent withdrew his appeal of CalPERS's determination. (Finding 12)

4. Government Code section 20160, which requires CalPERS to correct the errors it makes, 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.

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

(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.

5. The total benefits respondent received for the period of August 16, 2011, through August 1, 2016, was \$203,876.54. (Finding 13.) Respondent agreed to reimburse CalPERS \$126,518, which represented the retirement benefits he received through

September 2014. (Findings 7 and 9.) Between October 2014 and August 2016, respondent received an additional \$77,358.54. (Findings 13 and 14.) CalPERS sought to correct the error it made regarding respondent's industrial disability retirement benefits within six months after CalPERS was notified of respondent's criminal conviction. CalPERS's error was the result of mistake, surprise, inadvertence, and inexcusable neglect as those terms are used in Code of Civil Procedure section 473. The correction will not provide CalPERS with a status, right, or obligation not otherwise available under the Public Employees' Retirement Law.

6. In sum, when all the relevant factors set forth in Government Code section 20160 are considered, CalPERS properly sought reimbursement of \$77,358.54 in industrial retirement benefits respondent improperly received between October 2014 and August 2016.

ORDER

The appeal of respondent Timothy Jones is DENIED. The correction made by the California Public Employees' Retirement System to obtain reimbursement of the overpayments of benefits improperly and mistakenly paid to respondent in the amount of \$77,358.54 is SUSTAINED.

DATED: September 9, 2016

DocuSigned by:
Marcie Larson
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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings