

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues Against:

MICHAEL W. PORTER,

and

CALIFORNIA STATE PRISON - LOS  
ANGELES COUNTY, CALIFORNIA  
DEPARTMENT OF CORRECTIONS AND  
REHABILITATION,

Respondents.

Case No. 2016-0216

OAH No. 2016060523

**PROPOSED DECISION**

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 26 and 29, 2016, in Los Angeles. The record was closed and the matter submitted for decision at the conclusion of the hearing on September 29, 2016.

Terri L. Popkes, Senior Staff Attorney, represented the California Public Employees' Retirement System (PERS).

No appearance was made by or on behalf of any either respondent, despite timely and appropriate notice to each respondent. The matter therefore proceeded by default pursuant to Government Code section 11520. PERS submitted 11 exhibits and examined one witness, Angela Taylor.

**FACTUAL FINDINGS**

*Parties and Jurisdiction*

1. Anthony Suine signed the Statement of Issues in his official capacity as Chief of PERS' Benefit Services Division.

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CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED Oct 14 2016  
R. P. [Signature]

2. Michael W. Porter (respondent) was employed by respondent California State Prison - Los Angeles County, California Department of Corrections and Rehabilitation (CDCR).

3. By virtue of his employment, respondent was a state safety member of PERS subject to Government Code section 21151. Respondent's last day of pay at CDCR was April 30, 2014.

4. In March 2012, respondent was injured while engaged in a training exercise at work for CDCR. He filed a Workers' Compensation claim for that injury and went on a disability leave. (Ex. 9.)

5. Respondent's employment benefits with CDCR were exhausted on April 30, 2014.

6. On May 21, 2014, respondent submitted to an Agreed Medical Examination as a result of his injuries and complaints. An Agreed Medical Examination report dated July 24, 2014 indicates that respondent was advised to apply for a disability retirement. (Ex. 9.)

7. By letters dated March 1, 2013, August 21, 2014, and February 19, 2015, CDCR made attempts to contact respondent regarding the status of his disability. Those letters advised respondent of his employment options, including filing for a disability retirement. Respondent did not respond to any of those letters.

8. On August 18, 2015, respondent signed an application for industrial disability retirement, which requested a retirement effective date upon expiration of his employment benefits with CDCR, i.e., April 30, 2014. The application was filed with PERS on August 31, 2015. The disability claimed by respondent was a right shoulder condition.

9. Respondent's industrial disability retirement was approved as of December 29, 2015, and he has been receiving his industrial disability retirement from PERS since then. However, PERS deemed respondent's industrial disability retirement application to be late for purposes of him receiving his retirement benefit as of April 30, 2014.

10. PERS requested medical reports and information concerning respondent's medical condition to determine whether he made a mistake not filing for industrial disability retirement at or near the time he separated from employment and/or his employment benefits were exhausted. After a review of the reports and information, and after considering Government Code section 20160 and other applicable precedents, PERS determined that section 20160 does not apply to excuse respondent's late application by reason of mistake.

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11. By a letter dated December 29, 2015, PERS notified respondent of its determination that no correctable mistake had been made to allow PERS to change his effective retirement date to April 30, 2014. Respondent was advised of his right to appeal that determination.

12. By a letter dated January 22, 2016, respondent appealed PERS' denial of his request for an effective retirement date of April 30, 2014.

13. This appeal is limited to the issue of whether respondent made an error or omission which was the result of inadvertence, mistake, surprise or excusable neglect correctable by Government Code section 20160, which would entitle him to an effective retirement date of April 30, 2014.

### LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

2. The statutory scheme for disability retirement requires a "disability of permanent or extended and uncertain duration, as determined . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) "If the medical examination and other available information show to the satisfaction of the board that the member . . . is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability." (Gov. Code, § 21156.)

3. Government Code section 21252, subdivision (a), provides:

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 members application is received at an office of the board or by an employee of this system designated by the board.

4. Government Code section 20160, subdivision (a), governs a request by a PERS member or beneficiary to correct an error or mistake, and provides:

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, in advertence, 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.

5. According to Government Code section 21252, subdivision (a), an employee filing for a disability retirement will be provided with an effective retirement date as of the last date of paid service if the application is submitted to PERS within nine months of the member's discontinuance of state service; otherwise, the effective date of retirement is deemed to be the last day of the month in which the member's application is received. In this case, respondent's state service discontinued on April 30, 2014, but he filed his application for an industrial disability retirement on August 31, 2015, well more than nine months after his employment discontinued. Respondent provided no evidence indicating he made a correctible error or omission within the meaning of Government Code section 20160 that would allow him to claim an earlier retirement date retroactive to April 30, 2014. In fact, respondent had been advised of his right to file an industrial disability retirement several times before the critical nine month period lapsed. Respondent failed to appear at the hearing or otherwise provide evidence establishing that he made an excusable error or omission for purposes of Government Code section 20160. (Factual Findings 1-13.)

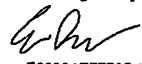
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6. Cause exists to deny respondent's application for an effective retirement date of April 30, 2014. (Factual Findings 1-13; Legal Conclusions 1-5.)

ORDER

Respondent Michael W. Porter's appeal is denied.

DATED: October 11, 2016

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ERIC SAWYER  
Administrative Law Judge  
Office of Administrative Hearings