

**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 an  
Earlier Effective Date of Retirement of:

NADINE T. WEST,

Respondent.

and

IRVINE UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. 2016-0099

OAH No. 2016061112

**PROPOSED DECISION**

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 25, 2016, in Orange, California.

Rory J. Coffey, Senior Staff Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Nadine T. West, respondent, represented herself.

There was no appearance by Irvine Unified School District (District).

The matter was submitted on October 25, 2016.

**ISSUE**

Did Ms. West made a mistake which was the result of inadvertence, mistake, surprise, or excusable neglect correctable under Government Code section 20160, which would have entitled her to an effective retirement date retroactive to February 21, 2013?

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED Nov 29, 2016  
C. Modley

## FACTUAL FINDINGS

### *Background*

1. Ms. West was employed by the District as a Campus Control Assistant IV. By virtue of her employment, Ms. West was a local miscellaneous member of CalPERS, subject to Government Code section 21150.

2. On February 21, 2013, the District sent Ms. West a letter stating the following: On August 16, 2012, August 20, 2012, September 17, 2012, October 20, 2012, and February 20, 2013, the District held interactive meetings with Ms. West to discuss and document the possibility of the District providing Ms. West with modified or alterative work, taking into consideration her work restrictions. At the interactive meeting on February 20, 2013, the District advised Ms. West that it could not accommodate her current restrictions as described by the Qualified Medical Examiner (QME). The District determined that those restrictions precluded Ms. West from performing the essential functions of her position. Because Ms. West was unable to return to work and had exhausted all of her available sick leave, the District took Ms. West off the payroll and placed her in inactive, unpaid status. The District placed Ms. West on a 39-month rehire list that would allow her to be reinstated to her position in the event her condition improved. The District advised Ms. West that because her condition rendered her eligible for disability retirement, the District would apply for disability retirement on her behalf in accordance to Government Code section 21153. The letter closed by recommending that Ms. West consult with CalPERS, a financial planner, or attorney prior to making a decision on disability retirement.

3. On March 8, 2013, the District submitted an application for disability retirement on behalf of Ms. West, which requested a retirement effective date of February 21, 2013. CalPERS received the application on March 11, 2013.

4. On March 27, 2013, CalPERS sent a letter to Ms. West notifying her that the District had submitted an application for disability retirement on her behalf. The letter included several forms that Ms. West needed to complete and return to CalPERS in order for CalPERS to determine whether Ms. West was presently substantially incapacitated from the performance of her usual duties with the District.

5. On May 8, 2013, CalPERS sent a letter to Ms. West again requesting Ms. West provide the forms and authorizations required for CalPERS to process the retirement application. The letter stated, "Whether you feel you are or are not disabled, it is very important for you to comply with our requests." The letter provided Ms. West 30 days to submit the requested documents. The letter stated that failure to do so could result in the application being cancelled. The letter concluded:

If cancelled, you would need to submit a new application for any future retirement request. Please be aware that with a new application you [sic] retirement effective date cannot be earlier

than the first day of the month your application is received by CalPERS, if not currently on pay status. You could lose retroactive benefits that you may now be entitled to under the current application.

6. On July 12, 2013, because Ms. West failed to provide the requested paperwork, CalPERS notified Ms. West that it was cancelling the employer originated disability retirement application. The letter noted that any future request would require a new application.

7. On June 29, 2015, Ms. West submitted to CalPERS an application for service pending disability retirement, requesting a retirement effective date of February 21, 2013. Ms. West claimed disability based on an orthopedic (neck) conditions.

8. On October 22, 2015, CalPERS approved Ms. West's disability retirement application. Ms. West began receiving her retirement allowance effective June 1, 2015.

9. By letter dated October 22, 2015, CalPERS denied Ms. West's request for an earlier retirement date of February 21, 2013. CalPERS noted that Government Code section 20160 may be used to correct a mistake due to excusable inadvertence, oversight, or mistake of fact or law on the part of the claimant. However, CalPERS determined that Ms. West did not make a mistake that was correctable under the Code.

10. Ms. West appealed CalPERS decision denying her request for an earlier effective retirement date. On June 24, 2016, complaint filed the statement of issues in his official capacity. The sole issue on appeal is whether Ms. West made an error which was the result of inadvertence, mistake, surprise, or excusable neglect correctable under Government Code section 20160, which would have entitled her to an effective retirement date retroactive to February 21, 2013.

*Ms. West's Correspondence with CalPERS*

11. Emily Sandoval, Staff Services Manager, has been employed by CalPERS for 27 years. In her current position, she manages the disability retirement appeals program. Ms. Sandoval testified that Touch Point is CalPERS's computerized system for documenting action taken involving a member's account. All phone calls and correspondence from members to CalPERS are documented in the Touch Point system. A Touch Point report for Ms. West was received as evidence.

12. Beginning on February 25, 2013, Ms. West called CalPERS multiple times to request information relating to disability retirement, service retirement, and estimates. In a conversation on April 11, 2013, Ms. West said she was aware that her employer submitted a disability retirement application and she needed to submit additional information. On June 4, 2013, Ms. West told CalPERS she had received the letter requesting additional medical

information but she was unable to obtain the records due to a case she had with workers' compensation. CalPERS advised her to speak to an attorney about this.

13. Ms. West did not call CalPERS again until February 19, 2014, when she inquired about service credit purchase. Ms. West called CalPERS again in August 2014 and April 2015. On April 16, 2015, she called CalPERS about backdating a disability retirement application.

14. Ms. Sandoval noted that along with the letter notifying her that the District had filed a disability retirement application on her behalf, CalPERS sent Ms. West a copy of Publication 35, which discusses disability retirement. The publication included a section that provides information for members who have workers' compensation claims. It 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."

#### *Ms. West's Evidence*

15. Ms. West's testimony was consistent with a detailed letter she submitted to CalPERS appealing its decision. Ms. West said that at the interactive meeting with the District, the District advised her to apply for unemployment benefits immediately. Because she desperately needed money to pay bills, she applied for and received unemployment benefits. However, as a condition of receiving unemployment benefits, she would have to actively seek work in order to continue to obtain benefits. Although she wanted her old job back with the District, she looked for other jobs she thought she could handle.

16. In March 2013, she learned the District had applied for disability retirement on her behalf. Ms. West was surprised, because she had not discussed disability retirement with the District until she received the application and CalPERS Publication 35 in the mail. She was confused as to why the District would suggest she apply for unemployment benefits, available for people who are able to work, and at the same time, submit a disability retirement application, for people who cannot work. Ms. West e-mailed the District about whether she would remain on the District's 39-month retire list if CalPERS granted her disability retirement. The District responded that if she was retired she would be removed from the list.

17. Ms. West's workers' compensation attorney had previously referred her to Dr. Charles Rudner, an orthopedic surgeon, in November 2012. Ms. West spoke to Dr. Rudner in April 2013 about her disability retirement. According to Ms. West, Dr. Rudner adamantly refused to provide any medical records or give out any information to anyone outside her workers' compensation case. He said he "did not want to make waves" and wanted "smooth sailing" into his impending retirement. Ms. West further said that Dr. Rudner's reports would not have indicated permanency of her medical status because he wanted to wait for her anticipated cervical spine surgery before making a final determination.

18. Ms. West said that since the beginning of her workers' compensation case in March 2011, she had been in an ongoing battle with insurance adjusters, the District, and its lawyer. Her workers' compensation attorney encouraged her not to do anything that would jeopardize her workers' compensation case. Ms. West took this to mean that she should not file for disability retirement.

19. Ms. West came to the realization that she was permanently incapacitated from the further performance of her job duties when she discussed her condition with her spine surgeon on May 26, 2015. Ms. West filed her application with CalPERS within a month thereafter.

## LEGAL CONCLUSIONS

### *Administration of the Retirement Fund*

1. The CalPERS retirement fund was established as a trust, to be administered in accordance with the provisions of the Public Employees Retirement Law solely for the benefit of the participants. (Gov. Code, § 20170.) Management and control of the retirement system is vested in the Board of Administration. (Gov. Code, § 20123). The Board of Administration has the exclusive control of the administration and investment of the retirement fund. (Gov. Code, § 20171.)

2. Pension legislation must be liberally construed, resolving all ambiguities in favor of the applicant. However, liberal construction cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

### *Burden and Standard of Proof*

3. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greator v. Bd. of Administration* (1979) 91 Cal.App.3d 54). In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

### *Applicable Statutes*

4. Government Code section 21151 provides in part:

(a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service. . . .

5. Government Code section 21152 provides in pertinent part:

Application to the board for retirement of a member for disability may be made by:

[¶] . . . [¶]

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

6. Under Government Code section 21153, an employer may not separate an employee who is disabled and otherwise eligible for disability retirement, "but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability" and takes other steps listed in the statute.

7. Government Code section 20160 provides in 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 . . . member . . . [if] 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).**

**(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.**

***Ms. West is not Entitled to the Benefit of Government Code Section 20160***

**8. Ms. West seeks to use Government Code section 20160 to correct her failure to timely submit to CalPERS the information required to process the disability retirement application filed by her employer. Ms. West has the burden of presenting documentation or other evidence to establish the right to correction. (Gov. Code § 20160, subd. (d).)**

**9. Ms. West must show that 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.” (Gov. Code § 20160, subd. (a)(2).) Any failure to make an “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. (Gov. Code § 20160, subd. (a)(3).) Neglect is “excusable” when a reasonably prudent person under the same or similar circumstances might have made the same error. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258; *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276; *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th**



1350, 1354.) Put another way, if a reasonably prudent person might have made the same error as Ms. West, her failure to prosecute her disability retirement application is “excusable” within the meaning of Civil Procedure section 473. “Where the default occurred as a result of deliberate refusal to act, and relief is sought after a change of mind, the remedy is clearly inappropriate. (Citations.)” (*Davis v. Thayer* (1980) 113 Cal.App.3d 892, 907.)

#### *Evaluation*

10. In March 2013, it was reasonable to believe Ms. West was disabled because her doctor informed her of work restrictions that the District could not accommodate in her current position. Because it was reasonable to believe that she was disabled at this time, the District had a ministerial duty to file the disability retirement application under Government Code section 21153. (*Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 460.) In order to process that application, CalPERS requested that Ms. West send certain documents and also warned her that failure to do so would result in her application being cancelled, which in turn would affect the effective date of retirement for any future application.


Fundamentally, the relevant facts show that Ms. West, after consultation with her workers’ compensation attorney, CalPERS staff, her doctor, and other individuals, voluntarily elected not to follow through on the disability retirement application because she did not believe she was permanently incapacitated; wanted to remain on the District’s 39-month hire list in order to possibly obtain employment with the District in another position; and was concerned that filing for disability retirement would impact her workers’ compensation case. CalPERS even advised that Ms. West should provide the requested documents and information even if she believed her condition was not permanent and stationary. Despite these warnings, Ms. West elected not to proceed with the application and CalPERS properly canceled it. As such, Ms. West failed to establish that her conscientious decision not to prosecute the application was the result of mistake, inadvertence, or excusable neglect. Rather, it was clear she elected not to proceed with the application because she did not want to retire on disability at that point in time.

Moreover, although Ms. West testified that her physician’s refusal to cooperate with her request to release medical information to CalPERS was the reason she failed to submit the requested information, a reasonably prudent person would have provided the other requested information to CalPERS and notified CalPERS of the doctor’s refusal. Ms. West would have been entitled to access her medical records as a matter of law, and her doctor’s supposed refusal was not the reason Ms. West failed to prosecute the disability application. (In fact, she did not apply for disability retirement at that time for the reasons noted above.) Accordingly, Ms. West is not entitled to the relief permitted by Government Code section 21060.

**ORDER**

**Respondent Nadine West's appeal of CalPERS decision denying her request for a retroactive effective disability retirement date of February 21, 2013, is denied.**

**Dated: November 28, 2016**

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**ADAM L. BERG**  
**Administrative Law Judge**  
**Office of Administrative Hearings**