

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
Disability Retirement and Earlier Effective
Retirement Date of:

TADASHA HICKS,

and

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondents.

Agency Case No. 2015-0756

OAH No. 2016010228

PROPOSED DECISION

Administrative Law Judge Thomas Y. Lucero heard this matter on December 5, 2016, in Los Angeles, California.

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

Tadasha Hicks, respondent, was self-represented.

The Los Angeles Unified School District did not appear.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on December 5, 2016.

FACTUAL FINDINGS

1. Acting in her official capacity, Anthony Suine, Chief of the Benefit Services Division of CalPERS, filed the statement of issues.

2. By virtue of her employment by the Los Angeles Unified School District, (LAUSD), respondent is a local miscellaneous member of CalPERS, subject to Government

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RETIREMENT SYSTEM
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Code section 21150. Respondent has the minimum service credit necessary to qualify for disability retirement.

3. On June 28, 2013, respondent submitted (i) an application for disability retirement (application) (Exhibit 3) and (ii) a letter requesting that retirement benefits be retroactive to June 3, 2006, in the period when she stopped working as an LAUSD Special Education Trainee.

4. The application was based on pseudotumor cerebri, lumbar peritoneal shunt replacement, loss of vision, particularly in the left eye, depression, and back pain. Pseudotumor cerebri is characterized by intracranial hypertension, that is, elevated fluid pressure in the brain, which mimics a brain tumor, though a tumor is absent. It can lead to chronic headaches and blindness.

5. To evaluate whether respondent was disabled, CalPERS engaged Martin Krell, M.D., F.A.C.S., Diplomate, American Board of Neurological Surgery, who performed an Independent Medical Examination (IME) of respondent on January 19, 2015. As documented in his January 19, 2015 IME report, Dr. Krell obtained from respondent a description of her work duties and a comprehensive history of her symptoms and treatment. He reviewed the very extensive medical records from Kaiser Permanente hospital and from the several physicians who had rendered respondent care since 2005. Based on his discussion with and examination of respondent, review of her medical records, consideration of her job duties, and his expertise, Dr. Krell opined that “[t]here are no specific job duties that the member is unable to perform.” (Exhibit 7.)

6. In an April 9, 2015 letter, CalPERS advised respondent:

A. “[Y]ou are not substantially incapacitated from the performance of your job duties as a Special Education Trainee with the Los Angeles Unified School District. Therefore, the application for disability retirement is denied.”

B. Citing Government Code section 20160 regarding correction of mistakes, the letter continued: “[T]he evidence suggests that you had knowledge of the application process and, therefore, were unable to establish that a correctable mistake was made.” (Exhibit 4.)

7. In a May 13, 2015 letter, respondent timely appealed the denial. (Exhibit 5.)

8. Dr. Krell had revised his opinion at the time of hearing. After re-examining respondent’s medical records and her duties as a Special Education Trainee, particularly the requirement that she lift disabled students, he opined that respondent was substantially incapacitated from the performance of her job duties as a Special Education Trainee with the Los Angeles Unified School District.

9. The issues on appeal are (i) whether respondent was permanently disabled or substantially incapacitated from the performance of her usual and customary duties as a

Special Education Trainee for the Los Angeles Unified School District, and (ii) whether respondent is entitled to relief under Government Code section 20160, so that her effective retirement date may be retroactive to June 3, 2006.

Circumstances of Respondent's Disability

10. Respondent has two children to care and provide for. She is concerned for her disabled son. She was unwilling to retire. Nevertheless, overwhelmed by her ailments, she left work in 2006.

11. Respondent's pseudotumor cerebri, the internal fluid pressure on her brain, built to the point that she was temporarily blind. She permanently lost peripheral vision. Untreated, her condition could have been fatal.

12. Her duties as a Special Education Trainee for the Los Angeles Unified School District required that respondent regularly lift children and maneuver them about, such as into or out of devices to help their locomotion or to allow them to use a toilet. Many of the children weighed more than 50 pounds. They were frequently uncooperative and might struggle against respondent. This sort of on-the-job activity jeopardized respondent's neurological condition, making it impossible for her to work with these children.

13. Respondent experiences debilitating headaches. She has undergone spinal taps, as a result of which, among other types of medical treatment, she has spent long stretches in the hospital.

14. Respondent has talked to many physicians, who have often been at a loss to advise or diagnose her. At one point respondent underwent testing for lupus. Many evaluations later, that disease was ruled out.

15. On the urgent recommendation of a physician, respondent underwent gastric surgery to control obesity. The treatment resulted in significant weight loss, but it also caused internal bleeding, causing more hospital visits and disruptions to respondent's life.

16. Respondent's medical records run to hundreds of pages. Even so, they hardly hint at how difficult her physical travails have been. Respondent has felt for years that she is in a constant struggle to survive. The struggle has led to her being depressed, yet another setback that prevented her from attending to little other than her health.

17. The testimony of respondent's mother, Glenda Hearn (formerly Lezine), supported respondent's testimony regarding her long course of treatment and the uncertainties she has faced.

18. As Ms. Hearn testified, however, she and respondent believed at first that her disability was temporary. That was part of the reason they did not turn in the application in the first nine months after respondent stopped working.

19. Respondent's disability has only gotten worse. Among respondent's practical challenges, she is unable to drive. Ms. Hearn lives in the high desert in north Los Angeles County, over 20 miles away from her daughter's residence. Nevertheless, despite the inconvenience, Ms. Hearn often takes her daughter to appointments.

Communications Regarding the Disability Retirement Application

20. CalPERS maintains an electronic database in which its personnel record communications with a member, in this case respondent. From the database CalPERS generates a written report, the Customer Touch Point Report (CTPR). The CTPR, Exhibit 11, includes these entries:

A. May 9, 2007:

The members mom [sic] called because the member is now disabled and needs some help getting her application together.

B. May 23, 2007:

Glenda Lezine mother to member Tadasha Hicks called regarding assistance filling out the disability retirement forms. Advised to complete as much as possible. Mailed disability retirement estimate.

C. May 29, 2007:

Contacted mbr [member] and will send driving directions; verified address. Mbr may bring d/r app [disability retirement application] to GRO [Glendale, California Regional Office].

D. February 11, 2013:

Showed member how to get the applic [sic] on line. Went over the process briefly and time frames and we will need a letter.

E. May 6, 2013:

Advised no paperwork received for her dis [disability] retirement application.

F. June 28, 2013:

Mbr submitted DR application w/letter requesting a retro date, since she had stopped working in 2006

21. The May 9, 2007 CTPR entry shows that at least by that date respondent was aware she was entitled to apply for disability retirement. Respondent had the help of her

mother as well as CalPERS office personnel to help her with filing the application in May 2007.

LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for disability retirement has the burden of proving by a preponderance of the evidence entitlement to disability retirement. (Gov. Code, § 21160, subd. (d), *infra*; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. Government Code section 21150, subdivision (a), provides in pertinent part:

A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age

3. Government Code section 20026 states in pertinent part:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

4. “Incapacity for performance of duty” means “the substantial inability of the applicant to perform his usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.)

5. In determining eligibility for disability retirement, the applicant’s actual and usual duties must be the criteria against which any impairment is judged. Generalized job descriptions and physical standards are not controlling. *Hosford v. Board of Administration*, *supra* 77 Cal.App.3d at pp. 860-861.

Respondent is Substantially Incapacitated

6. Dr. Krell’s testimony was credible. He considered the matters pertinent to the issue of disability. He revised his initial opinion against disability because he had new facts about what respondent’s job actually entailed. His revised opinion constitutes competent medical evidence. Based on that evidence, respondent is substantially incapacitated from the performance of her usual and customary duties as a Special Education Trainee for the Los Angeles Unified School District.

Effective Date of Disability Retirement

7. Government Code section 21154 provides in pertinent part:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

8. Government Code section 21252, subdivision (a), provides in pertinent part:

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.

9. Respondent submitted her application while she was physically incapacitated to perform her job duties. She was incapacitated from the 2006 discontinuance of her state service to the time of her June 28, 2013 application. She did not submit the application within nine months after the date she discontinued her service. Government Code section 21252, subdivision (a), prescribes that the effective date of her application is June 1, 2013, the first day of the month in which the application was received.

It is Not Proper to Correct the Application's Effective Date

10. Government Code section 21160 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.

(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).

11. Code of Civil Procedure section 473 provides in pertinent part:

(a) (1) The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars
[¶] . . . [¶]

(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . .

12. Respondent's contention that the effective date of her retirement should be corrected from June 28, 2013 to June 3, 2006 was not supported by the evidence. Respondent did not seek correction of the asserted error in filing a tardy application within a reasonable time.

13. Respondent knew on May 9, 2007, that she could make the effective date of her retirement the beginning of that month, because she was aware on that date (Finding 20A) that she could file an application. Under Government Code section 21160, subdivision (a), she had until November 2007 (six months after May 9, 2007) to make May 1, 2007 her effective retirement date or to seek correction if that was not the effective date. She missed that deadline, so that the effective date of her application should remain June 1, 2013.

14. Equitable principles likewise do not support correction in these circumstances. As there is no statutory definition of the terms, "mistake, inadvertence, surprise, or excusable neglect," relief based on these terms is left to the discretion of the court.

15. In exercising discretion, a crucial consideration is whether the party seeking relief acted reasonably. As the court stated in *Viles v. State* (1967) 66 Cal.2d 24, 29, 32-33:

An examination of the cases applying section 473 of the Code of Civil Procedure discloses that not every mistake of law is excusable [citations omitted,] but that an honest mistake is excusable, the determining factor being the reasonableness of the misconception. [Citations omitted.] [¶] . . . [¶]

[T]he well-recognized policy of the law [is] to liberally construe remedial statutes designed to protect persons within their purview, and the modern trend of judicial decisions [is] in favor of granting relief unless absolutely forbidden by statute [citations omitted]

16. Here, respondent argues that a delay of several years was reasonable because during the period from 2006 through 2013, she was so ill that she was unable to protect her interests, including her interest in retirement benefits. The evidence is convincing that respondent suffered long and immoderately from various conditions, some life-threatening. No doubt they were at times overwhelming. But the evidence also establishes that respondent was being assisted in 2007 by her mother, Ms. Hearn (then named Lezine) (Finding 10A), and by CalPERS administrators, who urged in May 2007 that respondent "complete as much as possible" (Finding 10B) of her application. Given that respondent had this sort of help and advice as far back as 2007, it is not reasonable to conclude she was completely unable to file an application for several years. She might have simply subscribed an application filled in by her mother or other assistants.

17. It is likewise not grounds for correction that respondent waited for years to file an application on the assumption that her disability might not be permanent. In not

submitting an application for this reason, respondent acted deliberately, not as a result of mistake or the like.

18. Respondent did not meet her burden of showing that she acted promptly as required by statute, within six months of discovering she could apply for disability. Respondent also did not meet her burden of showing she acted reasonably, so that her effective retirement date should be corrected.

ORDER

The appeal of respondent Tadasha Hicks is granted in part and denied in part.

1. Respondent is substantially incapacitated from the performance of her usual and customary duties as a Special Education Trainee for the Los Angeles Unified School District.

2. Respondent is not entitled to relief under Government Code section 20160. Her effective retirement date shall remain June 1, 2013.

Dated: December 30, 2016

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Thomas Y. Lucero
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THOMAS Y. LUCERO
Administrative Law Judge
Office of Administrative Hearings