ATTACHMENT A

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

In the Matter of the Appeal of the Effective Retirement Date of:

RANDY W. ELLIS,
Respondent,

COUNTY OF TEHAMA,
Respondent.

Case No. 2017-0208
OAH No. 2017050155

PROPOSED DECISION


Senior Staff Attorney Charles H. Glauberman represented the California Public Employees' Retirement System (CalPERS).

There was no appearance at the hearing by or on behalf of either respondent Randy W. Ellis or respondent the County of Tehama (County). CalPERS properly served each respondent with the Statement of Issues and Notice of Hearing. This matter proceeded as a default proceeding against each respondent pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on July 18, 2017.

ISSUE

Did respondent Ellis make an error which resulted from inadvertence, mistake, surprise or excusable neglect, which would entitle him to an earlier effective retirement date?
FACTUAL FINDINGS

1. On April 14, 2017, Anthony Suine signed the Statement of Issues in his official capacity as Chief, Benefit Services Division, CalPERS.

2. Respondent Ellis worked for the County. By virtue of his employment, respondent Ellis is a local miscellaneous member of CalPERS subject to Government Code section 21150 and has the minimum service credit to qualify for retirement.

3. In 2013 and 2014, respondent Ellis participated in several Interactive Accommodation Process Meetings (Accommodation Meeting) at the County Personnel Office due to his disabling medical condition. The purpose of the Accommodation Meetings was to identify the essential functions of respondent Ellis's position and determine whether his job could be modified to allow him to perform his essential job functions, given his disabling condition. Linda Durrer, County Return to Work Specialist, facilitated and was present at each meeting.

4. In addition to discussing respondent Ellis's essential job functions and how those functions might be modified to accommodate his condition, many of the Accommodation Meetings also included discussions regarding respondent Ellis's retirement benefits and options. During an Accommodations Meeting that occurred on August 1, 2013, the participants discussed "worse case scenarios" to determine the best course of action if respondent Ellis's medical condition could not be accommodated. This included discussing respondent Ellis's state disability benefits and CalPERS disability retirement options. During an April 28, 2014 Accommodation Meeting, respondent Ellis's disability retirement options were again discussed. Ms. Durrer told him that he should travel to the CalPERS office in Sacramento and meet with a CalPERS representative to discuss his retirement options. Additionally, Ms. Durrer provided him with an overview of the requirements for disability retirement and how disability retirement benefits are disbursed, and explained that individuals who receive disability retirement benefits may potentially return to employment under certain conditions. Ms. Durrer also engaged in a similar discussion with respondent Ellis, regarding his disability retirement options, during an Accommodation Meeting on June 27, 2014.

5. On May 27, 2015, respondent Ellis submitted a letter of resignation to the County, resigning from employment. The County accepted his resignation and he resigned from County employment, effective June 1, 2015.

6. On July 5, 2016, respondent Ellis signed an application for disability retirement (application) which requested a retirement effective date of June 1, 2015. The limitations and preclusions specified in the application which formed the basis for respondent Ellis's disability retirement, and how they affected his ability to perform his job, were the

---

1 Government Code section 21150 sets forth the criteria for a CalPERS member incapacitated for the performance of duty to be retired for disability.
same limitations and preclusions discussed during the Accommodation Meetings that occurred at the County Personnel Office in 2013 and 2014.

7. By way of a letter dated July 22, 2016, CalPERS informed respondent Ellis that additional information was required to determine whether it could accept his request for an earlier effective retirement date. The letter includes questions regarding the circumstances and timing surrounding respondent Ellis’s application. A similar letter was also sent to the County on the same date.

8. By way of a letter dated November 23, 2016, CalPERS informed respondent Ellis that his application for disability retirement had been approved. The letter also provided the following information regarding the effective date of respondent Ellis’s retirement:

The effective date of your retirement cannot be earlier than the day following the last day of sick leave with 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 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. You may request an earlier retirement date if these circumstances do not apply.

(Italics in original.)

9. CalPERS also provided respondent Ellis with a second letter dated November 23, 2016, which specified that CalPERS was denying his request for an earlier effective retirement date because a review of the information in his file did not establish that he made a correctable mistake when he failed to promptly file for disability retirement after separating from employment. The letter specified that the law permits a claimant to correct a mistake due to excusable inadvertence, oversight, or mistake of fact or law, but no correction may be made for a mistake caused by a claimant’s neglect, error in judgment, or change in circumstances. By letter dated November 28, 2016, CalPERS informed respondent Ellis that his effective retirement date was July 1, 2016. Respondent Ellis appealed from this determination on December 26, 2016.

10. Emily Sandoval, a CalPERS Staff Services Manager, has worked for CalPERS for 28 years, and has held her current position for the last 10 years. Her duties include reviewing disability retirement analyst case files to confirm that determinations regarding disability retirement claims are appropriate and to determine whether remedies are available to claimants who request relief due to their errors or mistakes. Ms. Sandoval was assigned to review CalPERS’s denial of respondent Ellis’s request for an earlier effective retirement date, as a result of his appeal.
11. Ms. Sandoval’s review revealed that respondent Ellis separated from County employment effective June 1, 2015, and applied for disability retirement over 13 months later, on July 5, 2016. She noted Government Code section 21252, subdivision (a), provides that a retirement application submitted more than nine months after the member’s discontinuance of service shall be deemed to have been submitted the first day of the month in which CalPERS receives the application. Respondent Ellis admitted in materials he submitted to CalPERS that he became aware of his option to apply for disability retirement as early as August 2013, but did not apply for disability retirement at that time because he wanted to continue working. Materials obtained from the County also revealed that respondent Ellis engaged in multiple discussions during Accommodation Meetings in 2013 and 2014 regarding his disability retirement options. He was encouraged to meet with a CalPERS representative to discuss his options in detail and was also informed that, if appropriate, he may be permitted to return to work even if he applies and is approved for disability retirement. After reviewing all of the information available to her, Ms. Sandoval found no correctable mistake that would warrant granting a retirement date to respondent Ellis any earlier than July 1, 2016, the first day of the month in which his application was received by CalPERS.

Discussion

12. Respondent Ellis had the burden to present sufficient evidence to establish that he is entitled to an earlier effective retirement date due to his commission of an error or omission that resulted from his mistake, inadvertence, surprise, or excusable neglect, as those terms are used in Section 473 of the Code of Civil Procedure. He also had the burden to present sufficient evidence that any correction of his error or omission would not provide him with a status, right, or obligation he would not have, but for that error or omission. Respondent Ellis did not appear at hearing and did not submit sufficient evidence to meet his burden. Consequently, his appeal is denied.

LEGAL CONCLUSIONS

Burden of Proof

1. The party asserting the affirmative in an administrative action has the burden of going forward and the burden of persuasion by the preponderance of the evidence. (McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051.) An applicant for retirement benefits has the burden of proof to establish a right to the entitlement, absent a statutory provision to the contrary. (Greatorex v. Board of Administration (1979) 91 Cal.App.3d 54, 57.) Thus, respondent Ellis had the burden of proof to establish that he was entitled to an earlier effective retirement date due to a correctable error or omission in his failure to apply for disability retirement within nine months of his separation from County employment due to mistake, inadvertence, surprise, or excusable neglect.
**Applicable Law**

2. Government Code section 21252, subdivision (a), provides the following regarding determining the effective date of an application for retirement:

   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 the system designated by the board.

3. Government Code section 20160, subdivision (a), provides for the correction of errors or omissions made by a member as a result of a mistake, inadvertence, surprise, or excusable neglect as follows:

   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.

Conclusion

4. Respondent Ellis had the burden of producing sufficient evidence to establish that his decision to wait to more than 13 months after his separation from County employment to apply for disability retirement was an error or omission that resulted from a mistake, inadvertence, surprise, or excusable neglect correctable pursuant to Government Code section 20160. He did not appear at hearing, and did not provide sufficient evidence to meet his burden. Therefore, CalPERS's determination that respondent Ellis is not entitled to an earlier effective date of retirement must be upheld, and his appeal from that determination must be denied.

ORDER

Respondent Randy W. Ellis's appeal from CalPERS's determination that he is not entitled to an earlier effective date of retirement is DENIED.

DATED: August 3, 2017

ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings