

ATTACHMENT E

THE PROPOSED DECISION

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal of Accepting the
Late Application for Industrial Disability
Retirement of

KEVIN S. SMITH,

Respondent,

and

CITY OF EL SEGUNDO,

Respondent.

Case No. 2018-1035

OAH No. 2018110062

PROPOSED DECISION

This matter was heard by James Michael Davis, Administrative Law Judge (ALJ) with the Office of Administrative Hearings on April 24, 2019, in Glendale, California.

Elizabeth Yelland, Senior Staff Attorney, represented complainant, the California Public Employees' Retirement System (CalPERS).

Kevin S. Smith (respondent) appeared personally and represented himself.

No one appeared for or on behalf of respondent City of El Segundo, and a default was taken against this respondent pursuant to Government Code section 11520.

At hearing, evidence was introduced and argument was made. To clarify an ambiguity in the record, exhibit 17, the certified mail return receipt from the City of El Segundo, was marked for identification and admitted in evidence. The matter was submitted for decision on April 24, 2019.

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FACTUAL FINDINGS

Parties and Jurisdiction

1. CalPERS made and filed the Statement of Issues in its official capacity.
2. Respondent was employed by respondent City of El Segundo. He retired effective October 3, 2015, with the rank of fire chief. Accordingly, respondent was a local safety member of CalPERS, subject to Government Code sections 21151 and 21154.
3. Respondent initially requested and received a service retirement. As discussed more fully below, after receiving payment for his service retirement for approximately six months, respondent sought to change his service retirement to an industrial disability retirement (IDR). After seeking more information for over a year, CalPERS ultimately denied respondent's IDR request in August 2018.
4. Respondent timely appealed CalPERS's denial and this matter ensued.

Background Information

5. Respondent spent over 30 years as a City of El Segundo firefighter. Having risen through the ranks, he served as fire chief the last 10 years of his career. During his stint as fire chief, respondent endeavored to lead by example. Part of that example was to be intolerant of gaming the system with regard to workplace injuries. On a personal level, he never let workplace injuries keep him off of the job. As he stated at hearing, he opted to "play hurt." He now realizes this approach was a disservice to himself and the public he served.
6. Respondent has been married since May 2017. He has a prior marriage that ended in divorce some time prior to May 2015. Respondent has a daughter and a son. The record is silent as to their ages.

Respondent's Medical Issues

7. Respondent testified that he hid his injuries from everyone, thinking he was being valiant. The only person he did not fool was his wife. Respondent's wife testified credibly regarding respondent's wide-ranging health issues and how they negatively affected their lives.
8. Respondent's most debilitating medical difficulties arose following the surgical replacement of his right hip in April 2015. A short time after the surgery, it became clear that this hip replacement was not progressing as well as his 2012 left hip replacement.

For instance, respondent was having trouble tying his shoes, could not walk long distances and had difficulty lifting things. He was in constant pain.

9. Respondent also experienced side effects from his medication, including memory loss, snoring, profuse sweating and restlessness.

10. To compound matters, in the summer and early fall of 2015, respondent developed sciatica that caused him immense pain, bringing him nearly to tears, just standing up.

Relevant Chronology

11. The follow events figure prominently in analyzing respondent's appeal:

In 1985, respondent begins his firefighting career with the City of El Segundo.

January 2010, respondent attends a Planning for Your Retirement workshop. These seminars are standardized. All of them providing information regarding the various types of retirements available, including IDR.

In 2012, respondent has left hip replacement surgery, returning to work approximately two weeks later.

April 2015, respondent undergoes right hip replacement surgery. As described above, respondent was in great pain in the months following.

May 2015, respondent submits his Service Retirement Application. (Ex. 3.)

July 2015, CalPERS sends respondent an acknowledgement letter informing respondent that he may be entitled to a disability retirement, if he is unable to work due to illness or injury. "To request a service pending disability retirement, you must complete a Disability Retirement Election Application." (Ex. 7.)

October 2, 2015, respondent's last day as a CalPERS participant, i.e., last day working as the City of El Segundo fire chief.

October 3, 2015, respondent's first day of service retirement.

October 6, 2015, respondent meets with his attorney, Gold Lee. From Mr. Lee respondent learned of his right to apply for service retirement pending IDR. Mr. Lee opined that application for the IDR should be pursued after receiving concurrence from the City of El Segundo's City Attorney's office. Mr. Lee instructed respondent to wait for his direction.

October 26, 2015, the date of CalPERS Service Retirement Confirmation Letter. (Ex. 8.) Respondent is informed of his monthly retirement benefit and that his first retirement check will arrive on December 1, 2015, or thereabouts.

December 1, 2015, respondent receives his first retirement check issued for the retirement period of November 1 to 30, 2015.

December 9, 2015, respondent's physician confirms that respondent suffers from sciatica radiating down his left leg.

March 1, 2016, at his attorney's direction, respondent gets an orthopedic evaluation. The doctor acknowledges that respondent is retired, but further indicates that his injuries would not permit respondent's return to work had he not been retired.

June 7, 2016, respondent applies for service retirement pending IDR.

August 1, 2016, by letter, CalPERS makes inquiries to the City of El Segundo and respondent regarding respondent's IDR application.

August 18, 2016, respondent City of El Segundo responds to CalPERS' inquiries.

December 11, 2016, respondent responds to CalPERS' inquiries.

July 26, 2017, respondent provides a second response to CalPERS' inquiries.

August 22, 2018, CalPERS Determination Letter, denying respondent's IDR application.
September 5, 2018, respondent appeals, culminating in the April 24, 2019 hearing.

12. The record shows that CalPERS fulfilled its fiduciary requirements in timely notifying respondent of the potential availability of all types of retirements, including IDR.

13. The record shows that respondent was aware of his ability to apply for a service pending IDR by October 6, 2015, and likely well before that date.

14. In CalPERS' written closing brief, it argued respondent may raise equitable estoppel as a ground for relief for respondent's late submission of his service retirement pending IDR. But under the facts here, it is not a legally-viable theory.

LEGAL CONCLUSIONS

Purpose of Disability Retirement

1A. The Public Employees' Retirement Law is set forth in Government Code section 20000 et seq. The general purpose of the public retirement system is "to prevent hardship to state employees who because of age or disability are replaced by more capable employees. The pension system serves as an inducement to enter and continue in state service [citation], and the provisions for disability retirement are also designed to prevent the hardship which might result when an employee who, for reasons of survival, is forced to attempt performance of his duties when physically unable to do so." (*Quintana v. Board of Administration* (1976) 54 Cal.App.3d 1018, 1021.)

1B. CalPERS has sole and exclusive fiduciary responsibility over the assets of the public retirement system and the manner in which benefits and related services are administered to participants and their beneficiaries. (Cal. Const., art. 16, § 17, subd. (a).)

Burden and Standard of Proof

2. A CalPERS active or retired member seeking correction of an error or omission pursuant to Government Code section 20160, which, as discussed below, is the case here, "has the burden of presenting documentation or other evidence to the board establishing the right to correction." (Gov. Code, § 20160, subd. (d).) An applicant for IDR has the burden of establishing eligibility by a preponderance of the evidence. (Evid. Code, §§ 115 and 500; see *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

3. "Preponderance of the evidence means evidence that has more convincing force than that opposed to it." [Citations.] (*Glage v. Hawes Firearms Company* (1990) 226

Cal.App.3d 314, 324-325.) “The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant.” (*Ibid.*, italics emphasis in original.) “If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation].” (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

Statutory Authority Related to Disability Retirement

4. Government Code section 21151, subdivision (a) provides that “[a]ny 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. Under Government Code section 21152, an application for disability retirement may be made by, among others, the member, or any person on his or her behalf.

6. “The application [for disability retirement] 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.” (Gov. Code, § 21154; italics added.)

7. Government Code section 20340, subdivision (a) provides that a person ceases being a “member” . . . “[u]pon retirement, except while participating in reduced worktime for partial service retirement.”

8. Government Code section 21453 provides: “An election, revocation, or change of election shall be made within 30 calendar days after the making of the first payment on account of any retirement allowance or, in the event of a change of retirement status after retirement, within 30 calendar days after the making of the first payment on account of any retirement allowance following the change in retirement status.” A “change in retirement status” includes changing from service to disability retirement.

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Statute Allowing CalPERS to Correct Errors or Omissions

9. Government Code section 20160 outlines circumstances when CalPERS may correct an active or retired member's errors or omissions. It states 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.

[¶]... [¶]

(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 20164.2....

Relevant Case Law

10A. The court in *Button v. Board of Administration* (1981) 122 Cal.App.3d 730, addressed Government Code section 20180, the predecessor statute to section 20160, concerning a retiree's request to change his service retirement to disability retirement, and its holding is instructive in determining whether respondent committed a correctable mistake of fact when he applied for service retirement pending IDR in June 2016.

10B. The *Button* facts are summarized as follows: Mr. Button worked until 1973 as an investigator at a district attorney's office. He applied for and received service retirement in April 1973. At the time, he was not aware of any disability and did not apply for or request further information concerning disability retirement, and he was not aware of any retirement policy that would bar him from changing his retirement status from "service" to "disability." In January 1976, he suffered a mild heart attack and applied for workers' compensation benefits which the Workers' Compensation Appeals Board awarded him in 1977. The Board found that although Mr. Button did not become compensably disabled until 1976, his injury was cumulative and arose out of his employment with the district attorney's office. Mr. Button then asked CalPERS to change his service retirement to disability retirement, and CalPERS denied his request. (*Button, supra*, 122 Cal.App.3d at pp. 733-734.)

10C. The *Button* court opined that the need for administrative and actuarial efficiency and the difficulty of making disability determinations years after the date of retirement, evidence a legislative intent that under normal circumstances retirees may not change their status. (*Button, supra*, at p. 735.) But under 20160, formerly 201180, "inadvertence or mistake constitutes a special circumstance excusing a retired member's earlier inaction" and Mr. Button should be allowed to correct his retirement status.

Equitable Estoppel

11A. As set forth in Factual Finding 14, CalPERS correctly contends that equitable estoppel does not apply to this case. To create equitable estoppel, the party to be estopped, here CalPERS, must have done or said something, including engaging in silence, which is intended to induce the other party (respondent) to change his position in detrimental reliance of those facts. (*California Canning Peach Growers v. Downey* (1925) 76 Cal.App. 1, 17.) Here, CalPERS fulfilled its fiduciary requirements by notifying respondent on multiple occasions of the availability of an IDR retirement. (Factual Finding 12.) Moreover, to find equitable estoppel on these facts would effectively nullify a strong rule of public policy: a policy of a clear deadline for the correction of mistakes under Government Code section 20160, subdivision (a). The nullification of a strong rule of public policy through estoppel is impermissible. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399.)

11B. Through his consultation with his attorney, respondent was aware of the ability to change his service retirement to an IDR retirement on October 6, 2015. (Factual Finding 13.) Respondent's attorney did not direct respondent to apply for service retirement pending IDR at that time. But his attorney's advice cannot form a basis for estoppel because "[t]here can be no equitable estoppel where the [estoppel-seeking party's] act appears to be rather the result of his or her own will or judgment than the product of what [the party to be estopped] did or represented." (31 C.J.S. (2019) Estoppel and Waiver, § 110; see also *Moody v. Amoco Oil Co.* (7th Cir. 1984) 734 F.2d 1200 [finding reliance on advice of counsel is no basis for estoppel].)

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Evaluation and Disposition

12A. Respondent's June 7, 2016 application was untimely because it was made after the deadlines prescribed by Government Code sections 21154 and 21453, and after respondent retired, i.e., ceased being a CalPERS member pursuant to Government Code section 20340. Because his disability retirement application was untimely, CalPERS may not accept it unless the provisions of Government Code section 20160, allowing CalPERS to correct errors or omissions, are met. Section 20160 contains two requirements before a correction may be made: (1) the correction was requested within a reasonable amount of time after discovery of the error or omission, not to exceed six months after the discovery (subdivision (a)(1)), and (2) the error or omission resulted from "mistake, inadvertence, surprise, or excusable neglect" (subdivision (a)(2)). Both conditions must be fulfilled. Here, neither condition is present. Specifically:

Timeliness

12B. As set forth in Factual Finding 13, on October 6, 2015, respondent was on notice of his ability to apply for service retirement pending IDR. His application was filed on June 7, 2016, approximately eight months after he learned of this option. Government Code section 20160, subdivision (a)(1) does not permit correction later than six months after discovery of the error or omission.

Mistake

12C. As set forth in Factual Finding 12, CalPERS fulfilled its fiduciary duties in informing respondent of the potential availability of an industrial disability retirement. But respondent consciously chose not to exercise the election available to him. Therefore, respondent's "error or omission" differed from the facts in *Button*. There, Mr. Button did not know he was disabled until three years later. (*Button, supra*, at p. 734.) Here, respondent knew of his disability at or near the time he retired, but, at the time, did not want to pursue a disability retirement. Thus, the mistake here is a mistake in judgment, the judgment to feign vitality to avoid the stigma of a disability retirement. It was a conscious choice at the time and is only a mistake in retrospect. Such a mistake is not correctable under Government Code section 20160.

13. All evidence has been considered. Respondent has not met his burden of presenting documentation and other evidence establishing that he made a legally correctable error or omission under Government Code section 20160, which is respondent's only statutory source for relief. Accordingly, as set forth in the order below, respondent's appeal should be denied and CalPERS' denial of his request to change from service to industrial disability retirement should be affirmed.

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ORDER

The determination by CalPERS denying respondent Kevin S. Smith's request to file a late application for industrial disability retirement is affirmed. The appeal filed by respondent Kevin S. Smith is denied.

DATED: May 22, 2019

DocuSigned by:
James Michael Davis
JAMES MICHAEL DAVIS
Administrative Law Judge
Office of Administrative Hearings