

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of Accepting the Late Application for Disability  
Retirement of**

**MARQUE L. GAINES and FRANCHISE TAX BOARD,  
Respondents**

**Agency Case No. 2019-0456**

**OAH Case No. 2019061023**

**PROPOSED DECISION**

Wim van Rooyen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 1, 2019, in Sacramento, California.

Austa Wakily, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondents Marque L. Gaines (Gaines) and the Franchise Tax Board (FTB) failed to appear at hearing.

Evidence was received, the record closed, and the matter submitted for decision on October 1, 2019.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM

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## **ISSUE**

Did Gaines make an error or omission as a result of inadvertence, mistake, surprise or excusable neglect, requiring CalPERS to accept the late filing of his disability retirement application?

## **FACTUAL FINDINGS**

### **Jurisdiction**

1. In a letter dated April 9, 2019, Anthony Suine, Chief of CalPERS' Benefit Services Division, refused Gaines' disability retirement application filed on February 5, 2019. Respondent timely appealed CalPERS' decision.

2. On June 21, 2019, Keith Riddle, Chief of CalPERS' Disability and Survivor Benefits Division, filed the Statement of Issues for purposes of the appeal. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

### **CalPERS' Evidence**

3. Gaines was employed by FTB as a Tax Program Assistant. By virtue of his employment, Gaines was a state miscellaneous member of CalPERS.

4. On July 25, 2017, pursuant to Gaines' request, CalPERS sent Gaines a copy of CalPERS' Publication 35, "A Guide to Completing Your CalPERS Disability Retirement Election Application" (Publication 35). In addition to providing detailed instructions for completing the disability retirement application, Publication 35 also

instructs members regarding workers' compensation claims as follows: "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. Delaying your application for retirement may affect important benefits you may be entitled to receive."

5. On August 29, 2017, Gaines applied in person for service pending disability retirement with an effective retirement date of November 22, 2017. He claimed disability based on a back injury with chronic back pain. CalPERS staff advised Gaines that all requested supporting documents must be submitted within 21 days of filing the disability retirement application or the application would be cancelled.

6. CalPERS permits eligible members to file for service pending disability retirement, and request a determination as to which type of benefit would be more beneficial for the member. In this case, CalPERS determined that disability retirement would be more beneficial for Gaines.

7. On September 5, 2017, CalPERS requested additional information and documents, including a physician's report, from Gaines. The request cautioned that if CalPERS did not receive the requested documents within 21 days, the disability retirement portion of his application would be cancelled.

8. In a letter dated October 3, 2017, CalPERS notified Gaines that his disability retirement application was cancelled, because CalPERS failed to receive the requested physician's report. The letter further stated: "If you wish to re-apply for retirement at a later date, it will be necessary for you to complete a new application at that time." The letter also clarified that the cancellation did not impact his application for service retirement.

9. Gaines called CalPERS to check on the status of his disability retirement application on October 11, 2017; October 13, 2017; and November 6, 2017. On each occasion, CalPERS phone representatives informed Gaines that his disability retirement application had been cancelled because he failed to submit a physician's report, and that he would need to resubmit a disability retirement application.

10. On November 23, 2017, CalPERS approved Gaines' application for service retirement. Gaines has been receiving service retirement benefits since December 2017.

11. On May 4, 2018, Gaines contacted CalPERS and indicated that he wanted to file another application for disability retirement. CalPERS staff advised him to complete the entire disability retirement application and sent him another copy of Publication 35.

12. On January 7, 2019, Gaines again contacted CalPERS with questions about submitting a disability retirement application. That same day, CalPERS mailed another copy of Publication 35 to Gaines.

13. On February 5, 2019, Gaines applied in person for disability retirement with an effective retirement date of November 22, 2017. He claimed disability based on upper and middle back pain.

14. In a letter dated April 9, 2019, CalPERS refused Gaines' disability retirement application. The letter explained that, because Gaines submitted the application after he service retired, it was construed as a request to change from service retirement to disability retirement. However, the request was filed late, and that late filing was not caused by a correctable mistake.

15. In his letter of appeal, Gaines contended that he did not apply for disability retirement because he was waiting to undergo a qualified medical evaluation (QME). As soon as the QME was completed, Gaines filed his disability retirement application dated February 5, 2019.

## **Discussion**

16. As early as October 2017, CalPERS informed Gaines by letter and multiple phone calls that his disability retirement application was cancelled, and that he would need to resubmit a disability retirement application. On May 4, 2018, after Gaines had been service retired for about six months, CalPERS again advised him to resubmit a disability retirement application. However, Gaines failed to do so until February 2019. Gaines' assertion that he submitted his renewed disability retirement application as soon as his QME was completed is unavailing. On multiple occasions, CalPERS provided Gaines with Publication 35, which plainly instructs members not to delay applying for disability retirement until the worker's compensation process is complete. To the extent that Gaines failed to follow CalPERS' explicit instructions and numerous requests to file a disability retirement application, he cannot now plausibly claim mistake, inadvertence, surprise, or excusable neglect.

## **LEGAL CONCLUSIONS**

1. The only question for determination in this proceeding is whether Gaines established that his disability retirement application, filed approximately 14 months after the effective date of his service retirement, should be accepted pursuant to Government Code section 20160. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of

which is essential to the claim for relief or defense that he is asserting"].) He must do so by a preponderance of the evidence. (See, *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

2. An application for disability retirement may be made by the member or any person on his behalf. (Gov. Code, § 21152, subd. (d).) Government Code section 21154 sets forth the timeline for filing an application for disability retirement, and provides, in relevant part:

The application shall be made only (a) while the member is in state 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. . . .

3. A person ceases to be a member upon retirement. (Gov. Code, § 20340, subd. (a).) Regarding a change of retirement status after retirement, 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. "Change in retirement status" includes, but is not limited to, change from service to disability retirement, from disability retirement to service retirement, from nonindustrial disability retirement to industrial disability retirement, or from industrial to nonindustrial disability retirement.

For purposes of this section, payment shall be deemed to have been made on the date a warrant is mailed, or the date funds are electronically transferred to a bank, savings and loan association, or credit union account for deposit in the member's account.

This section shall not be construed to authorize a member to change his or her retirement status after the election, revocation, or change of election provided in this section.

This section shall apply to any member who retires on or before December 31, 2017.

4. As set forth in Factual Findings 5 and 10, respondent service retired effective November 22, 2017, and ceased being a member as of that date. He began receiving retirement pay in December 2017. He did not file to change his retirement status from service to disability retirement until well over a year later. Therefore, his application for disability retirement was untimely.

5. Government Code section 20160, subdivision (a) provides that:

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.

[¶] . . . [¶]

6. Based on the Factual Findings as a whole, and specifically Factual Finding 16, respondent did not establish that his failure to file for disability retirement in a timely manner constituted an error or omission correctable under Government Code section 20160. Consequently, his late application for disability retirement was properly refused.

## ORDER

The appeal of respondent Marque L. Gaines is DENIED. CalPERS' decision to refuse Gaines' disability retirement application filed on February 5, 2019 is AFFIRMED.

DATE: October 28, 2019

DocuSigned by:  
*Wim van Rooyen*  
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WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings