

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:

**LILLIE B. SAMPLE and VALLEJO CITY UNIFIED SCHOOL
DISTRICT, Respondents**

Case No. 2019-0634

OAH No. 2019080683

PROPOSED DECISION

Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on September 16, 2019, in Sacramento, California.

Rory J. Coffey, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Lillie B. Sample appeared and represented herself.

Respondent Vallejo City Unified School District (District) did not appear, nor did anyone appear on its behalf. As the District was properly served with the notice of

PUBLIC EMPLOYEES RETIREMENT SYSTEM
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hearing, the matter proceeded as a default against it pursuant to Government Code section 11520.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on September 16, 2019.

ISSUE

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

FACTUAL FINDINGS

1. Respondent was employed by the District as a custodian. Her last physical date of work was June 2, 2017. By virtue of her employment, respondent is a local miscellaneous member of CalPERS.

2. On January 24, 2018, Jude G. Shadday, D.O., of Kaiser Permanente, completed an Industrial Work Status Report related to a bilateral-wrist injury respondent incurred on June 2, 2017. Dr. Shadday placed respondent on "modified activity at work and at home from 1/24/2018 through 2/7/2018", restricting her from lifting, carrying, pushing or pulling more than 10 pounds.

3. On February 21, 2018, respondent submitted an application for service retirement. She retired for service, effective February 24, 2018, and began receiving a retirement allowance in March 2018.

4. By letter dated February 26, 2018, CalPERS acknowledged receipt of respondent's service retirement application, and further notified respondent that she may be entitled to disability retirement if she was unable to work because of an illness or injury. On February 28, 2018, respondent contacted CalPERS to inquire regarding disability retirement options.

5. On March 26, 2018, respondent visited CalPERS's Regional Office in Walnut Creek and received additional counseling on disability retirement. At this visit, a CalPERS representative reviewed the necessary disability retirement forms with respondent and also provided her a copy of CalPERS' Publication 35, "A Guide to Completing Your CalPERS Disability Retirement Election Application" (Publication 35), which included the following:

You – or someone on your behalf such as your employer – may file a *Disability Retirement Election Application* for your retirement. You should apply for disability or industrial disability retirement as soon as you believe you are unable to perform your usual job duties because of an illness or injury that is of permanent or extended duration and expected to last at least 12 consecutive months or will result in death. Once we receive all the required information described in this publication, we can begin processing your application.

(Emphasis in original.)

6. On April 10, 2018, respondent completed a Resignation or Retirement Notice for the District, on which she asserted she retired based on disability and an

inability "to perform all duties." However, she never submitted this form to the District, citing an ongoing dispute with the District concerning her service credit.

7. On May 17, 2018, respondent again visited the Walnut Creek Regional Office and inquired about disability retirement. Respondent stated that she had been given a disability retirement application, but filed for service retirement in error. The CalPERS representative went over the process for service retirement pending disability retirement. She then provided respondent another disability retirement election application and advised her to file it immediately so that CalPERS could determine whether she was eligible.

8. On August 1, 2018, respondent called CalPERS and asked how to file for disability retirement. The CalPERS representative advised she should file a disability retirement election application. Two weeks later, on August 15, 2018, respondent called CalPERS again to inquire about "her disability retirement." Respondent was advised that she was receiving service retirement only as she had not yet filed for disability retirement. She was again advised to submit a disability retirement election application and requisite forms, then allow four to six months for CalPERS to process the application.

9. On December 5, 2018, respondent called CalPERS to inquire about disability retirement. The CalPERS representative informed her that she must file a disability retirement election application to receive those benefits.

10. On January 29, 2019, for the first time, respondent submitted a disability retirement election application on the basis of an orthopedic (back) condition with a requested retirement date of February 24, 2018. In the application, respondent

asserted that her disability occurred on June 25, 2017, while "lifting books at work [and] taking out trash." She listed Eileen Gaspar, M.D., as her treating physician.

11. By separate letters dated February 14, 2019, CalPERS requested respondent and the District to submit additional information and answer a series of questions to determine whether a correctable mistake caused the late filing of respondent's disability retirement application.¹ On March 6, 2019, CalPERS received respondent's written responses in which she asserted the following: On or about June 6, 2017, respondent's physician advised her that her "working days are over." She notified her employer of the same in March 2018, asserting that "HR never talked to me. I'm still trying to sign out and get 5 yr medical. HR and me still have issues." Respondent first advised CalPERS of her disability on February 22, 2018, but she did not have written documentation from her physician. She was advised, "if I was approved later, it would change." She did not file for service retirement pending disability retirement prior to her service retirement date because her physician had not yet advised her that she was disabled.

12. Along with her written responses to CalPERS's questions, respondent submitted a Physician's Report on Disability form completed and signed by Dr. Gaspar on March 1, 2019. On the form, Dr. Gaspar noted that respondent was unable to work since July 3, 2017, and identified her diagnoses as carpal tunnel syndrome and cervical radiculopathy, citing a magnetic resonance imaging (MRI) from June 2017. Dr. Gaspar further indicated that respondent is permanently and substantially incapacitated from performing her usual duties as a custodian.

¹ CalPERS received no response from the District.

13. By letter dated April 26, 2019, CalPERS notified respondent that it did not accept her late application for disability retirement and advised her of her appeal rights. By letter dated May 21, 2019, respondent timely appealed and requested an administrative hearing. CalPERS filed a Statement of Issues on July 31, 2019. This hearing followed.

Respondent's Testimony

14. Respondent's last day of work with the District was June 2, 2017. During this time, her doctor kept her off work one month at a time, but never stated she was permanently disabled. At the time of her separation, the District did not inform respondent about her retirement options, including possible disability retirement. By the time she filed for service retirement with CalPERS, she had been off from work for approximately six months. At hearing, respondent explained that she filed for service retirement – and not disability retirement or service retirement pending disability retirement – because she believed she either needed medical documentation of a disability or 12 months off-work status to apply.

15. Shortly after applying for service retirement, respondent visited the CalPERS' Regional Office in Walnut Creek, received a copy of Publication 35, and was advised to file a disability retirement election application on at least two separate occasions. However, she did not file an application after either visit because she thought she needed something in writing stating she was permanently disabled. Also in 2018, respondent retained an attorney to assist her with applying for disability benefits from the Social Security Administration. At the time, respondent did not understand the difference between CalPERS' disability retirement and Social Security disability benefits, except that the latter did not require her to be off work for 12 months.

16. At some point, Dr. Gaspar referred respondent to a neurologist for further evaluation. Respondent could not recall when she met with the neurologist, other than before January 29, 2019; however, she recalled that he verbally advised her she could not work anymore. Still, respondent had no written document stating that she was permanently disabled until Dr. Gaspar documented a permanent disability in her medical record in January 2019. Thereafter, respondent immediately filed for disability retirement.

Discussion

17. Respondent last physically worked for the District on June 2, 2017. She had been off work for six months as a result of a bilateral wrist injury at the time she filed for service retirement. At that time, respondent held the mistaken belief she could not file for disability retirement at the same time because she had not been off work for 12 consecutive months. Respondent's subjective belief aside, CalPERS never misled her in this regard. On the contrary, CalPERS informed her as soon as February 26, 2018, that she may be eligible to apply for disability retirement. Respondent was thereafter provided a copy of Publication 35 and verbally advised to file a disability retirement election application on the phone as well as during two separate personal visits to CalPERS' Regional Office. Even if respondent's mistaken belief that she had to be off work for 12 consecutive months due to injury was reasonable, she did not file for disability retirement in June 2018, when she reached the 12-month mark. Nor did she file for disability retirement after the neurologist advised she could never return to work. Rather, she did not file for disability retirement until more than 18 months after being taken off work, and nearly a year after she filed for service retirement.

18. Respondent has the burden of presenting documentation or other evidence she made an error or omission that was a result of mistake, inadvertence,

surprise or excusable neglect. She failed to meet this burden. Accordingly, her appeal should be denied, and CalPERS' denial of her request to change from service to disability retirement should be affirmed.

LEGAL CONCLUSIONS

1. The only question for determination in this proceeding is whether respondent established that her disability retirement application, filed 11 months after the effective date of her 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"].) She 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. Government Code section 20026 provides:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

3. 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. . . .

4. 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 21472 provides:

(a) 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.

(b) 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.

(c) 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.

(d) This section shall apply to any member who retires on or after January 1, 2018.

5. As set forth in Factual Finding 3, respondent service retired, effective February 24, 2018, and ceased being a member as of that date. She began receiving retirement pay in March 2018. She did not file to change her retirement status from service to disability retirement until almost one year later. Therefore, her application for disability retirement was untimely.

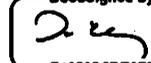
6. Pursuant to Government Code section 20160, CalPERS may correct an error or omission of a member when it is the result of mistake, inadvertence, surprise or excusable neglect as those terms are defined in Code of Civil Procedure section 473. However, "[f]ailure by a member . . . to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an 'error or omission' correctable under this section." (Gov. Code, § 20160, subd. (a)(3).) As set

forth in Factual Findings 17 and 18, respondent did not establish that her failure to file for disability retirement in a timely manner constituted an error or omission correctable under Government Code section 20160. Consequently, her request to file a late application for disability retirement must be denied.

ORDER

The request of respondent Lillie B. Sample to file a late disability retirement application is DENIED.

DATE: October 16, 2019

DocuSigned by:

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TIFFANY L. KING

Administrative Law Judge

Office of Administrative Hearings