

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of Accepting the Application for Industrial
Disability Retirement of:**

WILLIAM C. BAILEY

and

CITY OF SAN FERNANDO

Respondents

Agency Case No. 2018-0995

OAH No. 2018120581

PROPOSED DECISION

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on November 7, 2019, in Los Angeles, California.

John Shipley, Senior Staff Attorney, appeared for California Public Employees' Retirement System (CalPERS).

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED Feb. 5 20 20

LEA

William C. Bailey (respondent Bailey or Bailey) was present and represented himself.

Alex Y. Wong, Esq., Liebert Cassidy Whitmore, represented City of San Fernando (respondent City or City).

Oral and documentary evidence was received. The record was held open for the parties to file written closing briefs by January 13, 2020. CalPERS and respondent Bailey timely filed their closing briefs. CalPERS's brief was marked as Exhibit 21. Respondent Bailey's brief was marked as Exhibit K. OAH did not receive a brief from respondent City.

The record was closed and the matter was submitted for decision on January 13, 2020.

The ALJ issued a protective order for respondent Bailey's Exhibit D, which is a one-page color copy of his police identification cards.

FACTUAL FINDINGS

Jurisdictional Matters

1. Anthony Suine made and filed the Statement of Issues in his official capacity as Chief of the Benefit Services Division of CalPERS.
2. Respondent Bailey was employed by respondent City effective November 29, 2003. He was last employed by the City as a Police Sergeant. By virtue of this employment, respondent Bailey was a local safety member of CalPERS. (Gov. Code, §§ 21152, 21154, 21156.)

3. Respondent City is a public agency contracting with CalPERS for retirement benefits for its eligible employees. (Gov. Code, § 20022.)

Application for IDR

4. On March 21, 2014, respondent Bailey signed a Disability Retirement Election Application (application) by which he applied for industrial disability retirement (IDR). Respondent Bailey indicated on the application that he was employed by respondent City as a Police Sergeant. (Exh. 4.)

5. Section 3 of the application requires the applicant to answer questions and provide information regarding the applicant's disability, such as the specific disability claimed by the applicant, the date the disability occurred, how the disability occurred, the applicant's limitations and preclusions due to the injury or illness, and how the injury or illness has affected the applicant's ability to perform his or her job. Section 4 of the application requires the applicant to identify his or her treating physician. Respondent Bailey provided no information in Section 3 or Section 4 of his application for IDR. (See Exh. 4, p. 2.)

6. On April 8, 2014, CalPERS sent a letter to respondent Bailey notifying him that it had received his application for IDR and that CalPERS would be requesting respondent City, as his employer, to make the determination regarding his disability required by Government Code section 21157. (Exh. 7.)

7. By letter dated April 8, 2014, CalPERS requested respondent City to make a determination of whether respondent Bailey was incapacitated for the performance of his duties as a Police Sergeant, pursuant to Government Code section 21154. The letter advised respondent City that it was required to make the determination within six months of CalPERS's request, pursuant to Government Code section 21157. (Exh. 8.)

8. Six months later, by letter dated October 7, 2014, respondent City notified CalPERS that respondent Bailey "has been determined to be disabled for the performance of his duties." (Exh. 9.) Enclosed with the letter was "A Resolution of the City Manager of the City of San Fernando Relative to the Industrial Disability Retirement of Sergeant William Bailey" (Resolution). The Resolution was passed, approved, and adopted by the San Fernando City Council on August 4, 2014.

9. The Resolution was signed by Brian Saeki, City Manager, and states, in pertinent part, as follows:

"[A]fter review of medical and other evidence relevant thereto, I hereby determine that William Bailey, a local safety member of the Public Employees' Retirement System employed by the Agency, is incapacitated within the meaning of the Public Employees' Retirement Law for performance of his duties in the position of Police Sergeant.

(1) . . . I also determine that such incapacity is a result of injury arising out of and in the course and scope of his employment as a local safety member. . . .

(2) I hereby certify that the member was separated from his employment in the position of Police Sergeant effective April 24, 2014, after expiration on April 24, 2014 of his leave rights under section 21164 [of the] Government Code and no dispute as to the expiration of such leave rights is pending. His last day on pay status was April 24, 2014.

[¶] . . . [¶]

(5) The primary disability condition is orthopedic.

(Exh. 9, p. 2.)

10. By letter dated November 17, 2014, CalPERS notified respondent Bailey that respondent City had found him to be incapacitated for the performance of his duties as a Police Sergeant, and that the effective date for his IDR would be April 25, 2014. (Exh. 10.) By letter dated December 8, 2014, CalPERS notified respondent City that CalPERS had placed respondent Bailey on the Industrial Disability Retirement roll with an effective date of April 25, 2014. (Exh. 11.) CalPERS provided respondent Bailey a monthly IDR benefit allowance from that effective date.

CalPERS Internal Audit

11. Two years later, in August 2016, CalPERS conducted an internal audit scanning past cases to determine if individuals who were receiving disability (or industrial disability) benefits had actually been terminated from their position. This internal audit disclosed that respondent Bailey was separated from his employment with respondent City because he was terminated for cause. Specifically, the audit found that the City had coded respondent Bailey as having been terminated for cause.

12. On August 17, 2016, CalPERS sent a letter to respondent City requesting a copy of respondent Bailey's personnel file and other documents so that CalPERS could determine if Bailey was terminated for cause. The letter stated, in part:

William C. Bailey has been approved for industrial disability retirement and we are notified that the member was terminated with cause.

We need to determine whether this situation fits within the case of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 79 Cal.Rptr.2d 749, which holds that where "an employee is terminated for cause the discharge is neither the ultimate result of the disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement." [Additional cases were also cited in the letter.]

[¶] . . . [¶]

Please reply by **September 7, 2016**.

(Exh. 12 (bold in original).)

13. Respondent City did not respond to CalPERS's request by September 7, 2016. Consequently, on December 7, 2016, CalPERS sent a letter to respondent Bailey requesting that he sign an authorization to disclose protected health information to assist CalPERS in determining whether his employment was terminated for cause. The letter stated, in pertinent part:

[CalPERS] is trying to determine whether we can continue to provide you with disability retirement benefits. CalPERS approved you for disability retirement prior to receiving information that your case may not qualify. CalPERS has requested further information from you and your employer, including but not limited to a copy of your personnel file.

with any information concerning disciplinary proceedings (*Haywood v. American River Fire Protection District* (1999) 67 Cal.App.4th 1292, 79 Cal.Rptr.2d 749). A signed Authorization to Disclose Protected Health Information is needed in order for CalPERS to receive the required information (blank copy attached). CalPERS never received a signed Authorization from you.

(Exh. 13.)

14. On May 18, 2017, respondent Bailey signed the Authorization to Disclose Protected Health Information, as requested by CalPERS. (Exh. 15.) Subsequently, on July 6, 2017, respondent City provided CalPERS with the following documents and information: IDR Application; Workers' Compensation Claims, Industrial Injuries, and Medical Records; Discipline and Request for Disciplinary Hearing; Settlement Agreement, Compromise and Release and Award as Approved by the State Workers' Compensation Appeals Board Judge; and Work Performance Evaluations. (See Exhs. 14 and 16-20.)

Termination of Employment

15. The information provided to CalPERS by respondent City on July 6, 2017, established that respondent Bailey's employment with the City was terminated for cause.

16. On March 18, 2014, respondent City served respondent Bailey with a Notice of Intent to Terminate. (Exh. 16, p. 9.) Three days later, on March 21, 2014, respondent Bailey filed his application for IDR. (Exh. 4.)

17. (A) The City's termination action was based on respondent Bailey's violation of certain provisions of the Police Department Manual and the City's Personnel Rules, specifically those related to the Law Enforcement Code of Ethics, Conduct Unbecoming an Officer, and Integrity. (Exh. 16, pp. 1-3.)

(B) On September 30, 2013, respondent Bailey signed and submitted an application for promotion to Sergeant (2013 application). By signing the 2013 application, Bailey certified that all statements made on or in connection with the application were true and correct, and he acknowledged that any misstatement or omission of material fact might cause forfeiture of his rights to employment by the City.

(C) In the 2013 application, respondent Bailey identified colleges he attended and indicated that he earned a Bachelor of Arts degree from California State University, Long Beach (CSULB). Based in part on his academic credentials, respondent Bailey was placed on the highest eligibility list for the Sergeant promotion. Bailey was officially promoted to Sergeant on November 16, 2013.

(D) On January 2, 2014, respondent Bailey was interviewed by the City regarding allegations that he misrepresented his educational background on the 2013 application. During the interview, respondent Bailey admitted that he did not hold a bachelor's degree from CSULB or any other college or university. He also admitted that his purported degree gave him an advantage in the promotion process. During his interview, Bailey explained that he lied on the 2013 application because he had falsely stated on prior applications that he held a bachelor's degree from CSULB and felt he had to continue lying to avoid questions about his honesty. The City reviewed Bailey's academic records from CSULB, which confirmed he never received a bachelor's degree from the university. The City also reviewed Bailey's prior employment applications and

resumes he submitted in 2007 and 2009, and found that he similarly misrepresented his educational background on those applications.

18. On April 10, 2014, a pre-disciplinary *Skelly* meeting was held. Respondent Bailey attended the meeting with his attorney. Following the *Skelly* meeting, on April 24, 2014, respondent City decided that respondent Bailey should be terminated effective immediately. Respondent Bailey appealed the City's decision to terminate his employment. While the appeal was pending, on October 7, 2014, respondent Bailey and respondent City reached a settlement of the matter. The Settlement Agreement was signed by respondent Bailey and his attorney, Steven Welch, on July 28 and 30, 2014, and by City Manager Brian Saeki and respondent City's counsel, Alex Y. Wong, on October 7, 2014. (Exh. 18, p. 8.)

19. Pursuant to the Settlement Agreement, respondent City agreed to "certify Bailey for an Industrial Disability Retirement through the California Public Employees' Retirement System." (Exh. 18, p. 5.) In exchange, respondent Bailey agreed that he "expressly withdraws his disciplinary appeal and waives any and all claims now and forever that he has or may have for reinstatement to his position with the City. Bailey further agrees that he will not seek or maintain employment, independent contractor status, or any other business relationship with the City in any position or capacity whatsoever, and that the City is entitled to reject with or without cause any application for employment or agreement for independent contractor status or any other business relationship with the City made by Bailey." (Exh. 18, p. 6.)

20. Additionally, the Settlement Agreement included a settlement of respondent Bailey's pending workers' compensation claim for the sum of \$10,000 inclusive of attorneys' fees. Pursuant to the Settlement Agreement, the City's obligation to pay that sum became effective on October 12, 2014, when a workers'

compensation judge approved the Compromise and Release executed by the parties.
(Exhs. C and 19.)

21. Respondent Bailey's workers' compensation claim was based on his claim that he suffered "cumulative injury" in the course of his employment with the City's police department, starting from September 15, 2002, through February 14, 2014. (Exh. C, p. 4.) Respondent Bailey claimed "cumulative injury" related to his ear (hearing loss), back (spine), shoulders, knees, and circulatory system. (*Id.*)

Cancellation of IDR Benefits

22. By letter dated August 15, 2018, CalPERS notified respondent Bailey that it had reviewed his file during an internal audit and found he was not eligible to receive IDR benefits. The letter explained:

We have determined that your employment ended for reasons which were not related to a disability medical condition. When an employee is separated from employment as a result of disciplinary action or the employee enters into a settlement agreement where the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination and/or a mutual understanding of separation from employment due to a pending adverse action renders the employee ineligible to apply for industrial disability retirement. [¶] Your industrial disability retirement benefits will be revoked.

(Exh. 5.)

23. By letter dated September 13, 2018, respondent Bailey appealed CalPERS's decision that he was not eligible to receive IDR benefits and that his IDR benefits were being revoked. The letter stated, in part:

I disagree with CalPERS' revocation determination as stated in the . . . August 15, 2018 letter to me from Anthony Suine, Chief Benefit Services Division.

My separation from employment was due to my disabling medical condition, which condition was verified by the City's designated doctors and certified by the City. My facts differ from the facts of the cases cited in the August 15th letter.

Accordingly, I am appealing this determination and hereby request a hearing.

(Exh. 6 (emphasis in original).)

24. On August 15, 2018, CalPERS informed respondent Bailey of its intent to collect the IDR benefits paid to him but which he was not eligible to receive. Pursuant to Government Code section 20164, subdivision (b)(1), where CalPERS makes an erroneous payment, the right to collect the payment shall expire three years from the date of payment. CalPERS contends it is entitled to collect any payments made to respondent Bailey on or after August 15, 2015. In this case, CalPERS seeks to recover \$230,938.66 from respondent Bailey. (See Exhs. F, G, I.) Respondent Bailey testified that he has repaid CalPERS \$66,000 of the \$230,938.66 overpayment amount.

25. On May 2, 2019, respondent Bailey sent CalPERS a Service Retirement Election Application, in which he applied for service retirement effective November 24, 2017. CalPERS allowed Bailey to apply for regular service retirement retroactive to November 24, 2017, which is when he would have initially qualified for a service retirement at age 50. In his transmittal letter, respondent Bailey stated he was submitting the service retirement application "in a good faith effort to get a jump on the amount of alleged overpayment received." (Exh. H.) Respondent Bailey further stated that "[i]n no way am I waiving any rights with respect to my IDR, including my right to continue with the appeals process regarding my IDR." (*Id.*)

Respondent Bailey's Contentions

26. According to respondent Bailey, he submitted his IDR application while he was pursuing a workers' compensation claim and also in the midst of the City's disciplinary proceeding regarding misstatements on his employment applications. Respondent Bailey contends that, after a medical examination "discovered that I was disabled," the disciplinary proceeding and workers' compensation claim were resolved in a settlement agreement that acknowledged my qualification for IDR." (Bailey's Closing Brief, p. 2.)

27. Respondent Bailey completed his IDR application at the CalPERS office in San Bernardino with a CalPERS representative, who he claims instructed him to leave much of the application blank and who failed to include certain forms with the application. After the City notified CalPERS of its determination that Bailey was disabled and eligible for IDR, CalPERS approved Bailey's IDR application. For more than two years, Bailey regularly received his monthly IDR benefit allowance.

28. Respondent Bailey contends that CalPERS should be estopped to cancel or revoke his IDR benefits. He contends that CalPERS abdicated its role in the IDR process when it approved his IDR application, which he described as "incomplete" because it did not contain all required information and forms. He notes there was information in the CalPERS system that his employer coded his employment as terminated. Bailey feels it is "unacceptable behavior" for CalPERS to accept an incomplete IDR application, do nothing in approving his application, and then years later based on some "cryptic audit" attempt to remedy the fact it did nothing. He contends CalPERS was in a position to have known the true facts of his employment status with the City when it approved his IDR application.

29. Respondent Bailey contends that if any correction to his IDR benefits is allowed, it should not be retroactive. Government Code section 20160, subdivision (e), requires corrections must be such that the status, rights, and obligations of all parties are "adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time." Respondent Bailey contends that it is not possible, over five years later, to adjust the status, rights, and obligations of all the parties in this case to be the same as they would have been if CalPERS did not approve his application for IDR. Bailey contends the effect of revoking his IDR now is fundamentally different than it would have been if his IDR application was denied in 2014. For example, as a result of his Settlement Agreement with the City, Bailey testified he lost his lifetime medical benefits and he compromised his workers' compensation claim. Bailey is also now on a service retirement retroactive to 2017, and CalPERS, at his request, has stopped paying him IDR benefits to avoid any further overpayments.

30. Respondent Bailey became a full-time police officer with the City in November 2003. He enjoyed being a police officer and thought of police work as a career and not just merely a job. He testified that he had planned to work for the City until he reached age 65. Respondent Bailey is proud of his many accomplishments and the numerous awards and commendations he received during his career as a police officer. Bailey's documentary evidence included performance reviews, character reference letters, commendations, awards, training certificates, and college transcripts. (See Exhs. B1-B8.)

Issue on Appeal

31. CalPERS filed a Statement of Issues in this matter that framed the issue as whether CalPERS should accept respondent Bailey's application for IDR. However, there is currently no issue of whether respondent Bailey's application should be accepted, because the application was, in fact, accepted by CalPERS in November-December 2014, based on the City's information that Bailey was substantially incapacitated from performing his duties as a result of a work-related orthopedic injury. CalPERS later learned, in 2016, that respondent Bailey's employment with the City had been terminated for cause, which rendered him ineligible to receive IDR benefits. CalPERS now seeks to correct the mistake it made in approving respondent Bailey's application for IDR.

32. Therefore, by agreement of the parties, the issue presented in this appeal is: "Is CalPERS entitled under Government Code section 20160 to correct its mistake in approving respondent Bailey's IDR application?"

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. As the party seeking correction of an error or omission, CalPERS has the burden of presenting documentation or other evidence to the board establishing the right to correction. (Gov. Code, § 20160, subd. (d).) The standard of proof is by a preponderance of the evidence. (Evid. Code, § 115.)

Eligibility for IDR

2. Government Code section 21152 states, in pertinent part: "Application to the board for retirement of a member for disability may be made by: ... [¶] (d) The member or any person in his or her behalf."

3. Government Code section 21154 states, in pertinent part:

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

4. Government Code section 21157 provides: "The governing body of a contracting agency shall make its determination within six months of the date of the receipt by the contracting agency of the request by the board pursuant to Section

21154 for a determination with respect to a local safety member. [¶] A local safety member may waive the requirements of this section."

5. Government Code section 21156, subdivision (a)(2), provides: "In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process."

6. Pursuant to Government Code section 21156, subdivision (a)(1), in the case of a local safety member, if the medical examination and other available information show to the satisfaction of the governing body of the contracting agency employing the member that the member "is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service."

7. In *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1307 (*Haywood*), the court held that "where . . . an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed."

8. (A) CalPERS's Precedential Decision¹ 13-01, entitled *In the Matter of the Application for Disability Retirement of Robert Vandergoot and California Dept. of Forestry and Fire Protection* [2013] (*Vandergoot*), found that *Haywood* applied to preclude a disability retirement when an employee settles a pending termination for cause and agrees not to seek reemployment.

(B) The applicant in *Vandergoot* was employed by the California Department of Forestry as a Heavy Fire Equipment Operator. Mr. Vandergoot voluntarily resigned his employment after being served with a Notice of Adverse Action (NOAA). In exchange for Mr. Vandergoot's agreement to resign, the employing department agreed to withdraw the pending NOAA. Additionally, Mr. Vandergoot agreed in a Stipulation and Settlement to not seek, transfer to, apply for or accept any employment in any capacity with his employing department in the future. If he returned to employment with the department in violation of the agreement, he would be subject to dismissal without any right of appeal. (*Vandergoot* at p. 4.)

(C) CalPERS denied Mr. Vandergoot's application for IDR, arguing that because he resigned while disciplinary charges were pending, he was no longer eligible for disability retirement. The Decision in *Vandergoot* concluded that *Haywood* applied whether Mr. Vandergoot was terminated for cause or voluntarily resigned his employment and waived any reinstatement rights. The Decision explained:

¹ An agency such as CalPERS may designate a final decision as precedential that contains a significant legal or policy determination of general application that is likely to recur. (Gov. Code, § 11425.60.)

In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*. This is because *Haywood* makes it clear that a necessary requisite for disability retirement is the potential for reinstatement of the employment relationship with the District if it is ultimately determined that respondent is no longer disabled. (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at pp. 1296-1297.) Such is not possible here. The employment relationship has not only been severed, but the terms of the Stipulation and Settlement Agreement expressly lock respondent out from being reinstated. Such a circumstance must be viewed as wholly inconsistent with the policy behind and rationale for disability retirement[.]

(*Vandergoot* at p. 7.)

9. The Court of Appeal in *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156, recently affirmed the *Vandergoot*, noting that "*Vanergoot* is eminently logical: resignation in these circumstances does indeed appear to be 'tantamount to a dismissal for purposes of applying the *Haywood* criteria.'" (*Id.* at p. 1176.)

10. In this case, respondent Bailey's withdrawal of his disciplinary appeal, his waiver of any future right to reinstatement to his position with the City, and his agreement not to seek or maintain any future employment, independent contractor

status, or any business relationship with the City, is tantamount to a dismissal and rendered him ineligible for disability retirement under *Haywood*.

11. The two exceptions to the *Haywood* case are inapplicable to respondent Bailey's case. First, Bailey's termination was not preemptive of an otherwise valid claim for disability retirement. The phrase "preemptive of an otherwise valid claim for disability retirement" was explained by the court in *Smith v. City of Napa* (2004) 120 Cal.App.4th 194. "Thus, if a plaintiff were able to prove that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot preempt the right to receive a disability pension for the duration of the disability." (*Smith, supra*, 120 Cal.App.4th at p. 206.) Here, respondent City took action to terminate respondent Bailey's employment on the grounds that Bailey misrepresented his educational background on the 2013 application, which Bailey submitted to the City on September 30, 2013. As of that date, respondent Bailey did not have a mature claim for disability retirement. Nor did Bailey have a mature claim for disability retirement when the City served him with the Notice of Intent to Terminate on March 18, 2014. Respondent Bailey did not apply for IDR until March 21, 2014.

12. The second *Haywood* exception, i.e., the employee's discharge was not the ultimate result of a disabling medical condition, was not established by the evidence. The City terminated Bailey's employment because he engaged in dishonesty when he misrepresented his educational background on the 2013 application as well as applications in 2007 and 2009. No evidence was presented that Bailey's dishonesty was the result of a disabling medical condition.

13. Respondent Bailey's assertion that his medical condition was "verified by the City's designated doctors and certified by the City" was in reference to his workers'

compensation claim, which was resolved as part of the settlement of the City's termination action. A "workers' compensation ruling is not binding on the issue of eligibility for CalPERS disability retirement because the focus of the issues and the parties is different." (*Smith, supra*, 120 Cal.App.4th at p. 207.) The basis for the City's termination action, i.e., that Bailey misrepresented his educational background on promotional applications, resulted from his dishonesty, and not a medical condition.

14. Based on the foregoing, at the time CalPERS approved his application for IDR, respondent Bailey was not eligible to receive IDR benefits because his employment with the City was terminated for cause, which was not known to CalPERS until two years later. Thus, CalPERS's approval of Bailey's application for IDR was erroneous as a matter of law.

CalPERS's Right of Correction

15. Government Code section 20160 provides, in pertinent part:

[¶] ... [¶]

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of ... 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).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

16. For purposes of establishing a right of correction, CalPERS has demonstrated it made a mistake in approving and paying IDR benefits for respondent Bailey, because he was not eligible to receive such benefits. CalPERS reasonably relied on respondent City's representation that Bailey was incapacitated from performing his duties due to a work-related, orthopedic injury, and reasonably assumed the City's representation was made in good faith. CalPERS later learned that respondent Bailey's employment had actually been terminated for cause, which the City failed to mention in its communications with CalPERS. Based on the documentation provided by the City two years after-the-fact, it appears the City was substituting IDR for the disciplinary process when it supported Bailey's application for IDR.

17. Pursuant to Government Code section 20160, CalPERS is mandated to correct all actions taken as a result of errors or omissions of any contracting agency. Critical to correcting mistakes under section 20160 is that the correction must not provide the party seeking correction with a status, right, or obligation not otherwise available. Here, CalPERS must correct its mistake by cancelling respondent Bailey's IDR benefits, which are benefits he is not entitled to receive.

18. By reason of the foregoing, CalPERS has met its burden of presenting documentation or other evidence establishing the right to correction under Government Code section 20160, subdivision (b). Pursuant to Government Code section 20164, CalPERS is entitled to collect, as overpayments, any IDR benefits paid to respondent Bailey on or after August 15, 2015. (Exhs. K, p. 15; 20E, pp. 17-18.) Respondent Bailey's argument that the doctrine of estoppel applies to bar CalPERS from cancelling his IDR benefits is without merit and not persuasive. As stated in its closing brief, equitable estoppel is not available against CalPERS when it would compel CalPERS to provide benefits that require it to act in excess of its statutory authority.

(Exh. K, pp. 14-15.) Here, CalPERS is not allowed by statute and case law to provide IDR benefits to members who are terminated for cause.

19. Respondent Bailey contends that CalPERS's mistaken approval of this IDR application was CalPERS's fault. That contention is neither persuasive nor supported by the evidence. CalPERS complied with its obligations. For an IDR application, the determination of a local service member's disability is required to be made by the employer. CalPERS, upon receipt of the employer's determination that the employee is disabled, is required to retire the member for disability. CalPERS was not required to undertake its own separate disability determination. Further, when an error is discovered, the law requires CalPERS to take action to correct the error, which is what CalPERS seeks to do in this case.

20. Based on the foregoing, respondent Bailey's appeal shall be denied. CalPERS shall be allowed to correct its mistaken approval of Bailey's IDR application, as set forth in the Order below. (Factual Findings 1-32; Legal Conclusions 1-19.)

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ORDER

Respondent William C. Bailey's appeal is denied. CalPERS is entitled under Government Code section 20160 to correct its mistake in approving respondent Bailey's application for industrial disability retirement. Further, CalPERS is entitled to collect any payments made to respondent Bailey on or after August 15, 2015, in accordance with Government Code section 20164.

DATE: February 4, 2020

DocuSigned by:
Erlinda Shrenger
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ERLINDA G. SHRENGER

Administrative Law Judge

Office of Administrative Hearings