

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 Industrial

Disability Retirement of:

MARILYN ROWE, Respondent

and

DEPARTMENT OF STATE HOSPITALS, PATTON, Respondent

Case No. 2019-0636

OAH No. 2019100977

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on March 2, 2020, in San Bernardino, California.

Charles Glauberman, Senior Attorney, represented complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS), State of California.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED March 26 2020

SMS

Marilyn Rowe, respondent¹, did not appear.

Department of State Hospitals, Patton, did not appear.

The record was closed and the matter submitted for decision on March 2, 2020.

DEFAULT

On proof of compliance with Government Code sections 11505 and 11509, this matter proceeded as a default pursuant to section 11520.

ISSUE

Did respondent make an error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect when she filed her disability retirement election application seven years after she service retired, which would require CalPERS to accept the late application?

SUMMARY

Respondent did not make an error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect when she filed her disability retirement election application seven years after she service retired. CalPERS is therefore barred from considering her late application.

¹ In this decision, unless otherwise noted, "respondent" refers to Ms. Rowe.

Background

1. Respondent was last employed with the Department of State Hospitals, Patton, as a registered nurse, on April 10, 2009. By virtue of her employment, respondent was, at the time of her last employment, a state safety member of CalPERS.

2. Respondent filed a service retirement election application, and service retired on June 30, 2011. At the time she filed her service retirement election application, respondent had not worked since April 10, 2009, due to an injury.

3. On May 4, 2018, respondent filed a disability retirement election application seeking an industrial disability retirement, retroactive to the commencement date of her service retirement in 2011. On June 20, 2018, CalPERS cancelled that application because proper information in order to evaluate the application had not been received. Respondent did not appeal the cancellation.

4. On July 1, 2018², respondent filed a second disability retirement election application seeking an industrial disability retirement, retroactive to the commencement date of her service retirement in 2011. CalPERS cancelled that application on October 4, 2018, because, although respondent – through her attorney – provided an explanation as to why the application was seven years late, it did not indicate that the delay was the result of mistake, inadvertence, surprise, or excusable neglect as required by law.

5. On May 13, 2019, respondent appealed CalPERS's cancellation of her July 1, 2018, disability retirement election application.

² CalPERS received the application on July 23, 2018.

6. On May 24, 2019, respondent's counsel notified CalPERS of her withdrawal from representation. In the letter, respondent's counsel provided respondent's address and directed all further correspondence be sent to that address. It is the same address that CalPERS had on file as respondent's address of record.

7. On October 1, 2019, complainant filed the statement of issues alleging that CalPERS was barred from accepting respondent's July 1, 2018, disability retirement election application because respondent's late filing was not due to an error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect.

8. OAH sent a notice of assigned hearing dates to respondent at her address of record on file with CalPERS on October 24, 2019. The notice of assigned hearing dates was never returned as "unclaimed" or "addressee unknown."

9. CalPERS sent a notice of hearing to respondent on October 30, 2019, to her address of record. The notice of hearing was never returned as "unclaimed" or "addressee unknown."

10. Nothing in any of the CalPERS member contact notes between 2011 and present indicate respondent has ever changed her address on file.

11. On March 2, 2020, the matter was called for hearing. Respondent was not present. Given that all correspondence in this matter had been sent to respondent's address of record, service was proper, and the matter proceeded as a default.

Evidence Presented at Hearing

12. Mari Cobbler testified at the hearing. Her testimony and documents submitted by complainant, are summarized as follows: Ms. Cobbler is an Appeals Analyst with CalPERS. Her duties include reviewing appeals and considering any

additional information provided by an appellant in connection with the appeal, along with the original determination made by CalPERS.

CalPERS is only permitted to receive a disability retirement election application from a CalPERS member. When a person service retires, they are no longer a member of CalPERS. If a person is on service retirement and applies for a disability retirement more than the four-month grace-period after they service retired, CalPERS reviews the file to determine whether they can accept the late application. The only way CalPERS can accept a late application is under the "mistake" statute, Government Code section 20160.

Ms. Cobbler reviewed respondent's file. She found that respondent had applied for a service retirement in June 2011. Respondent applied for disability retirement in 2018. In between that time, respondent had a long history of communication with CalPERS, including requesting a disability retirement election application and Publication 35, the Guide to Completing Disability Retirement, multiple times.

CalPERS sent a series of questions to respondent to ascertain why she did not file her application sooner to assist in the determination of whether her late filing was due to an error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect. There were no indications of such, and CalPERS determined it could not accept respondent's late application.

13. Complainant provided a Customer Touch Point Report (report) that contained every contact respondent had with CalPERS between 2011 and present. The report indicated the following:

- Respondent first inquired about filing a disability retirement election application on May 30, 2012. CalPERS sent Publication 35 to respondent.

- On July 25, 2012, respondent called CalPERS twice, and spoke to two different people, regarding filing for a disability retirement.
- On October 31, 2012, respondent contacted CalPERS regarding filing for a disability retirement.
- On March 23, 2013, respondent called CalPERS and requested a disability retirement election application again, and one was sent.
- On March 27, 2013, respondent called CalPERS regarding filing a disability retirement election application. CalPERS again sent respondent Publication 35.
- On July 26, 2013, respondent called CalPERS twice to ask questions about a disability retirement and obtain a "packet" for disability retirement. Publication 35 was sent again.
- During the month of September 2013, respondent made several inquiries about disability retirement estimates, trying to ascertain how much money she would receive if her service retirement was switched to disability.
- On October 2, 2013, the report reflects CalPERS mailed respondent a disability retirement estimate and again sent her Publication 35.
- On January 20, 2015, respondent called CalPERS and again requested a disability retirement estimate.
- Throughout 2016 and 2017, the notes reflect respondent spoke with a number of individuals regarding financial problems, health insurance

affordability problems, and possible wage garnishments. Respondent also tried to ascertain if she could obtain her retirement in some way other than a paper check or direct deposit.

- All throughout 2018, CalPERS sent respondent disability retirement estimates.

14. CalPERS received respondent's first disability retirement election application on May 9, 2018. On May 9, 2018, CalPERS sent out a request for additional information. On May 22, 2018, CalPERS sent respondent another letter granting her an extension to respond to its previous inquiry and also had several additional requests. Respondent did not provide the requested information.

15. On June 20, 2018, CalPERS advised respondent that her May 9, 2018, application for a disability retirement had been cancelled. Respondent did not appeal the cancellation.

16. On July 1, 2018, respondent filed a second disability retirement election application, requesting an industrial disability retirement retroactive to June 28, 2011. In the application respondent wrote that she had not been able to work since April 15, 2008, after an injury at work. CalPERS cancelled this application on October 4, 2018, because respondent did not provide evidence that her failure to timely submit a disability retirement election application was due to mistake, inadvertence, surprise, or excusable neglect.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The management and administration of CalPERS is vested in the Board of Administration (board). (Gov. Code, § 20120.)

2. Article XVI, section 17, subdivision (a), of the California Constitution provides in part:

The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

3. The board, subject to applicable law and regulations, shall determine and may modify benefits for service and disability retirement benefits. (Gov. Code, § 20123.)

4. The Constitution imposes on CalPERS a duty to "ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland v. Public Employees' Retirement System* (2002), 95 Cal.App.4th 29, 46 (cited with approval in *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 544.)

5. 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.

6. Government Code section 20160, provides:

(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.

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

7. Government Code section 20340 provides:

A person ceases to be a member:

(a) Upon retirement, except while participating in reduced worktime for partial service retirement.

(b) If he or she is paid his or her normal contributions, unless payment of contributions is the result of an election pursuant to paragraph (1) of subdivision (b) of Section

21070, or unless, after reducing the member's credited service by the service applicable to the contributions being withdrawn, the member meets the requirements of Section 21075 or if he or she is paid a portion of his or her normal contributions where more than one payment is made, or these contributions are held pursuant to Section 21500. For the purposes of this subdivision, deposit in the United States mail of a warrant drawn in favor of a member, addressed to the latest address of the member on file in the office of this system, electronic fund transfer to the person's bank, savings and loan association, or credit union account, constitutes payment to the person of the amount for which the warrant is drawn or electronically transferred.

(c) If the member has less than five years of service credit, or less than 10 years of service credit if the member is subject to Section 21076 or 21076.5, and no accumulated contributions in the retirement fund at the time of termination of service, unless the member establishes membership in the Judges' Retirement System, the Judges' Retirement System II, the Legislators' Retirement System, the State Teachers' Retirement System, or the University of California Retirement Plan, or establishes reciprocity with a reciprocal retirement system.

8. Government Code section 21152 provides:

Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

(b) The university if the member is an employee of the university.

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

9. Government Code section 21154 provides:

The application 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.

10. Government Code 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.

Burden and Standard of Proof

11. Government Code section 20160, subdivision (d), provides that the party seeking to avail themselves of the mistake/correction provisions set forth in Government Code section 20160 has the burden of showing right to correct the mistake. The standard of proof is a preponderance of the evidence. (Evid. Code, §§ 110, 115, 500.) In this case, respondent has the burden of proving that she is entitled to switch her service retirement to a disability retirement and require CalPERS to accept her late application.

Evaluation

12. While CalPERS has the authority to correct errors or omissions concerning service and disability retirements if the error or omission was borne out of mistake, inadvertence, surprise, or excusable neglect, in no event may CalPERS correct any mistake when the request comes more than six months after discovery of the mistake. (Gov. Code, § 21060, subd. (a).)

Mistake, inadvertence, surprise, or excusable neglect, are understood as each of those terms are used in Section 473 of the Code of Civil Procedure. Case law has also

interpreted each of those provisions. Mistake, for example, must be an honest mistake "where there are no elements of negligence, laxness or indifference." (*Security Truck Line v. City of Monterey* (1953) 117 Cal.App.2d 441, 445.) Mistake is not a grounds for relief when it is the result of "ignorance of the law . . . or unjustifiable negligence in discovering the law." (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206.) Surprise, as used in Section 473, refers to some condition or situation in which a party "is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." (*Ibid.*) Finally, as for inadvertence or neglect, a party's neglect "must have been such as might have been the act of a reasonably prudent person under the same circumstances." (*Ibid.*)

Respondent did not meet her burden. Respondent service retired in 2011. Respondent first inquired about filing a disability retirement election application on May 30, 2012, almost a year after she had already been service retired. By this time, respondent had already been service retired for a year and was no longer a member. Thus, even if she had filed her disability retirement election application at this time, CalPERS would still have only been permitted to accept it pursuant to the mistake provisions contained in Government Code section 21060 – the same provision at issue in this case. CalPERS immediately sent respondent Publication 35 in May 2012, which explained all rights and obligations concerning a disability retirement. In the ensuing six years, respondent communicated with CalPERS countless times regarding a variety of issues, including a disability retirement. Respondent requested and received multiple disability retirement estimates between 2011 and 2018. CalPERS also mailed Publication 35, which explained everything applicable to a disability retirement, to respondent four times. Nonetheless, respondent waited until 2018 to ultimately file the disability retirement election application at issue.

There is no evidence that respondent's failure to timely file her disability retirement election application was the result of mistake, inadvertence, surprise, or excusable neglect as required by Government Code section 21060. Even if there were justifiable grounds for the late-filed application, six months has passed since respondent discovered the mistake, which bars CalPERS from correcting the error. As a result, CalPERS is barred from accepting respondent's July 1, 2018, disability retirement election application, and properly cancelled it.

ORDER

Respondent Marilyn Rowe's appeal from CalPERS's cancellation of her July 1, 2018, disability retirement election application is dismissed. CalPERS acted properly in cancelling the application and is barred from accepting it under Government Code section 21060.

DATE: March 26, 2020

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Kimberly Belvedere
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KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings