

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:

JOHN E. MEDCALF, Respondent,

and CALIFORNIA HIGHWAY PATROL, Respondent.

Agency Case No. 2020-0202

OAH No. 2020070638

PROPOSED DECISION

Julie Cabos-Owen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on July 13, 2021. Keith Riddle (Complainant), Chief of the Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS), was represented by Dustin Ingraham, Staff Attorney. John E. Medcalf (Respondent) represented himself. There was no appearance on behalf of California Highway Patrol (CHP).

At the hearing, the ALJ was provided with Exhibits A, D, E, F, H, I, K, L, M, O, and P which all contained confidential information protected from disclosure to the public. Redaction of the documents to obscure this information was not practicable and

would not provide adequate privacy protection. To prevent the disclosure of confidential information, concurrent with the issuance of this Proposed Decision the ALJ issued a Protective Order providing that the Exhibits A, D, E, F, H, I, K, L, M, O, and P shall be placed under seal following their use in preparation of the Proposed Decision. These exhibits shall remain under seal and shall not be opened, except by order of the Board of Administration for CalPERS, by OAH, or by a reviewing court. A reviewing court, parties to this matter, their attorneys, or a government agency decision maker or designee under Government Code section 11517 may review the documents subject to this order provided that such documents are protected from release to the public.

Testimony and documents were received in evidence. The record closed and the matter was submitted for decision on July 13, 2021.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity as Chief of the Disability and Survivor Benefits Division of CalPERS.
2. Respondent was employed by the CHP as a State Traffic Officer. By virtue of his employment, Respondent was a state safety member of CalPERS.
3. In December 2016, Respondent suffered an injury/exacerbated injury while on the job, and he started medical treatment. In late 2017, he began exploring his retirement options.

4. Prior to applying for retirement, Respondent sought information and advice from CalPERS by calling customer service representatives several times, including the following instances.

5A. On January 23, 2018, Respondent called CalPERS with questions regarding Industrial Disability Retirement (IDR). A CalPERS agent directed him to the CalPERS website for the necessary forms and informed him of the application processing time frame.

5B. On that date, CalPERS also mailed "A Guide to Completing Your CalPERS Disability Retirement Election Application," also called "PUB-35," to Respondent. He reviewed that document.

6. PUB-35 informed members they could apply for service retirement pending IDR, noting:

You have the option to apply for a service retirement pending your disability or industrial disability retirement—if you qualify for a service retirement. This would allow you to receive a monthly service retirement allowance while awaiting the determination of your disability retirement application.

To apply for a "service pending" retirement, check the Service Pending Disability Retirement or Service Pending Industrial Disability Retirement box on the Disability Retirement Election Application form[.]

The service retirement portion of your application will most likely be processed before a determination is made for your disability or industrial disability retirement[.]

(Exhibit 16, p. PERS113.)

7. On May 4, 2018, Respondent called CalPERS with questions regarding service retirement (SR) and IDR. The representative explained the processes to submit applications for SR and IDR.

8A. On May 8, 2018, Respondent again called CalPERS with questions about disability retirement. He asked about the alternative options of applying for SR pending IDR versus applying first for SR and later applying for IDR. Regarding SR pending IDR, the representative advised Respondent his SR would continue while awaiting determination of his IDR, and "if [Respondent] does not meet the 21 days [he] can resubmit IDR [application.]" (Exhibit 15, p. PERS095.) The CalPERS representative did not indicate any time frame or deadline for IDR application resubmission.

8B. The "21 days" to which the CalPERS representative referred was CalPERS' internal deadline for submitting application-supporting documentation, as set forth in PUB-35. The 21-day deadline is not specified by statute or regulation. Although there is no established grace period for the 21-day deadline, CalPERS will periodically grant

extensions of time if a member contacts them and informs them of a delay in obtaining required documentation.¹

8C. To inform members of their responsibilities when applying for disability retirement, PUB-35 stated, in pertinent part:

- Make sure your employer, physician, and workers' compensation carrier (if any) complete and submit forms to CalPERS in a timely manner. Let them know you have a deadline to meet.
- You must submit a complete application package, which means you provide us all the required forms and other documentation we need to begin processing your request.
- If we receive an incomplete application package, you will only have 21 calendar days to provide us with any remaining documents—even if your employer or doctor is causing the delay.

¹ This Factual Finding was established by the testimony of Timothy Grigsby, Associate Governmental Program Analyst in CalPERS' Disability and Survivor Benefits Division, upon questioning by the ALJ.

- If you do not provide all the needed documents within 21 calendar days, CalPERS will cancel your application.
- If your application is canceled, and you believe you are still eligible for a disability retirement, you will need to submit a new application package to start the process over again.

(Exhibit 16, p. PERS110.)

8D. PUB-35 sets forth no time frame or deadline for re-submission of an IDR application after it is canceled.

9. On June 4, 2018, Respondent submitted an application for SR pending IDR (2018 application). The 2018 application included a completed application form, with a cover page on which Respondent checked the box for the application type "Service Pending Disability Retirement." In filing the 2018 application, Respondent claimed disability based on an orthopedic (back, left leg) condition.

10A. Respondent retired for service effective May 25, 2018, and he has been receiving his retirement allowance from that date.

10B. After his May 2018 SR, Respondent continued to receive medical treatment for his 2016 injury.

11A. On June 6, 2018, CalPERS mailed Respondent a letter requesting the following documents to process his application for IDR:

- Job description/duty statement. Obtain a copy of this from your employer.
- Physician's Report on Disability form. Provide your physician . . . this form along with the Physical Requirements form and job description (obtained from your employer/enclosed). The completed Physician's Report form should be based on a recent examination.
- Workers' Compensation Carrier Request form. Complete and sign page 1 of the form then forward the entire form to your carrier. They will complete page 2 and return the form to CalPERS with copies of your medical records.
- Authorization to Disclose Protected Health Information form.....Sign and return this form to CalPERS.
- Medical Records. All medical reports related to your disabling condition from at least one year prior to your last day of work to the present.

(Exhibit 8.)

11B. The June 6, 2018 letter also stated, "This will be your only written notification. If we do not receive these documents within 21 days from the date of this letter, your application will be canceled." (Exhibit 8.)

12. Respondent timely submitted all required documentation except the completed Workers' Compensation Carrier Request and Physician's Report on

Disability because he was not the entity tasked with completing those forms.
Respondent continued awaiting their transmittal.

13A. On June 19, 2018, CalPERS contacted Respondent by telephone and advised him that CalPERS had not yet received the Workers' Compensation Carrier Request and Physician's Report on Disability. CalPERS advised Respondent that CalPERS must receive these missing forms by July 4, 2018 to avoid cancellation of his application for IDR.

13B. Respondent told the CalPERS representative he was concerned about cancelation of his 2018 application if the remaining required documents were not submitted. Respondent was relieved when the CalPERS representative told him he just needed to resubmit his application with "a new page 1." (Respondent's testimony.) However, Respondent was instructed to make sure he had everything needed for his resubmission since that would be his "last opportunity." (Respondent's testimony.) Respondent was given no time frame or deadline for resubmission after cancelation.

14A. On July 5, 2018, CalPERS sent a letter to Respondent informing him CalPERS had cancelled his application for IDR because the requested information had not been received. The letter further stated, "If you have applied for or are currently receiving [SR], this action will not affect that benefit. [¶] 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." (Exhibit 10.)

14B. The July 5, 2018 letter did not specify a time frame or deadline within which to resubmit an IDR application. The July 5, 2018 letter also failed to notify Respondent that his CalPERS membership ceased when he began SR and that his post-

cancelation ability to apply for IDR would be affected by his SR status. (See Legal Conclusions, below.)

15. After July 5, 2018, and through June 2019, Respondent continued receiving medical treatment for his 2016 injury/exacerbated injury. On June 25, 2019, CalPERS finally received the required Physician's Report on Disability.

16. On July 31, 2019, Respondent contacted CalPERS, and a CalPERS agent confirmed receipt of the Physician's Report on Disability. The CalPERS agent advised Respondent that CalPERS had the original forms he submitted but that he would need to resubmit the IDR application.

17. On August 1, 2019, Respondent called CalPERS with questions regarding how to "re-open" his IDR application. CalPERS did not have a mechanism to re-open the 2018 application. Since the 2018 application had been canceled, CalPERS required a new application. Consequently, a CalPERS agent instructed Respondent to submit a complete IDR application package and advised him his signature may need to be notarized again. The agent informed Respondent the IDR application processing could take four to six months.

18. On August 5, 2019, Respondent resubmitted his application for IDR (2019 application). In resubmitting his application, Respondent used a photocopy of the completed 2018 application form, with a new cover page checking the box for the application type "Industrial Disability Retirement." Respondent's submission included all required documents, along with a letter specifying:

I previously submitted a [SR] Pending [IDR] application on May 29, 2018. The [SR] portion was approved, but the [IDR] portion was canceled due to the Physician's Report not

being ready within the required timeline. I was recently notified the Physician's Report was received by your Department on June 25, 2019; therefore, I am re-submitting my [IDR] application for your review and approval.

In addition to the Physician's Report which has already been received by your Department, I've attached copies of:

- Physical Requirements of Position/ California Highway Patrol 14 Critical Physical Activities
- Workers' Compensation Carrier Request form
- Authorization to Disclose Protected Health Information form
- Employer Information for Disability Retirement

(Exhibit 11.)

19A. On September 10, 2019, CalPERS sent a letter to acknowledging receipt of Respondent's "request to change from [SR] to disability retirement" and noting:

In general, a member cannot change their retirement status after they retire[.] An exception can be made if due to excusable inadvertence, oversight, or mistake of fact or law on the part of the claimant. However, no exception can be made for a mistake caused by the claimant's neglect of a legal duty, error in judgment, or change in the claimant's circumstances.

CalPERS' staff will be collecting more specific information to determine if a correctable mistake was made.

(Exhibit 13.)

19B. In the September 10, 2019 letter, CalPERS asked Respondent several questions and explained its need for additional information as follows:

You will need to forward medical evidence which establishes that you were continuously disabled from the date of your last day on pay status to the present. The Government Code provides this requirement when a disability application is submitted more than four months after separation from CalPERS employment, or at any time after the person's active membership ceases, such as with service retirement.

(Exhibit 13, emphasis added.)

19C. The language of the September 10, 2019 letter was confusing as it sought information about Respondent's continuing disability (under Government Code section 21154) and discussed submission of applications "after the person's active membership ceases, such as with service retirement." By 2019, Respondent was unable to apply for disability retirement under Government Code section 21154. (See Legal Conclusions, below.)

20A. On September 16, 2019, Respondent sent his written responses to CalPERS' inquiry. CalPERS' questions and Respondent's answers (as set forth in Exhibits 13 and 14) are noted verbatim below.

20B. Question 1:

You originally submitted an application on June 4, 2018 which was canceled due to CalPERS not receiving all the required forms/ information. Please explain why you did not comply with the notification informing you that your application would be canceled if the appropriate documents were not submitted.

Respondent's answer:

Unfortunately, my doctor's office did not complete the Physicians Report before my application was cancelled. I spoke to a CalPERS representative shortly before the application was cancelled, and I informed her I was concerned I wasn't going to meet the deadline. She informed me that all I needed to do was resubmit my application once the Physicians Report was completed.

20C. Question 2:

Did any physician instruct you to stop working in your former position because of permanent disability? 2a. If no, when did your doctor determine that you were incapacitated for your former job duties?

Respondent's answer:

Yes.

20D. Question 3:

Did you advise your employer that you had to retire because of a disability? 3a. If no, why did you not do so?

Respondent's answer:

Yes, please see enclosed copy of California Highway Patrol "Retirement" Memorandum submitted by me on May 18, 2018.

20E. Question 4:

How did you learn of the right to apply for reconsideration that is found under Government Code section 20160? 4a.

On what date did you become aware that you could submit a request to correct a mistake?

Respondent's answer:

My right to resubmit my [IDR] application for reconsideration was learned during a telephone conversation with one of your CalPERS representatives. I also read about the right to resubmit an application on page 4, in the 'A Guide to Completing Your CalPERS Disability Retirement Election Application' which states, "If an application is cancelled due to needed documents, and you believe you are still eligible for a disability retirement, you will need to submit a new application package to start the process over again." 4(a): June of 2018.

20F. Question 5:

Did you file a workers' compensation claim at any time? If so, you must send the Workers' Compensation Carrier Request form. . . to your workers' compensation carrier.

Respondent's answer:

Yes, I did. Also, the Workers' Compensation Carrier Request form has already been submitted and the CalPERS website confirms all medical records pertaining to my claims were received on 8/13/2019.

Also, my SCIF claims adjuster, Bryan Thorsell, has confirmed that all medical records concerning my injury were sent to CalPERS on 8/09/2019. These records, along with the Physicians Report received by CalPERS on June 25, 2019, contain the medical evidence which establishes that I was continuously disabled from my last day on pay status to the present.

21. In answering Question 4, Respondent did not indicate he had actually "learn[ed] of the right to apply for reconsideration that is found under Government Code section 20160." (Factual Finding 20E.) Rather, his answer speaks to his June 2018 understanding of his "right to resubmit [his IDR] application for reconsideration" after cancelation. Respondent's answer to Question 4 does not address when he discovered his right to correct his mistake under Government Code section 20160.

22A. In a November 26, 2019 letter, CalPERS notified Respondent it had reviewed the 2019 application he "submitted after [he] service retired," and it was denying his "request to change from service to disability retirement" because it could not accept his "late application." (Exhibit 4.) CalPERS noted Respondent's 2018 application process and the cancelation of the 2018 application due to missing documentation. CalPERS informed Respondent, "The evidence suggests you had knowledge of the application process and, therefore, were unable to establish that a correctable mistake was made." (*Ibid.*)

22B. CalPERS explained:

Government Code section 20160 may be used as authority to correct an error or omission due to mistake of fact or law, inadvertence, surprise, or excusable neglect on the part of a member. However, no exception can be made for a mistake caused by a member's failure to make an inquiry that would be made by a reasonable person in like or similar circumstances.

(Exhibit 4.)

22C. The November 2019 letter was the first written notice from CalPERS informing him that his application was considered "late." The November 2019 letter did not explain the impact of cancelation on Respondent's ability to reapply nor did it point to any time frame within which Respondent should have sought to reapply.

23A. In a December 18, 2019 letter, Respondent appealed CalPERS' refusal to accept his 2019 application and requested a hearing.

23B. In his appeal letter, Respondent asserted that his application was not "late," and he did not request a "change" from SR to IDR but intended from the outset to apply for IDR pending SR. Specifically, his letter stated:

You reference Government code section 20160 as the authority in determining whether or not an error or a mistake may be corrected. In regards to making an error or a mistake, I believe it is important to point out that I didn't decide to change my mind about my retirement status after I retired and request to switch from a [SR] to an [IDR]. My intention, from the beginning of this process, was to clearly seek approval for a [SR] PENDING [IDR] related to the "on-duty" injury I sustained on December 13, 2016. This was not an error or mistake on my part.

(Exhibit 5.)

23C. Respondent pointed out PUB-35 did not mention any time frame or deadline for submission of an IDR application or resubmission after an IDR application is canceled. Additionally, based on information provided by a CalPERS representative in June 2018, Respondent understood he just needed to re-submit his application "with a new page #1 when all of the necessary documents were completed." (Exhibit 5.) Respondent further explained his delayed resubmission as follows:

[The CalPERS representative] DID NOT MENTION A TIME FRAME OR A SPECIFIC DATE MY APPLICATION HAD TO BE RE-SUBMITTED BY.....Had I been properly informed that the re- submission of my application had to be within a

certain time frame, I absolutely would have made sure I complied with the deadline, especially knowing how important a disability retirement means to me and my family.

[I]n addition, my medical condition was on-going, and I was still being continuously treated by my physician for the on-duty related injury that had originally caused me to retire. I hadn't reached the point of permanent and stationary, and the status of my injury and possible permanent disability were still undetermined. Also, as of the date of this letter, my workers' comp case is still open and has not been settled.

(Exhibit 5.)

23D. Respondent further noted the first time he "was made aware of a 'time frame'" was in the September 10, 2019 letter from CalPERS, when additional medical evidence was requested which would only apply to the deadlines in Government Code section 21154. (See Factual Finding 19B.)

23E. Respondent concluded, "I've tried my very best to stay on top of things during this entire process. But, as a consequence of me being provided with incorrect information, I feel I'm being punished and that my disability retirement is being denied based on what I would consider a 'technicality.' Unfortunately, this technicality will have life-long implications to my family and me. If you would please re-evaluate your decision and take another look at all of the facts, it would be greatly appreciated."

(Exhibit 5.)

24. The Statement of Issues, filed on June 25, 2020, cites numerous statutes and includes the legal bases for CalPERS's refusal to accept Respondent's 2019 application. This was the first document to identify the legal bases for Respondent's 2019 application being deemed late and to explain the time frame to correct any mistakes.

25. The issue on appeal is whether Respondent made a mistake as a result of inadvertence, mistake, surprise, or excusable neglect correctable by Government Code section 20160, which would require CalPERS to accept his 2019 application for IDR.

26A. At hearing, CalPERS (through Mr. Grigsby's testimony) reiterated its grounds for refusal to accept Respondent's 2019 application and expounded on the legal bases for its determination as set forth in the Statement of Issues. Respondent also reiterated and explained his position.

26B. (1) At hearing, CalPERS expounded on its November 2019 asserted grounds for denial under Government Code section 20160. In the denial letter CalPERS noted Respondent's pre-cancellation failure to submit documents and his "failure to make an inquiry that would be made by a reasonable person in like or similar circumstances." (Exhibit 4.) At hearing, CalPERS focused on Respondent's change of status after cancellation of the 2018 application and his delay in resubmitting his application. CalPERS explained that it deemed Respondent's 2019 application to be a request to change his SR to IDR because Respondent was already on SR, and his 2018 application for IDR had been previously canceled. CalPERS determined it could not accept the 2019 application because Respondent was no longer a member of CalPERS. Under Government Code section 21154, applicants for disability retirement must be members of CalPERS. When Respondent initially applied for SR pending IDR, he was still a member of CalPERS. However, under Government Code section 20340, a

person's status as a CalPERS member ceases upon retirement. At the time of his 2019 application, Respondent was on SR, and therefore, was no longer a CalPERS member. Consequently, at the time of his 2019 application, Respondent was not qualified to apply for disability retirement, and his 2019 application was deemed "late."

(2) Respondent insisted that his application should not be construed as a request to change from SR to IDR, and that he never intended to apply for just SR. He maintained that his intention has always been to apply for IDR for his 2016 work injury. Respondent noted that he was placed on disability on June 26, 2016, and was never able to return to work, and that he chose SR pending IDR as an option since he was already 55 years old. Respondent understood if he chose SR pending IDR, he would receive a monthly allowance while awaiting CalPERS' determination on his IDR. After going through this hearing, Respondent now realizes that his SR selection affected his ability to resubmit his IDR application after cancelation, and he hopes he will not be penalized for taking SR to continue providing for his family.

(3) Respondent does not believe his application was late. He applied within the required time frame, and he submitted all the required documents over which he had control within the 21-day deadline. He had been told the Physician's Report on Disability would only take a couple of weeks to submit to CalPERS, and he kept checking weekly, but it was not timely submitted. Respondent noted that his application was canceled unilaterally by CalPERS and through no fault of his own. Furthermore, Respondent understood from CalPERS representatives' instructions that if his application was canceled, he would remain eligible to apply for IDR and just needed to resubmit his application materials to revive his IDR application. He was given no time frame or deadline for resubmission.

(4) CalPERS acknowledged its members can rely on information from CalPERS representatives and from CalPERS publications when going through the retirement process, including when filling out retirement applications. CalPERS also acknowledged that CalPERS' publications, including PUB-35, did not address any time frame from resubmission of a canceled disability retirement application. Nevertheless, Respondent's 2019 application was late by statutory definition. (See Legal Conclusion 2.)

26C. (1) After determining Respondent's 2019 application to be late, CalPERS analyzed whether it could accept Respondent's 2019 application as a result of a "correctable mistake" under Government Code section 20160. CalPERS maintains that Respondent's error or omission was failing to submit the required documentation for his 2018 IDR application.

(2) CalPERS's characterization of Respondent's error is imprecise and fails to recognize the complexity of his mistake. Respondent timely filed his 2018 IDR application and submitted documents over which he had control. His omission originated with his inability to prompt two outside entities to timely submit documents on his behalf. Alone, such an omission did not, by statute or regulation, cut off Respondent's rights, and it did not solely cause the predicament in which Respondent stands. Respondent's error or omission included misunderstanding the legal ramifications of allowing his 2018 application to be canceled without seeking an extension of time to submit the required documentation. Respondent was unaware he could have asked for, and CalPERS had the discretion to grant, an extension of the 21-day deadline. Such a course of action could have preserved his 2018 application. Unbeknownst to Respondent (and contrary to instructions of CalPERS representatives), upon cancelation of his 2018 application, Respondent's omission could not be

corrected by mere resubmission of the application and the required documentation. CalPERS's discretionary cancellation of Respondent's 2018 application created the legal demarcation after which further IDR applications were considered "late" (see Legal Conclusions, below) and prompted the need for Respondent to seek relief under Government Code section 20160. Nevertheless, Respondent's mistake was essentially his inaction on his 2018 application leading to its cancellation.

26D. (1) CalPERS asserts that Respondent's "discovery of the right to make the correction" of his mistake occurred on his receipt of the July 5, 2018 cancellation letter informing him that the IDR portion of his application had been canceled due to the missing documents. This asserted discovery date is incorrect.

(2) The July 5, 2018 letter provided Respondent no means to discover the right to correct his mistake. The July 2018 letter does not specifically explain Respondent's mistake, his right to correct it, how to correct it, and the time frame within which to correct it. As supported by Respondent's credible testimony, after reading the July 2018 letter, he was unaware of the entirety of his error and the means and time frame to correct it. The earliest Respondent was notified of any ability to correct a mistake was via CalPERS's September 10, 2019 letter which briefly mentioned "[a]n exception can be made" for "excusable inadvertence, oversight, or mistake of fact or law." However, the September 2019 letter again fails to fully explain Respondent's mistake and the impact of cancellation on Respondent's ability to resubmit his IDR application (i.e., that his prior SR and resulting non-membership in CalPERS rendered him ineligible to apply in 2019 for IDR). Additionally, given Respondent's confusion in responding to the September 2019 letter, Respondent did not discover his right to correct his mistake under Government Code section 20160 through the September 2019 letter. Arguably, Respondent's earliest discovery of his right to correct his mistake

was through the November 2019 letter citing Government Code section 21160. However, even that letter did not fully explain the impact of cancelation on Respondent's ability to reapply nor did it point to any time frame within which Respondent should have sought to reapply. The full explanation of Respondent's error and the course to correct that error was first set forth in the Statement of Issues.

LEGAL CONCLUSIONS

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) Thus, Respondent has the burden of establishing by a preponderance of the evidence that he is entitled to have CalPERS accept his 2019 application. Respondent has met his burden of proof.

2A. Government Code section 21154 requires that any application for disability retirement be made only: "(a) while the member is in state service, or (b) while the member . . . 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."

2B. Under Government Code section 21152, subdivision (d), an application for disability retirement may be made by "[t]he member or any person in his or her behalf." However, under Government Code section 20340, subdivision (a), "A person ceases to be member . . . [u]pon retirement."

2C. Although Respondent's 2018 application was made timely (i.e., prior to his retirement), CalPERS canceled that application and instructed Respondent to file a new application. Respondent's 2019 application was made after he had retired for service and was no longer a CalPERS member. Consequently, he was no longer allowed to submit any application for disability retirement, and his 2019 application was untimely.

2D. Prompted, in part, by statements in CalPERS' September 10, 2019 letter (see Factual Findings 19B and 19C), Respondent asserts his 2019 application is allowed under Government Code section 21154, subdivision (d), because he has been "physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application." However, that subdivision specifically refers to a "member," thus precluding Respondent.

2E. In *Button v. Bd. of Admin.* (1981) 122 Cal. App. 3d 730 (*Button*), the court analyzed the precursor statutes to Government Code sections 21152, 21154, and 20340 in similar circumstances. The *Button* court held:

Although appellant contends that subdivision (d) of section 21023 [precursor to 21152] applies to him, he is precluded by section 20390, subdivision (a) [precursor to 20340, subdivision (a)], which provides: "A person ceases to be member: (a) Upon retirement." A retiree is no longer a "member" of PERS. (*Barnwell v. City Council of Beverly Hills* (1947) 81 Cal.App.2d 189, 193, 183 P.2d 698.) Moreover, the time limitations of section 21024 [precursor to section 21154] reinforce this preclusion.

(*Button, supra*, 122 Cal.App.3d 730, 734–35.)

3A. While Government Code sections 21152, 21154, and 20340 “evidence a legislative intent that under normal circumstances retirees may not change their status,” Government Code section 20160 dictates that CalPERS’ “interests in administrative and actuarial efficiency are not of overriding importance so as to allow honest mistakes to remain uncorrected,” and “[t]hat section equally applies to post-retirement changes in status.” (*Button, supra*, at p. 737.) Consequently, although Respondent’s 2019 application was not filed in conformity with Government Code sections 21152, 21154, and 20140, Respondent is afforded the opportunity to seek relief from his mistake under Government Code section 20160.

3B. Government Code section 20160 provides, 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.

(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. [¶]

(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.

3C. (1) Government Code section 20160, subdivision (a)(2), references Code of Civil Procedure (CCP) section 473, which is generally used to grant civil relief when a judgment or some other action has been taken against someone due to that person's (or their attorney's) mistake, inadvertence, surprise, or excusable neglect.

(2) The case law regarding the propriety of relief granted under CCP section 473 has determined that "an honest mistake of law is a valid ground for relief when the legal problem posed 'is complex and debatable.'" (*McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d 352, 360.) The controlling factors in determining whether a mistake of law is excusable are the reasonableness of the misconception and the justifiability of the failure to determine the correct law. (*McCormick, supra*, at

p. 360; *Ontario v. Superior Court*(1970) 2 Cal.3d 335; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313.)

(3) The term "surprise," as used in CCP section 473 refers to a "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." (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611.) The phrase "excusable neglect," refers to that the type of neglect that might have been the act of a reasonably prudent person under the same circumstances. (*Davis v. Thayer* (1980) 113 Cal.App.3d 892.)

(4) However, not all mistakes or neglect will result in the granting of relief. "[I]gnorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief." (*Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 319.) Unless a party "shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business, his motion for relief under section 473 will be denied.....The law frowns upon setting aside default judgments resulting from inexcusable neglect." (*Davis v. Thayer, supra*, 113 Cal.App.3d 892, 907.) Although courts liberally provide relief to parties under CCP section 473, they do not act as guardians for persons who are grossly careless as to their own affairs. (*Luz v. Lopes* (1960) 55 Cal.2d. 54.)

(5) Relief under CCP section 473 is conditioned on the party seeking relief within a reasonable time, and relief may be denied when there is an unreasonable delay. (*Mercantile Collection Bureau v. Pinheiro* (1948) 84 Cal.App.2d 606.) Similarly, Government Code section 20160, subdivision (a), requires a member to "make the inquiry that would be made by a reasonable person in like or similar

circumstances,” and the failure to do so does not constitute a correctable “error or omission.”

3D. (1) In this case, Respondent failed to ensure timely submission of documents from outside entities to complete his 2018 application, or in the alternative, to seek an extension of time from CalPERS to submit those documents. By these omissions, he erroneously allowed CalPERS to cancel his 2018 application based on misunderstanding of the law. The inquiry at hand is whether this error or omission resulted from “excusable neglect” (that is, the type of neglect that might have been the act of a reasonably prudent person under the same circumstances), coupled with an honest mistake of the law (due to the complexity of the legal problem, the reasonableness of the misconception, and the justifiability of the failure to determine the correct law).

(2) This is not a case where Respondent was lax about his retirement. The record indicates he made numerous calls to CalPERS inquiring about various aspects of his retirement including during the SR pending IDR application process in 2018. He also reviewed PUB-35. In June 2018, Respondent was upset about the delayed submission of forms over which he had no control. However, he was unaware (and only learned at this administrative hearing) that the 21-day deadline was not statutory but rather an internally set time limit that could be extended by CalPERS. Based on CalPERS’s instructions, Respondent understood that if his application was canceled due to factors beyond his control, he could just resubmit his application. In reliance upon CalPERS’s instructions and the lack of any specified deadline for application resubmission (including in the July 2018 cancelation letter), Respondent reasonably believed that when his 2018 application was canceled, he could reapply later.

(3) Respondent was never told he could seek extension of the 21-day internally set deadline, which could have kept his 2018 application open and prevented cancelation and its subsequent legal impact. Respondent was unaware of the legal impact of the cancelation on his ability to later apply for IDR. Consequently, he waited for submission of the required forms by outside entities, and when they were not submitted, he was not prompted to quick action by CalPERS's cancelation, but continue to await submission of the documents before resubmitting his application.

(4) Respondent's failure to successfully prod outside entities to secure their timely submission of required documentation was an omission caused by factors beyond his control and, therefore, constituted "excusable neglect." Additionally, Respondent's failure to seek an extension of the 21-day deadline was caused by Respondent's unawareness of such an option and, therefore, constituted excusable neglect. Furthermore, Respondent's allowing CalPERS to cancel his 2018 application, believing he could later resubmit it, resulted from his honest mistake of the law, prompted by CalPERS' statements and Respondent's understandable inability to determine and comprehend the complexity of his resulting legal circumstances (i.e., that cancelation would preclude future applications because he was a non-member by virtue of his SR).

(5) Contrary to CalPERS' assertion, there was no failure by Respondent "to make the inquiry that would be made by a reasonable person in like or similar circumstances." Given the foregoing, Respondent's error or omissions were caused by a combination of excusable neglect and an honest mistake of the law which would entitle him to relief under Government Code section 20160, as long as his request to correct the error or omission was made "within a reasonable time after discovery of

the right to make the correction, [not exceeding] six months after discovery of this right." (Gov. Code, § 20160, subd. (a)(1).)

3E. (1) CalPERS asserts that Respondent had only six months from the July 5, 2018 cancelation letter to remedy his mistake (i.e., by January 5, 2019). Since Respondent did not submit his 2019 application until a year and one month after the cancelation letter (i.e., August 5, 2019), CalPERS refused to accept Respondent's 2019 application. However, as noted in Factual Finding 26, CalPERS's asserted discovery date is incorrect.

(2) Respondent did not discover his right to correct his mistake in the July 5, 2018 letter. In July 2018, Respondent reasonably believed he could re-submit his application during the period he was a retired member and that the resubmitted application would re-open his original application. Respondent was unaware of his mistake of law, much less the right to make correction of his mistake, until CalPERS's refusal to accept his 2019 application. By the time Respondent discovered his specific mistake (in November 2019 at the earliest), he had already requested that CalPERS allow him to remedy it. Consequently, Respondent's request to correct his mistake was made within a reasonable time after discovery of the right to make the correction.

4A. Courts have provided relief from mistake under similar circumstances, allowing retirees to change their retirement status years after electing a different option. (*Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559 (*Rodie*); *Button, supra*.) In *Rodie*, a police chief knew that he was eligible for either disability or service status but elected disability retirement believing he would receive larger payments. Years later, he learned he was mistaken and sought to change to service retirement. In *Button*, a district attorney's investigator was initially unaware he may have been eligible for disability retirement and elected service retirement. Years later, he sought

to change to disability retirement. In both cases, the courts applied the precursor statute to Government Code section 20160 and allowed the retirees to correct their mistakes and to change their retirement status.

4B. In rendering their decisions, the *Rodie* and *Button* courts pointed to the established policy requiring liberal construction of pension statutes in favor of the applicant. (*Rodie, supra*, at p. 565; *Button, supra*, at p. 737.) Such a liberal interpretation is essential “to effectuate, rather than defeat, [the] purpose of providing benefits for the employee[.]” (*Button, supra*, at p. 737.) The *Rodie* court noted, “We can discern no reason for treating an employee’s mistaken choice between two types of retirement to which he is entitled by reason of past services differently from any other mistake depriving him of benefits to which he is fairly entitled.” (*Rodie, supra*, at p. 566.) Additionally, the *Button* court noted, “In light of the clear legislative intent to compensate in a certain manner those employees who are disabled at the time they retire[,] and given the express language of section 20180 [precursor the section 20160], it is unreasonable to attribute to the Legislature an intention to preclude an otherwise eligible employee from receiving a disability pension on the sole ground that his disabling condition was not diagnosed as such at the time of retirement.” (*Button, supra*, at pp. 737-738.)

4C. Here, unlike *Rodie* and *Button*, Respondent is not seeking to change his initial election of IDR, only to have CalPERS honor it. As set forth in detail above, Respondent timely submitted his application in 2018, and he chose to take SR pending a determination of his IDR application. Through excusable neglect and an honest mistake of the law, Respondent’s 2018 application was canceled, and his 2019 IDR application was precluded. CalPERS, not Respondent, chose to cancel his 2018 application due to internal procedures. CalPERS could have extended the 21-day

internally set deadline since there was no statutory preclusion. CalPERS could have informed Respondent that cancelation would render him ineligible to reapply for IDR because he was service retired and no longer a CalPERS member. CalPERS could have warned Respondent that his only remedy was to seek relief under Government Code section 20160. CalPERS took none of these actions. If not for the delayed submission of documents outside Respondent's control and CalPERS's discretionary cancelation of his application, Respondent's IDR application could have reached a determination on its merits. Here, similar to *Rodie* and *Button*, the broad interpretation of Government Code section 20160 is essential "to effectuate, rather than defeat, [the] purpose of providing benefits for the employee," and to avoid barring an employee from receiving a disability pension to which he may be entitled.

5A. To support denial of Respondent's appeal, CalPERS submitted a precedential decision, *In the Matter of the Appeal of Decreased Level of Retirement Allowance of Harvey H. Henderson* (1998) Case No. 1558, OAH No. L-1997120250, Precedential Board Decision No. 98-02 (*Henderson*). However, this precedent is inapposite and provides no grounds to bar correction of Respondent's mistake. In *Henderson* CalPERS ordered the return of erroneous overpayments to a retired employee, despite the employee's pre-retirement reliance on the erroneous assurances of CalPERS representatives that he was entitled to the payment amounts. *Henderson* is distinguishable from the case at hand because Respondent may indeed be entitled to disability retirement if his application proceeds to review and determination on the merits.

5B. To support denial of Respondent's appeal, CalPERS also submitted two non-precedential cases as argument for CalPERS's position: *In the Matter of Accepting the Late Application of Sigrid Lintag*, Case No. 2017-0315, OAH No. 2017080012.1

(Lintag); and *In the Matter of Accepting the Late Application of Steven C. Erickson*, Case No. 2018-0508, OAH No. 2018090241 (*Erickson*). These cases are nonbinding, unpersuasive, and provide insufficient grounds to bar correction of Respondent's mistake. In *Lintag* and *Erickson*, CalPERS refused to grant employees relief under Government Code section 20160 and to accept their disability retirement applications when the employees did not submit disability retirement applications until years after they had retired for service. Unlike *Lintag* and *Erickson*, Respondent elected IDR prior to his retirement date, and that application was pending when he took SR. This was not a case where Respondent later changed his mind. In this case, it would be a miscarriage of justice to bar the acceptance and review of Respondent's IDR application.

6. Given the foregoing, Respondent should be allowed to correct his mistake, and CalPERS should accept and subsequently consider Respondent's application for IDR to determine if Respondent was disabled when he retired.

//

//

//

//

//

//

//

//

ORDER

The appeal of Respondent, John E. Medcalf, is granted. CalPERS shall accept as timely and consider Respondent's application for industrial disability retirement to determine if Respondent was disabled when he retired and entitled to a change in his retirement status.

DATE: 08/02/2021

Julie Cabos-Owen

JULIE CABOS-OWEN

Administrative Law Judge

Office of Administrative Hearings