

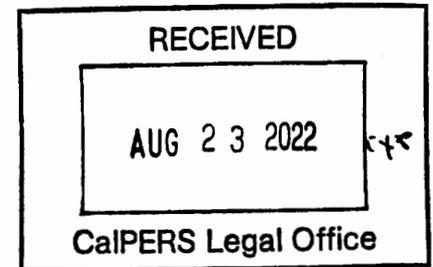
**ATTACHMENT C**

**RESPONDENT'S ARGUMENT**



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RE: In the Matter of the Appeal of Accepting the Late Application for Industrial Disability Retirement of THOMAS R. HAMILTON, Respondent, and CITY OF PALO ALTO, Respondent  
 Ref. No. 2021-0679

## RESPONDENT'S ARGUMENT

### I. INTRODUCTION

Respondent Thomas R. Hamilton sustained an injury to his right knee during the course and scope of his employment as a firefighter for the City of Palo Alto Fire Department on February 7, 2018. As a result of this injury, he became permanently and substantially incapacitated from the performance of his usual job duties.

Hamilton remained continuously disabled from the date of discontinuance of service to the time he applied for industrial disability retirement with the California Public Employees' Retirement System ("CalPERS"). As such, his application for industrial disability retirement was timely. It was only through mistake, inadvertence, surprise, or excusable neglect that he initially filed for a service retirement instead of an industrial disability retirement. After realizing this error, he sought to correct it by filing for an industrial disability retirement. Additionally, the statute of limitations for filing his application for industrial disability retirement was equitably tolled when he filed a workers' compensation claim for the same disabling injury. For these reasons, CalPERS must accept Hamilton's application for industrial disability retirement.

### II. ISSUE PRESENTED

1. **SHOULD CALPERS ACCEPT HAMILTON'S APPLICATION FOR INDUSTRIAL DISABILITY RETIREMENT?**

### III. STATEMENT OF FACTS

While employed as a firefighter for the City of Palo Alto, Hamilton sustained a work-related injury to his right knee on February 8, 2018, for which he filed a workers' compensation

claim. On May 2, 2018, he underwent arthroscopic surgery and was temporarily taken off work during his recovery.

Uncertain if he would be able to return to work as a firefighter, Hamilton visited the San Jose Regional Office of CalPERS on May 17, 2018 and requested information regarding retirement, including a retirement estimate request.

On October 22, 2018, Hamilton again visited the San Jose Regional Office of CalPERS and was again given information regarding retirement. Specifically, he was told to return to the San Jose Regional Office when he was ready to submit his retirement application, and the staff would assist him in completing it correctly.

On January 8, 2020, Hamilton underwent partial knee replacement surgery. Following surgery, he was able to return to work as a fire inspector in a temporary modified duty assignment. This temporary assignment ended as of June 30, 2020.

On or about July 26, 2020, Hamilton submitted a service retirement application with CalPERS online, with an effective retirement date of August 1, 2020. At the time, no doctor had definitively concluded that he was permanently and substantially incapacitated from the performance of his usual duties.

Shortly thereafter on July 29, 2020, Hamilton called Vanda McCauley at the City of Palo Alto. He was advised by Ms. McCauley to file a service pending industrial disability retirement application, as the City agreed that he was permanently restricted from performing his regular duties as a firefighter.

On August 2, 2020, CalPERS sent a letter to Hamilton advising him that his service retirement had been processed, and that he still had the right to apply for an industrial disability retirement. The following day, on August 3, 2020, Hamilton called CalPERS and indicated that he wanted to change his service retirement to an industrial disability retirement. CalPERS advised Hamilton that he should submit his application for industrial disability retirement when he had the necessary supporting documents to do so, including a medical report establishing permanent incapacity.

Following August 3, 2020, Hamilton attempted to visit the San Jose Regional Office of CalPERS on several occasions, as he was previously advised to do, in order to obtain assistance in completing an industrial disability retirement application. However, due to the COVID-19 pandemic, the CalPERS Regional Offices were closed to the public, and Hamilton was unable to meet with anyone in person.

On September 23, 2020, Hamilton was evaluated by James B. Stark, M.D. In a report dated September 26, 2020 (received by Hamilton on October 2, 2020), Dr. Stark concluded that “[i]t is not too early to initiate industrial disability retirement proceedings. I do not anticipate measurable improvement in the foreseeable future to the extent that Mr. Hamilton could return to fire suppression activities.” This was the first time any medical doctor definitively established

that Hamilton was permanently and substantially incapacitated from the performance of his usual duties as a firefighter.

On March 19, 2021, Hamilton filed an industrial disability retirement application with CalPERS.

On June 22, 2021, CalPERS refused to accept Hamilton's application for industrial disability retirement. On July 16, 2021, Hamilton appealed the rejection of his application for industrial disability retirement.

On August 3, 2021, California Speaker pro Tempore wrote a letter to CalPERS urging it to meet its duties to its members, including Hamilton, and specifically noting the delays caused by the COVID-19 pandemic.

#### IV. LEGAL ARGUMENT

##### A. CALPERS MUST ACCEPT HAMILTON'S APPLICATION FOR INDUSTRIAL DISABILITY RETIREMENT BECAUSE HE WAS CONTINUOUSLY DISABLED FROM THE DATE OF DISCONTINUANCE OF STATE SERVICE TO THE TIME OF HIS APPLICATION.

An application for industrial disability retirement "shall 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." Cal. Gov't Code § 21154.

The four separate instances set forth in section 21154 "each independently state a time within which an application may be filed." *Piscioneri v. City of Ontario* (2002) 95 Cal. App. 4th 1037, 1044. "If the employee is able to prove that he or she has been continuously disabled from the date of discontinuance of state service to the time of the application for disability retirement, his application is timely under clause (d) of section 21154." *Id.*

In this case, it is undisputed that Hamilton was continuously disabled from the date of discontinuance of service to the time of his application for industrial disability retirement. He last worked for the City of Palo Alto on June 30, 2020, when his temporary accommodation became unavailable. His state service was discontinued as of his retirement date of August 1, 2020. From August 1, 2020 through the date he filed his industrial disability retirement application, March 19, 2021, Hamilton remained continuously disabled. At no point was he released to return to work in any capacity by any physician, and indeed, Dr. Stark opined as of September 23, 2020 that he did "not anticipate measurable improvement in the foreseeable future to the extent that Mr. Hamilton could return to fire suppression activities."

Because Hamilton was continuously physically incapacitated to perform duties from August 1, 2020 (the date of discontinuance of state service) through March 19, 2021 (the date of

his application for industrial disability retirement). his application was timely and must be accepted by CalPERS.

**B. CALPERS MUST ACCEPT HAMILTON'S APPLICATION FOR INDUSTRIAL DISABILITY RETIREMENT DUE TO MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLIGENCE.**

“[T] 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.”

Cal. Gov't Code § 20160(a)

Section 20160 is available to correct a retired member's election to retire for service rather than disability, where such election results from mistake, inadvertence, surprise, or excusable neglect. *Rodie v. Bd. of Admin.* (1981) 115 Cal. App. 3d 559, 567 (construing former section 20180). In *Rodie*, the employee knew when he retired that he was eligible for both a service retirement and a disability retirement, and he applied for a disability retirement. *Id.* at 563. The following year he applied for and was awarded federal disability benefits only to discover that his disability pension benefits were then reduced correspondingly. *Id.* Because there would be no such reduction if he were receiving a service pension, he applied for a status change. *Id.* The court held that his initial election to pursue disability retirement benefits was a mistake, and allowed the change to a service retirement under section 20180 (the predecessor to section 20160). *Id.* at 567-70.

Similarly, in *Button v. Bd. of Admin* (1981) 122 Cal. App. 3d 730, the retiree was allowed to pursue a change in his retirement from service to disability based on a mistake of fact under section 20180. *Id.* at 739-40. In *Button*, the employee initially elected to receive a service retirement, as he was not aware of any disability. *Id.* at 733. He subsequently suffered a heart attack, and petitioned to convert his service retirement to a disability retirement. *Id.* at 733-34. Noting that “pension statutes are to be liberally interpreted in favor of the applicant so as to effectuate, rather than defeat, their avowed purpose of providing *benefits* for the employee” (*Id.* at 737, citing *Campbell v. Bd. of Admin* (1980) 103 Cal. App. 3d 565, 571 [emphasis in original]), the Court in *Button* held that the employee had established a mistake of fact and should be allowed to pursue a change from service to disability retirement. *Id.*

In this case, the evidence establishes that Hamilton's failure to initially apply for an industrial disability retirement was the result of mistake, inadvertence, surprise, or excusable neglect. After sustaining a work-related injury, he visited the San Jose Regional Office of CalPERS on multiple occasions requesting assistance regarding retirement. He was advised to return to the Regional Office when he was ready to file his application, but was unable to do so because it was closed due to the COVID-19 pandemic.

Furthermore, shortly after mistakenly filing for a service retirement, Hamilton called CalPERS and indicated that he wanted to change his service retirement to an industrial disability retirement. Unfortunately, he was given the incorrect advice that he should submit his application for industrial disability retirement only when he had the necessary supporting documents to do so, including a medical report establishing permanent incapacity.

Hamilton first obtained medical evidence establishing his permanent incapacity on October 2, 2020, when he received the report of Dr. Stark dated September 26, 2020. He filed his application for industrial disability retirement within six months of this date, on March 19, 2021.

Based on this evidence, it is clear that Hamilton's failure to initially file for an industrial disability retirement was the result of mistake, inadvertence, surprise, or excusable neglect. Upon learning of this mistake, he immediately notified CalPERS of his intention to change from service retirement to industrial disability retirement. Additionally, within six months of obtaining evidence supporting his right to an industrial disability retirement, he filed an industrial disability retirement application. Accordingly, CalPERS must accept Hamilton's industrial disability retirement application pursuant to Government Code section 20160.

**C. CALPERS MUST ACCEPT HAMILTON'S APPLICATION FOR INDUSTRIAL DISABILITY RETIREMENT BECAUSE THE STATUTE OF LIMITATIONS FOR FILING WAS EQUITABLY TOLLED.**

The doctrine of equitable tolling applies when "an injured person has several legal remedies and, reasonably and in good faith, pursues one." *Elkins v. Derby* (1974) 12 Cal. 3d 410, 414. "The application of the doctrine requires timely notice to defendant of the claims plaintiff has against him, lack of prejudice to the defendant in gathering defense evidence, and reasonable and good faith conduct on the part of the plaintiff." *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal. App. 3d 834, 847, n. 3.

In *Collier v. City of Pasadena* (1983) 142 Cal. App. 3d 917, the Court of Appeal held that filing a workers' compensation claim equitably tolled the statute of limitations for filing a disability pension claim arising out of the same disabling injury. *Id.* at 919. In *Collier*, a firefighter sustained a work-related injury and filed a workers' compensation claim shortly thereafter. *Id.* at 920. The city contested the workers' compensation claim, and litigation ensued. *Id.* Eventually, the workers' compensation claim settled, and the employee subsequently attempted to file an industrial disability retirement application. *Id.* at 921. The application was initially rejected based on the assertion that it had not been timely filed. *Id.*

The Court held that the doctrine of equitable tolling applied to the employee's claim. First, it noted that the employee provided timely notice to the City of his employment-related disability when he filed his workers' compensation claim, and the evidence relevant to his workers' compensation claim was nearly identical to that germane to the disability retirement claim. *Id.* at 927, 928-29. Second, the Court concluded that the City was not prejudiced in gathering evidence to contest the disability retirement claim because the essential factual elements of the two causes of action were nearly identical. *Id.* at 929. Finally, the Court held that the employee acted reasonably and in good faith because he filed his disability retirement application within a reasonable time after the period of tolling concluded. *Id.* at 931. Overall, the Court in *Collier* held that the filing of the employee's workers' compensation claim equitably tolled the statute of limitations for filing an industrial disability retirement application.

The facts in this case are no different. Hamilton filed a workers' compensation claim shortly after sustaining his work-related injury, which gave the employer notice of his employment-related disability. Additionally, the City was not prejudiced in gathering evidence to contest his disability retirement claim, and in fact, it has acknowledged that Hamilton is permanently restricted from performing his regular duties and will not object to CalPERS accepting his application for industrial disability retirement. Finally, Hamilton has acted reasonably and in good faith by attempting to meet with CalPERS to file his application for industrial disability retirement (which he was unable to do due to the pandemic), and by filing his application within a reasonable timeframe after obtaining evidence that he is permanently incapacitated from performing his usual duties. Based on these facts, equitable tolling requires CalPERS to accept Hamilton's industrial disability retirement application.

## V. CONCLUSION

For the foregoing reasons, CalPERS must accept Hamilton's application for industrial disability retirement. He was continuously disabled from the date of discontinuance of service to the time of his application; any alleged defect in filing was due to mistake, inadvertence, surprise, or excusable neglect; and, the statute of limitations for filing his application for industrial disability retirement was equitably tolled.

Very truly yours,



Kenneth M. Sheppard

:kms

cc:

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