

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 Industrial
Disability Retirement Application of:

GLORIA L. FOSTER,

Respondent

and

DEPARTMENT OF CORRECTIONS,
CENTRAL CALIFORNIA WOMEN'S
FACILITY,

Respondent.

Case No. 2016-0804

OAH No. 2016090342

PROPOSED DECISION

Administrative Law Judge Tiffany L. King, Office of Administrative Hearings, State of California, heard this matter on November 16, 2016, in Fresno, California.

Austa Wakily, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Gloria Foster (respondent) was present and represented herself.

Melissa Wilkerson, Classification and Pay Analyst, appeared on behalf of California Department of Corrections and Rehabilitation (CDCR), Central California Women's Facility (CCWF).¹

Evidence was received, the record was closed, and the matter was submitted on November 16, 2016.

¹ The Statement of Issues lists the employer respondent as "Department of Corrections Central California Women's Facility." At hearing, Ms. Wilkerson confirmed the correct name is California Department of Corrections and Rehabilitation, Central California Women's Facility.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 12/16 2016
Det. G. Wooten

FACTUAL FINDINGS

1. Respondent began her state career at the California Department of Social Services, where she worked from April 1984 to approximately July 1989. In July 1989, she was hired as a Correctional Officer (CO) by CDCR. After completing the POST² academy, respondent worked at California State Prison, Corcoran (Corcoran) for six months. In 1990, she laterally transferred to an Office Assistant position at Corcoran. Approximately six months later, she promoted to an Office Technician position at CCWF. Respondent was an Office Technician for approximately six years. She then promoted to Personnel Specialist, and three years later promoted to Personnel Supervisor. She held the position of Personnel Supervisor for nine years.

2. As a Personnel Specialist and Personnel Supervisor, respondent was familiar with the various benefits offered to state employees, including disability retirement, and referred employees to CalPERS for further information. Over the years, she attended multiple trainings offered by CalPERS in which the different types of retirement options were discussed, including disability retirement. The information covered at such trainings is included in CalPERS' Publication 35. "A Guide to Completing Your CalPERS Disability Retirement Election Application." Respondent also received a copy of Publication 35 in February 2009, when she inquired about the differences between service and disability retirement.

3. In 2008 or 2009, respondent accepted a Service Manager position with CDCR's Board of Parole. In 2014, her position was eliminated. Thereafter, respondent lateralled to a CO position, but had to complete the POST academy again. After successfully completing training, respondent was assigned as a CO to CCWF in September 2014. On October 30, 2014, respondent was assaulted by an inmate which caused her psychological injury. Respondent did not return to work after October 30, 2014.

4. Kathleen Noain is the Return-to-Work Coordinator at CCWF. She worked alongside respondent for several years when respondent was in the Personnel Unit. On October 31, 2014, Ms. Noain learned respondent had been assaulted by an inmate. She called respondent at her home to check on her. They also discussed the opening of a workers' compensation claim.

5. Respondent met with Ms. Noain in person on November 3, 2014, at which time she submitted paperwork for her workers' compensation claim. On the same date, Ms. Noain mailed a letter to respondent offering her Early Intervention Services pursuant to California Code of Regulations, title 15, section 3426. The letter discussed the Early Intervention Program, which is operated by a third party contractor and designed to help employees navigate the workers' compensation process.

² POST stands for Peace Officer Standards Training.

6. On November 17, 2014, Ms. Noain spoke with respondent by telephone and advised that a letter with a description of options available to respondent would be mailed shortly (options letter). That afternoon, Ms. Noain mailed the options letter to respondent. However, the letter was returned as undeliverable on December 1, 2014. On December 2, 2014, Ms. Noain re-mailed the options letter to respondent. The second letter was not returned. The options letter provided, in pertinent part, the following options:

3. Separation from State Service

a. Disability Retirement (DR) or Industrial Disability Retirement (IDR): If you are unable to return to work due to your permanent functional limitations, you may apply for DR or IDR with the California Public Employees' Retirement System (CalPERS). DR and IDR are considered a temporary separation from state service. Health benefits are available through CalPERS while you are on retirement status. If, after you are approved for DR or IDR and, at a later date, it is determined you are able to return to work as a Correctional Officer, you will have mandatory rights to reinstatement to the Correctional Officer classification.

b. Service Retirement: If you are eligible, you may apply for service retirement with CalPERS. A service retirement is a permanent separation from state service. Health benefits are available through CalPERS while you are on retirement. You would retain permissive reinstatement rights to state service.

c. Voluntary Resignation: You may choose to voluntarily resign from state service. You will retain permissive reinstatement rights. You may be able to purchase health, dental and vision benefits.

7. A checklist form, which allowed respondent to mark which options she wished to discuss with CDCR and return to CCWF, was provided with the options letter. Respondent never returned the completed form to CCWF.

8. Respondent was treated by Kathleen Baron, M.D., and Greg Hirokawa, Ph.D., a clinical psychologist, for injuries related to her workers' compensation claim. On November 6, 2014, Dr. Baron did not believe respondent was capable of working at that time and recommended respondent find another type of job. On December 8, 2014, Dr. Hirokawa diagnosed respondent with adjustment disorder with anxiety and depressed mood, opining that respondent's conditions primarily stemmed from her fear of being assaulted by inmates.

Dr. Hirokawa suggested retirement as an option to respondent as he did not believe it was likely she would be able to return to her usual and customary duties as a CO.³

9. On December 12, 2014, respondent signed and submitted an application for service retirement. On March 2, 2015, CalPERS approved respondent's service retirement, with an effective date of December 15, 2014. She has been receiving her retirement allowance as of that date.

10. The State Compensation Insurance Fund (SCIF), the state's workers' compensation provider, initially denied respondent's workers' compensation claim in January 2015. It ultimately accepted her claim in March 2015.

11. On March 18, 2015, Michael S. Kesselman, Ph.D., a clinical psychologist, performed a qualified medical evaluation (QME) of respondent. In a report, also dated March 18, 2015, Dr. Kesselman diagnosed respondent with anxiety disorder not otherwise specified. He apportioned respondent's impairment as 90 percent industrial and 10 percent non-work related.

12. On February 8, 2016, respondent submitted an application for industrial disability retirement on the basis of a psychological condition, with an effective retirement date of December 15, 2014.

13. By separate letters dated March 15, 2016, CalPERS requested additional information from respondent and CCWF. CCWF responded by letter dated April 4, 2016. In its letter, CCWF confirmed that, at the time of her service retirement, respondent never indicated she was retiring because she was too disabled to continue working. CCWF also confirmed that respondent was provided information regarding disability retirement before her separation.

14. In a letter to CalPERS, dated April 19, 2016, respondent asserted that Drs. Baron and Hirokawa advised her to "take [her] pension and find other type of employment." She further asserted she did not inquire about disability retirement prior to retiring for service because her workers' compensation claim had not been approved yet.

³ Drs. Baron and Hirokawa did not testify at hearing. Their opinions were summarized in the qualified medical evaluation (QME) report, dated March 18, 2015, which is discussed later in this Decision. The QME report was received as administrative hearsay and considered to the extent permitted under Government Code section 11513, subdivision (d). That subdivision provides, in relevant part:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

15. Thereafter, CalPERS determined that: (1) respondent's membership with CalPERS ceased on December 15, 2014, pursuant to Government Code section 20340; (2) her application for industrial disability retirement was not timely submitted pursuant to Government Code section 21154; and (3) respondent did not meet the criteria under Government Code section 20160 to allow for the correction of a mistake. By letter dated May 23, 2016, CalPERS notified respondent and CDCR of its determination and advised them of their appeal rights. Respondent timely appealed and requested an administrative hearing by letter dated June 23, 2016.

16. CalPERS filed a Statement of Issues on September 7, 2016, which indicated that the appeal is limited to the issue of "whether respondent made a mistake as a result of inadvertence, mistake, surprise, or excusable neglect correctable by Government Code section 20160, which would entitle her to submit an application for industrial disability retirement while receiving service retirement benefits."

Respondent's Testimony

17. Respondent testified that she did not apply for disability retirement when she applied for service retirement because her workers' compensation claim had not been accepted yet. She also asserted she was "not in [her] right mind" at that time, noting that her son experienced kidney failure approximately one month after respondent filed for service retirement. Finally, respondent testified that she did not file because she believed CDCR had filed for disability retirement on her behalf.

18. Respondent testified she never received the options letter from CCWF, although she had been expecting it after her November 17, 2014 telephone discussion with Ms. Noain. Regarding her workers' compensation claim, which SCIF accepted in March 2015, respondent asserted she did not learn her claim had been accepted until "much later," though she could not specify when.

19. Respondent understood that workers' compensation and state employee retirement were two different systems, operated by SCIF and PERS, respectively. However, she believed Drs. Baron and Hirokawa had shared information concerning her mental condition with CDCR and SCIF, and that CDCR would act on such information, i.e., by filing for disability retirement on her behalf. However, respondent never received any communication from CDCR regarding a disability retirement application, and she took no affirmative action to confirm that CDCR had so filed on her behalf. Respondent did not think it was strange that she had received nothing from CDCR because she knew the disability retirement process "takes a long time."

20. In November 2015, respondent's brother asked her if she was certain CDCR had filed for disability retirement on her behalf. Her brother advised her to follow up on the matter. After learning that CDCR had not filed for disability retirement on her behalf,

respondent submitted her application for industrial disability retirement on February 8, 2016.⁴

Discussion

21. In this case, respondent had the mistaken belief that she could not apply for CalPERS disability retirement while her workers' compensation claim was pending acceptance. Respondent's subjective belief aside, neither CalPERS nor CDCR misled her in this regard. Respondent was provided notice of her right to apply for disability retirement as early as November 17, 2014. Moreover, she was knowledgeable of the disability retirement option from her prior experience in personnel, including several CalPERS trainings she attended which specifically discussed the subject. Respondent's asserted belief that she had to wait until after her workers' compensation claim was accepted was contradicted by her asserted belief that CDCR filed for disability retirement on her behalf after it learned, in December 2014, that Drs. Baron and Hirokawa concluded she could not return to work as a CO. Such a belief by respondent was not rational as she had received no indication from CDCR that it had applied for disability retirement on her behalf. Having received no such communication, it was incumbent upon respondent to follow up with her employer or CalPERS as to the status of her application at some point during the 14 months following her service retirement. (Gov. Code, § 20160, subd. (a)).

22. Respondent has the burden of presenting documentation or other evidence she made an error or omission that was a result of mistake, inadvertence, surprise or excusable neglect. She failed to meet this burden. Accordingly, her appeal should be denied and CalPERS' denial of her request to change from service to disability retirement should be affirmed.

LEGAL CONCLUSIONS

1. The only question for determination in this proceeding is whether respondent established that her application for industrial disability retirement, filed 14 months after the effective date of her service retirement, should be accepted under Government Code section 20160.

2. Government Code section 21154 sets forth when a CalPERS member may file an application for disability retirement. In relevant part, it provides:

⁴ At hearing, respondent asserted she filed the disability retirement application in November 2015, not February 2016 as contended by CalPERS. However, the evidence establishes the latter. The disability retirement application was signed by respondent on February 8, 2016, and has a receipt-stamp by CalPERS of the same date. Respondent offered no contrary evidence to establish she filed the application two months earlier.

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. ...

3. At all times relevant to respondent's industrial disability retirement application, Government Code section 21252, subdivision (a), set forth the conditions under which a member who has ceased to be employed in state service may apply for retirement as follows:

A member's written application for retirement, if submitted to the board within nine months after the date the member discontinued his or her state service, and, in the case of retirement for disability, if the member was physically or mentally incapacitated to perform his or her duties from the date the member discontinued state service to the time the written application for retirement was submitted to the board, shall be deemed to have been submitted on the last day for which salary was payable. *The effective date of a written application for retirement submitted to the board more than nine months after the member's discontinuance of state service shall be determined in accordance with Section 20160. (Emphasis added.)*

4. As set forth in Government Code section 21252, subdivision (a), because respondent filed her industrial disability retirement application more than nine months after she ceased to be employed in state service, the determination of whether CalPERS should accept respondent's application must be made in accordance with section 20160. (*Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559, 567.)

5. Government Code section 20160 governs requests by CalPERS members or beneficiaries to correct an error or omission. It 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, 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.

[¶] ... [¶]

(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).

6. 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.

7. Government Code section 21151, subdivision (a), states:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

8. In *Button v. Board of Administration* (1981) 122 Cal.App.3d 730 (*Button*), the court reviewed whether a CalPERS retiree should be allowed to apply for disability retirement four years after he service retired. Mr. Button, a retired investigator with the Santa Clara District Attorney's Office, applied for service retirement in 1973. At that time, Mr. Button was aware that he could apply for disability retirement if he were disabled. However, despite feeling "exhausted," Mr. Button did not believe he was disabled or incapacitated from service. In 1976, Mr. Button suffered a mild heart attack, and was diagnosed with coronary artery disease. He applied for workers' compensation, and in 1977, the Workers' Compensation Appeals Board determined that, "although appellant did not become compensably disabled until 1976, his injury was cumulative and arose out of his employment with the county." (*Id.* at p. 734.) Mr. Button thereafter applied to CalPERS to convert his service retirement to a disability retirement. CalPERS denied Mr. Button's request, and Mr. Button appealed.

In *Button*, the court recognized that "the need for administrative and actuarial efficiency and the difficulty of making disability determinations years after the date of retirement, evidence a legislative intent that under normal circumstances retirees may not change their status." (*Button, supra*, 122 Cal.App.3d at p. 735.) But the court found that the "decisive question is whether the existence of abnormal or unusual circumstances will permit

subordination of conventional interests in favor of other policy considerations.” (*Ibid.*) As the court noted,

Section 20180 [now 20160] dictates that PERS’ interests in administrative and actuarial efficiency are not of overriding importance so as to allow honest mistakes to remain uncorrected.

The court recognized 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 and his family.” (*Button*, supra, 122 Cal.App.3d at p. 737, quoting from *Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565, 571.) The court concluded that Mr. Button should be allowed to file his disability retirement application, finding that:

In light of the clear legislative intent to compensate in a certain manner those employees who are disabled at the time they retire (see § 20001), and given the express language of section 20180 [now 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, 122 Cal.App.3d at pp. 737-738.)

9. In 1982, after *Button* was issued, the Attorney General was asked to opine on the following question:

Does the Public Employees’ Retirement Law authorize a revocation of an election to retire for service, and consideration of a new election to retire for disability, after the statutory time for such election has elapsed, where the change in status will not affect the amount of the benefit, but where the change is requested because the retirant asserts it will provide a tax advantage?

(65 Ops. Cal. Atty. Gen. 542 (1982).)

The question presented to the Attorney General involved a CalPERS member “who, fully aware of his medical condition and the availability of disability retirement benefits, applied for and received service retirement benefits.” (65 Ops. Cal. Atty. Gen. at p. 544.) The Attorney General noted that “as the *Button* court stresses, under normal circumstances, a retirant may not change status.” (*Id.* at p. 549.) The Attorney General concluded that the question presented “no special circumstance which would warrant a revocation of the

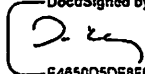
original election to retire for service and a new election to retire for disability. The member was aware of his medical condition and the availability of alternate benefits when he made his choice, and a change in status would not provide new or additional benefits.” (*Ibid.*) While an opinion by the Attorney General is not binding, the reasoning set forth in the cited opinion is persuasive.

10. When all the evidence is considered, respondent did not show that she should be allowed to file an industrial disability retirement application. Respondent was aware of the option to file for disability retirement at the time she filed for service retirement, having been so advised by her employer and based upon her prior work experience. Unlike the employee in *Button*, respondent believed herself to be disabled or incapacitated from duty at the time she filed for service retirement. Respondent failed to demonstrate that her failure to timely file her application was the result of mistake, inadvertence, surprise, or excusable neglect. Even when the applicable pension statutes are interpreted liberally, respondent did not establish that she is entitled to the protections and benefits of Government Code section 20160. Consequently, respondent did not establish that she should now be allowed to seek industrial disability retirement.

ORDER

The request of respondent Gloria Foster to file an industrial disability retirement application is DENIED.

DATED: December 15, 2016

DocuSigned by:

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TIFFANY L. KING
Administrative Law Judge
Office of Administrative Hearings