

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Appeal for an Earlier Effective Date of
Disability Retirement of:**

**MIGTERRY R. SOLINAP and DEPARTMENT OF
DEVELOPMENTAL SERVICES, Respondents**

Agency Case No. 2021-0366

OAH Case No. 2021080462

PROPOSED DECISION

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on November 3 and 22, 2022, by videoconference and telephone from Sacramento, California.

Preet Kaur, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Migterry R. Solinap (Solinap) represented herself.

There was no appearance by or on behalf of respondent Department of Developmental Services (DDS). DDS was duly served with the Notices of Hearing in this

matter. Consequently, the matter proceeded as a default hearing against DDS pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record closed, and the matter submitted for decision on November 22, 2022.

ISSUES

1. Did Solinap make a correctable mistake entitling her to an earlier effective retirement date of June 4, 2019, for purposes of Industrial Disability Retirement (IDR) benefits?
2. May CalPERS use deductions from Solinap's IDR allowance to repay DDS for Temporary Disability Advanced Payments (TDAP) previously made to Solinap?

FACTUAL FINDINGS

Jurisdictional Matters

1. On February 3, 2021, CalPERS granted Solinap's employer-generated application for IDR effective May 1, 2020, and denied Solinap's request for an earlier effective retirement date of June 4, 2019. On March 4, 2021, CalPERS also informed

Solinap that it intended to use deductions from Solinap's IDR allowance to repay DDS for TDAP¹ DDS previously made to Solinap.

2. On March 31, 2021, Solinap appealed CalPERS' determinations concerning Solinap's effective retirement date and TDAP deductions. On July 1, 2021, Keith Riddle, in his official capacity as Chief of CalPERS' Disability and Survivor Benefits Division, signed and thereafter filed the Statement of Issues for purposes of the appeal. The matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.²

CalPERS' Evidence

3. DDS employed Solinap as a Psychiatric Technician (Safety) at its Porterville Developmental Center. By virtue of her employment, Solinap was a state safety member of CalPERS.

4. In the course of her employment with DDS, Solinap sustained industrial injuries. Those injuries led to various work restrictions attributable to neurological (headaches) and orthopedic (neck and low back) conditions.

¹ TDAP are an advancement on disability benefits paid by an employer pending adjudication of an application submitted by the employer on the employee's behalf to CalPERS.

² All further statutory references are to the Government Code, unless otherwise specified.

5. Between 2014 and 2017, Solinap called CalPERS and/or visited CalPERS' Fresno Regional Office (FRO) on several occasions and received information about online retirement classes, service retirement (SR), disability retirement (DR), IDR, SR pending DR, working after retirement, reinstatement from retirement, and retirement estimates. CalPERS staff specifically answered "several questions regarding coming back to work for a CalPERS employer after a DR or IDR approval." Additionally, Solinap was mailed and/or provided with hard copies of PUB-43 A Guide to Completing Your CalPERS Service Retirement Application (PUB-43); PUB-35 A Guide to Completing Your CalPERS Disability Retirement Election Application (PUB-35); PUB-33 A Guide to CalPERS Employment After Retirement (PUB-33); and PUB-37 A Guide to CalPERS Reinstatement from Retirement (PUB-37). She also requested and received multiple DR and IDR allowance estimates from CalPERS.

6. PUB-35 contains extensive information regarding DR, IDR, and service pending DR or IDR. It notifies members that:

The effective date of your retirement can be no earlier than the day following your last day on payroll, as long as your application is **received by CalPERS within nine months** of that date. If not, the retirement date can be no earlier than the first of the month in which CalPERS receives your application.

(Emphasis in original.) Given the foregoing, PUB-35 specifically directs members to apply "as soon as you believe you are unable to perform your usual duties because of an illness or injury that is of permanent or extended duration and expected to last at least 12 consecutive months or to result in death." Members are advised not to wait until any worker's compensation claim is resolved because delaying an application to

CalPERS “may affect important benefits you may be entitled to receive.” Additionally, PUB-35 notifies members of their rights to cancel their application “at any time before it is officially approved” or seek future reinstatement from an approved retirement, as discussed in greater detail in PUB-37.

7. On November 30, 2017, Solinap again visited the CalPERS FRO. CalPERS staff reviewed SR, SR pending IDR, and IDR with Solinap, who confirmed that she had the application materials. However, Solinap represented that she was not ready to submit an application.

8. Solinap continued working on light duty status until October 2018, when DDS informed her that it could no longer accommodate her work restrictions. According to DDS’s payroll reporting to CalPERS, Solinap last received pay from DDS in October 2018.

9. Between March 2019 and April 2020, Solinap engaged in an extended interactive process with DDS to determine whether she could potentially return to her former position as a psychiatric technician with restrictions or be provided an alternate position at DDS within those work restrictions. On June 27, 2019, Solinap again visited CalPERS’ FRO and indicated that DDS would be submitting an IDR application for her. CalPERS staff addressed Solinap’s questions regarding IDR, the employer-originated application, employment after retirement, and reinstatement from retirement. CalPERS staff also provided her with additional hard copies of PUB-33, PUB-35, and PUB-37. As part of her interactive process with DDS, DDS also provided Solinap with another hard copy of PUB-35 on July 19, 2019. At a final April 17, 2020 meeting, DDS terminated the interactive process on the basis that it remained unable to accommodate her work restrictions in her former or any alternate position.

10. On May 1, 2020, CalPERS received an employer-generated application for IDR filed by DDS on Solinap's behalf. DDS listed Solinap's last day on its payroll as April 11, 2019.

11. On May 8, 2020, CalPERS received Solinap's own application for IDR. Solinap listed her last day on payroll as June 3, 2019, and her retirement date as June 4, 2019.

12. On February 3, 2021, CalPERS granted Solinap's employer-generated application for IDR effective May 1, 2020. CalPERS denied Solinap's request for an earlier effective retirement date of June 4, 2019. It explained that CalPERS received the application more than nine months after Solinap discontinued state service. Thus, under the statute that governs effective retirement dates, her effective retirement date could be no earlier than the first day of the month in which the application was received, i.e. May 1, 2020. Additionally, CalPERS determined that Solinap was not entitled to any relief under the applicable mistake statute. It reasoned that she did not make a correctable mistake entitling her to an earlier effective retirement date because she had sufficient knowledge of the IDR application process.

13. On March 4, 2021, CalPERS also sent Solinap a letter regarding the TDAP Solinap had previously received from DDS. Specifically, that letter noted:

Your former employer, [DDS], informed us you received monthly TDAP in the amount of \$2,592.27. The total advanced payments paid to you for the period of May 1, 2019 through January 31, 2021 amounted to \$54,437.61.

Your monthly retirement benefit is \$2,566.03 and was effective on May 1, 2020. The retroactive portion of your

benefit for the period of May 1, 2020 through February 28, 2021 amounted to \$25,660.30.

The TDAP is being reimbursed to your former employer from the retroactive portion of your retirement benefit in the amount of \$25,660.30. However, the total TDAP paid to you exceeds the retroactive portion of your retirement benefit. Therefore, a deduction of ten percent of the monthly retirement benefit in the amount of \$256.60 will be deducted monthly until the remaining balance of \$28,777.31 is paid in full.

Solinap's Evidence

14. Solinap testified at hearing. Solinap stated she was unaware that she was required to file her IDR application within nine months of discontinuing state service or lose the benefit of an earlier effective retirement date. She waited until May 2020 to submit her application to CalPERS for three reasons: (1) she was actively participating in the interactive process with DDS in the hope of returning to work there in some capacity; (2) she did not want to be "forced on" and "stuck in" retirement if an appropriate position could be located; and (3) her former attorney who initially represented her for purposes of her IDR application suggested she wait until the interactive process with DDS "plays out."

Solinap acknowledged her prior communications with CalPERS by telephone and at in-person visits to CalPERS' FRO. Although she cannot presently recall receiving PUB-33, PUB-35, and PUB-37, she also does not dispute that CalPERS previously provided them to her. However, she indicated that her headaches sometimes

prevented her from reading documents on a computer, and she instead relied on her former attorney's advice.

15. Solinap also generally objects to the TDAP deductions from her IDR allowance. She was never made aware that TDAP may have to be repaid via deductions from future retirement benefits.

LEGAL CONCLUSIONS

Burden/Standard of Proof

1. In ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051). The standard of proof is preponderance of the evidence. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."].) A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

2. Solinap bears the burden of proving by a preponderance of the evidence that she made a correctable mistake that entitles her to an earlier effective retirement date for purposes of IDR benefits. (See Gov. Code, § 20160, subd. (d) [party seeking correction bears burden of establishing right to correction]; see also Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"].)

3. CalPERS bears the burden of proving by a preponderance of the evidence that any TDAP deductions are authorized and appropriate.

ISSUE 1: CORRECTABLE MISTAKE/EARLIER EFFECTIVE RETIREMENT DATE

The Statutory Effective Retirement Date

4. Section 21252, subdivision (a), provides:

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 the first day of the month in which the member's application is received at an office of the board or by an employee of this system designated by the board.

With exceptions not applicable here, "state service" means "service rendered as an employee or officer (employed, appointed, or elected) of the state . . . for compensation, and only while he or she is receiving compensation from that employer therefor" (§ 20069, subd. (a).)

5. Solinap discontinued state service, as defined by section 20069, subdivision (a), on the last day she was on DDS's payroll. CalPERS's records show that Solinap stopped receiving compensation from DDS in October 2018. DDS and Solinap previously represented that Solinap's last day on payroll was April 11, 2019, and June 3, 2019, respectively. Regardless of which of those three dates actually constituted Solinap's last day on payroll, CalPERS received the application more than nine months later. Thus, pursuant to section 21252, subdivision (a), Solinap's effective retirement date must be the first day of the month the application was received by CalPERS, i.e., May 1, 2020.

Applicability of Mistake Statute

6. Although CalPERS appropriately determined Solinap's May 1, 2020 statutory effective retirement date, that does not complete the required analysis. Solinap may nonetheless qualify for an earlier effective retirement date if she can show that she made a correctible mistake.

7. Subject to certain conditions, the Board "may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member" if the "error or omission was the result of mistake, inadvertence, surprise, or excusable neglect." However, "[f]ailure 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." (§ 20160, subd. (a).)

8. In October 2018, DDS informed Solinap that it could no longer accommodate her work restrictions. By that time, Solinap had had numerous communications with CalPERS about IDR, and also had PUB-33, PUB-35, and PUB-37 in her possession. Although she claims to have difficulty reading documents on a

computer due to her headaches, she was given hard copies of those publications to review.

9. Had Solinap reviewed the above-mentioned publications, she would have been aware of the need to apply for IDR as soon as she became unable to perform her usual duties as well as the impact of waiting more than nine months to apply. Those publications would also have addressed many of her questions about potential cancellation of her application and/or future reinstatement after retirement if the interactive process with DDS proved successful. Solinap's failure to review the publications in her possession and contact CalPERS with any follow-up questions constitutes a failure "to make the inquiry that would be made by a reasonable person in like or similar circumstances" and not a correctable error or omission.

10. Solinap's claimed reliance on her former attorney's advice does not change the analysis. CalPERS provided Solinap with adequate information regarding her obligations in its publications. A reasonable person would have reviewed that information, and at a minimum, questioned her attorney regarding any inconsistent advice. Solinap's decision not to review information provided by CalPERS does not constitute a correctable mistake. Any remedy for erroneous legal advice lies against her former attorney, not CalPERS.

11. In sum, Solinap failed to show that she made a correctable mistake entitling her to an earlier effective retirement date. Thus, CalPERS's determination of a May 1, 2020 effective retirement date must be affirmed.

ISSUE 2: DEDUCTIONS FOR TDAP

12. With respect to TDAP, section 19253.5 provides, in part: "If the application for disability retirement is subsequently granted, the retirement system

shall reimburse the appointing power for the temporary disability allowance which shall be deducted from any back disability retirement benefits otherwise payable to the employee.” (§ 19253.5, subd. (i)(3).) Additionally, section 21419.5 provides:

The system shall deduct the amount of interim disability allowance made to a state member pursuant to subdivision (i) of Section 19253.5 from the member's retroactive disability allowance, and reimburse the state agency that has made the interim disability allowance payments. If the retirement disability allowance is not sufficient to reimburse the total interim disability allowance payments, an amount no greater than 10 percent of the member's monthly disability allowance shall be deducted and reimbursed to the state agency until the total interim disability allowance payments have been repaid. The state member and this system may agree to any other arrangements or schedule for the member to repay the interim disability allowance payments. If the disability application is denied, the system shall not be responsible for reimbursing the amount of interim disability allowance paid to the member by the state agency.

13. Because Solinap was granted IDR, applicable law requires CalPERS to reimburse DDS for the TDAP it previously made. Under the statutory scheme, such reimbursement must be deducted first from the retroactive portion of Solinap's retirement benefits, and if that is insufficient, from her monthly IDR allowance at a rate of no more than 10 percent. Here, CalPERS appropriately applied the statutory

requirements to Solinap's IDR benefits and correctly computed the deduction amounts. Even if Solinap was unaware of the requirement for TDAP to be repaid, ignorance of the law is not a defense to its application.

ORDER

The appeal filed by Migterry R. Solinap is DENIED.

DATE: December 6, 2022

Wim vanRooyen

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings