

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Statement of Issues Against:

WENDELL M. BENNETT, Respondent,

and

**DEPARTMENT OF STATE HOSPITALS-METROPOLITAN,
Respondent.**

Agency Case No. 2020-0037

OAH No. 2020060930

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on April 1 and July 6, 2021, in Los Angeles, California.

Dustin Ingraham, Staff Attorney, represented Keith Riddle (complainant), Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Wendell M. Bennett (respondent) appeared and represented himself.

Department of State Hospitals-Metropolitan (Metropolitan Hospital) did not appear at the hearing, even though it was properly served with a Notice of Hearing. Therefore, this matter proceeded as a default hearing against Metropolitan Hospital pursuant to Government Code¹ section 11520, subdivision (a).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on July 6, 2021.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant filed the Statement of Issues in his official capacity.
2. CalPERS is the state agency responsible for the administration of the Public Employees' Retirement Law (PERL), section 20000 et seq.
3. Respondent was employed by Metropolitan Hospital as a Psychiatric Technician. By virtue of his employment, respondent is a state safety member of CalPERS.
4. On September 10, 2007, respondent signed an application for service retirement pending industrial disability retirement (Application #1), with a requested effective retirement date of October 6, 2006. (Ex. 6, PERS43.) In Application #1, respondent claimed disability on the basis of an orthopedic (back) condition. (*Id.* at PERS 45.) CalPERS processed respondent's request for service retirement while his

¹ All further references to a statute are to the Government Code.

industrial disability retirement (IDR) application was pending. Respondent retired for service effective September 1, 2007, and has been receiving his service retirement allowance from that date.

5. On November 26, 2007, CalPERS notified respondent of the cancellation of the IDR portion of Application #1 because it was incomplete and informed respondent that he may resubmit a new IDR application. From 2008 to 2019, respondent resubmitted four more (for a total of five) IDR applications.

6. After a review of the case, CalPERS determined that (1) respondent's membership with CalPERS ceased on September 1, 2007, (2) respondent's IDR application was not timely submitted, and (3) respondent did not make a correctable mistake. In a letter dated November 26, 2019, CalPERS informed respondent that it could not accept his late application.

7. In a letter dated December 19, 2019, respondent timely requested an appeal and request an administrative hearing.

8. The issue on appeal is whether respondent made a correctable mistake as a result of inadvertence, mistake, surprise, or excusable neglect, which would entitle him to retroactively change his retirement status from service retirement to industrial disability retirement.

Respondent's IDR Applications

FIRST APPLICATION

9. CalPERS uses a database to record contacts with its members and other events relating to its members. A printout, known as Customer Touch Point Report (CPTR), was received in evidence as exhibit 29. A CPTR entry for September 10, 2007,

indicates that a CalPERS staff member, Brenda Reponte, conducted a pre-retirement counseling session with respondent. (Ex. 29, PERS 173.) On the same date, respondent signed and submitted Application #1, in which he requested an effective retirement date of October 6, 2006, and claimed IDR on the basis of an orthopedic (back) condition. (Ex. 6, PERS43, 45.)

10. In a letter dated November 21, 2007, CalPERS informed respondent that his request for service retirement pending disability retirement was processed, with an effective retirement date of September 1, 2007. (Ex. 7, PERS 56.)

11. According to the CPTR, on November 26, 2007, CalPERS staff Denise Horton notified respondent by telephone that the IDR portion of Application #1 was canceled because it was missing the BSD-92 form, a form that requests information regarding respondent's workers' compensation insurance carrier. However, Ms. Horton advised respondent that his IDR application could be refiled. (Ex. 29, PERS 171.)

SECOND APPLICATION

12. On January 2, 2008, CalPERS received a second IDR application (Application #2) from respondent. (Ex. 8.) Application #2 is an exact copy of Application #1. In Application #2, respondent again requested an effective retirement date of October 6, 2006, and claimed IDR on the basis of an orthopedic (back) condition. Upon its receipt, CalPERS cancelled Application #2 and relaunched Application #1.

13. On October 29, 2008, CalPERS mailed letters to both respondent and Metropolitan Hospital requesting information about whether a correctable mistake was made because respondent had requested an effective retirement date (October 6,

2006) that was earlier than the first date of the month when Application #1 was received (September 1, 2007). The letter to respondent stated:

NOTICE TO MEMBER

Cooperation in providing the requested information is essential to CalPERS' efforts to reach a determination, however, we cannot proceed without it and will cancel the request for an earlier retirement date if we do not receive a written response within 30 days of the date of this letter. A cancellation notice will be forwarded upon expiration of the 30 days.

(Ex. 10, PERS 72, emphasis in the original.)

A CPTR entry dated November 3, 2008, indicates that CalPERS staff member Thomas Lowell discussed the contents of the October 29, 2008 letter with respondent regarding the determination of an earlier effective retirement date. (Ex. 29, PERS 168.) However, neither respondent nor Metropolitan Hospital replied to CalPERS' inquiries.

14. In a letter dated December 18, 2008, CalPERS advised respondent that it was canceling the relaunched Application #1 (after cancellation of Application #2) for non-compliance and that any future request would require a new application. (Ex. 12.)

15. Between 2008 and 2018, CPTR entries show that respondent contacted CalPERS on two separate occasions regarding his IDR application. Specifically, on October 12, 2010, CalPERS staff member Anna Marfori reviewed respondent's IDR application with him, highlighted certain sections that remained incomplete, and advised him of the deadlines and additional documents required for submission. (Ex. 29, PERS 167.) On October 11, 2013, respondent met with CalPERS staff member

Steven Cohen at the Glendale Regional Office. Mr. Cohen reviewed the IDR application packet with respondent and advised him about the additional documents he must submit to complete the package. Mr. Cohen wrote that “[respondent] will return when has docs ready.” (*Id.* at PERS 166.)

THIRD APPLICATION

16. On December 5, 2018, respondent went to the Glendale Regional Office to inquire about disability retirement. CalPERS staff member Art De La Rosa told respondent to submit an IDR application with instructions on how to complete it. (Ex. 29, PERS 164.) Subsequently, on December 10, 2018, respondent submitted a third IDR application (Application #3), once again requesting an effective retirement date of October 6, 2006. (Ex. 13, PERS 79.)

17. In a letter dated December 14, 2018, CalPERS notified respondent that several documents, including the Physician’s Report on Disability form and the Workers’ Compensation Carrier Request form, were missing from Application #3. The letter further 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.**” (Ex. 14, PERS 92, emphasis in original.)

18. A CTPR entry dated December 27, 2018 indicates that CalPERS staff member Charlotte Mata made a courtesy call to respondent on the same date. Ms. Mata spoke with respondent, informed him of the missing documents, and granted him an extension, until January 25, 2019, to submit these documents. (Ex. 29, PERS 163.) This extension was confirmed by a letter dated the same date, addressed to respondent from CalPERS. (Ex. 15.) On January 18, 2019, Ms. Mata left respondent a

voicemail reminding him of the missing documents and the deadline for submission. (Ex. 29, PERS 162.)

19. However, respondent did not submit any of the missing documents by January 25, 2019. Consequently, in a letter dated January 25, 2019, CalPERS canceled Application #3.

FOURTH APPLICATION

20. On March 18, 2019, respondent submitted to CalPERS his fourth IDR application (Application #4). Application #4 is an exact duplicate of Application #3, and respondent once again requested an effective retirement date of October 6, 2006.

21. On May 2, 2019, CalPERS mailed a letter to respondent requesting further information about his request for an effective retirement date (October 6, 2006) that is earlier than the first day of the month in which CalPERS received Application #4 (March 18, 2019). (Ex. 20.) On the same date, CalPERS also mailed letters to both respondent and Metropolitan Hospital requesting information about respondent's submission of a late application (i.e., Application #4 was submitted more than four months after respondent's separation from CalPERS employment or retirement) and whether a correctable mistake was made. (Exs. 21 & 22.) The May 2, 2019 letter addressed to respondent from CalPERS regarding the late application stated, in relevant part:

Please forward medical evidence which establishes you were continuously disabled from the date of your last day on pay status to the present. This is a 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 (Government Code section 21154).

[¶] . . . [¶]

Notice to Member:

Your cooperation in providing the requested information is essential to our efforts to reach a determination. If we do not receive a written response by 05/23/2019, we will cancel your application. If your application is canceled, you will not be permitted to reapply for disability retirement.

(Ex. 22, PERS 123 (emphasis in original).)

22. On May 23, 2009, CalPERS sent another letter to respondent requesting the same information about his late application but extending the deadline for a response from May 23 to June 10, 2019. (Ex. 25.) On June 10, 2019, CalPERS received a letter from respondent that was responsive to some of CalPERS' requests. (Ex. 27.) However, respondent did not provide medical records for the periods of February 24, 2011, to November 2, 2014; November 4, 2014, to October 31, 2016; and December 9, 2018, to June 2019. On June 20, 2019, CalPERS sent respondent a letter notifying him that Application #4 was canceled due to those missing documents and due to respondent's failure to establish continuous disability from his last day on pay status to the present. (Ex. 28.)

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FIFTH APPLICATION

23. On September 5, 2019, respondent submitted to CalPERS his fifth IDR application (Application #5). Respondent did not list a requested effective retirement date on Application #5. (Ex. 3, PERS 23.)

24. In a letter dated November 26, 2019, CalPERS informed respondent that it could not accept Application #5 because it was late. Based on respondent's history of inquiries regarding his IDR, CalPERS determined that respondent had knowledge of the IDR application process and that no correctable mistake was made. (Ex. 4.)

Testimony of Mari Cobbler

25. At the administrative hearing, Mari Cobbler, Associate Government Analyst, reviewed respondent's file and testified regarding the events described above. She asserted that under section 21154, respondent is no longer a member of CalPERS due to his retirement. Thus, he is no longer qualified to submit an IDR application. Furthermore, section 20160, discussed in detail below, places a six-month time limit on correcting any error or omissions made by an applicant. Because respondent submitted Application #5 several years after the cancellation of Application #1, Ms. Cobbler opined that he is ineligible for a correction of error under the statute.

Respondent's Testimony

26. Respondent admitted at the hearing that Application #5 is late. Respondent also conceded that CalPERS attempted many times to assist him in his IDR applications, but he reached "levels of frustration" (his words) and gave up because he suffered from depression and bad health. Respondent testified that he was in chronic pain due to his bad back, and it was difficult for him to even go through the day, let

alone try to navigate the IDR process. Respondent stated that he is making efforts to be a better person and to be more “accountable in the world” (his terms).

Testimony of Nancy Gabaldon Bennett

27. Respondent’s wife, Nancy Gabaldon Bennett, testified that she worked with respondent at Metropolitan Hospital. Ms. Bennett clarified that respondent was injured on his job after being attacked by patients. In addition, respondent’s son passed away, which distressed respondent emotionally. Respondent made his best efforts to complete the IDR applications, but he got the run-around from some of his providers. Respondent wants another opportunity to submit his IDR application.

LEGAL CONCLUSIONS

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) In this case, therefore, respondent has the burden of establishing by a preponderance of the evidence that he is entitled to submit Application #5 and retroactively change his retirement status from service retirement to industrial disability retirement. As set forth in Factual Findings 1 to 27 and Legal Conclusions 1 to 7, that burden has not been met.

2. Section 21151 provides, in pertinent part:

(a) 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. . . .

3. Under section 21152, subdivision (d), a member of CalPERS can make an application for disability retirement on his or her behalf. As relevant here, section 21154 requires the application to be made while the member is in state service, or within four months of the discontinuance of state service, or 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." (§ 21154, subds. (a), (c), & (d).) Under section 20340, subdivision (a), a person ceases to be a member of CalPERS upon retirement.

4. In the case at hand, it is undisputed that Applications #1 through #4 were properly canceled. Effective September 1, 2007, when respondent retired and began to receive his service retirement benefits, he ceased to be a CalPERS member. More than 12 years after his retirement, respondent submitted Application #5 on September 5, 2019. Respondent testified that, during those 12 intervening years, he suffered chronic pain and depression after the death of his son. However, no evidence was presented that he suffered a disabling condition, within the meaning of section 21154, subdivision (d), which prevented him from submitting a new and complete IDR application. Thus, Application #5 was not timely.

5. Section 20160 allows for the correction of a mistake under certain circumstances. It states 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.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. . . .

6. The laws relating to pension benefits should be liberally construed in favor of the applicant. (*Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559, 565.) Such a liberal interpretation can be used to effectuate, rather than defeat, the purpose to provide benefits for the employee. (*Button v. Board of Administration* (1981) 122 Cal.App.3d 730, 737.) In *Rodie*, a police chief elected a disability retirement rather than a service retirement under the mistaken belief that he would receive larger payments. In *Button*, a district attorney's investigator retired on a service retirement but then sought to change his election to a disability retirement when he allegedly learned that he was in fact disabled. In both cases, the applicants were allowed to

correct their mistakes and change their retirement status from service retirement to industrial disability retirement.

7. Here, respondent's mistake, namely, the untimely submission of Application #5, is not correctable under section 20160 because the statute requires respondent to have filed his new application within six months of discovering any error or omission. In a letter dated December 18, 2008, CalPERS advised respondent that it was canceling his relaunched Application #1 (after the cancellation of Application #2) for non-compliance and that any future request will require a new application. Therefore, to comply with section 20160, respondent must have submitted his new application within six months of December 18, 2008. However, by respondent's own admission, he was frustrated by the IDR application process, even though a review of respondent's case shows that CalPERS made extensive efforts to assist and educate respondent about his IDR applications. Nevertheless, respondent subsequently submitted several IDR applications that were incomplete. More than ten years later, on September 5, 2019, respondent submitted Application #5. Although respondent suffered personal setbacks after the IDR portion of Application #1 was canceled, a reasonable person in similar circumstances would have sought to make a correction within a reasonable amount of time and within the statutory deadline. In consideration of these facts, CalPERS properly denied the acceptance of respondent's late Application #5.

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ORDER

CalPERS's determination, that respondent Wendell M. Bennett's September 5, 2019 application for industrial disability retirement was submitted late and that no correctable mistake was made, is affirmed. Respondent's appeal is denied.

DATE: 07/19/2021

Ji-Lan Zang

JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings