

ATTACHMENT A

THE PROPOSED DECISION

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

**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.

Agency Case No. 2021-0679

OAH No. 2022010202

PROPOSED DECISION

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on May 5, 2022, via videoconference.

Senior Staff Attorney John Shipley represented complainant Keith Riddle, Chief of the Disability and Survivor Benefits Division of the California Public Employees' System (CalPERS).

Attorney Kenneth M. Sheppard represented respondent Thomas R. Hamilton.

There was no appearance on behalf of the City of Palo Alto.

The record was held open for post-hearing briefing. Briefs from complainant and respondent were received and marked for identification as Exhibits 29 and I, respectively. The matter was submitted on June 6, 2022.

ISSUE

Is CalPERS required to accept respondent's application for industrial disability retirement, submitted to CalPERS on March 30, 2021?

FACTUAL FINDINGS

1. On January 5, 2022, complainant Keith Riddle filed the statement of issues in his official capacity as Chief of the Disability and Survivor Benefits Division of CalPERS.
2. Respondent Thomas R. Hamilton (Hamilton) was last employed by respondent City of Palo Alto (City) as a firefighter/paramedic/inspector. By virtue of his employment, respondent was a local safety member of CalPERS.
3. On May 17, 2018, Hamilton visited CalPERS's San Jose Regional Office and submitted a "Retirement Allowance Estimate Request" form requesting an industrial disability retirement (IDR) estimate with a projected retirement date of December 31, 2018. CalPERS staff provided Hamilton with "A Guide to Completing Your CalPERS Disability Retirement Election Application" publication (PUB 35) which contains an application and all of the forms needed to submit an IDR application. PUB 35 also explains how to fill out and submit the necessary forms and provides information on who to contact for assistance. CalPERS staff also explained to Hamilton

that he could choose to submit a service pending IDR application or an IDR application, and that he could state "Upon Expiration of Benefits" as his retirement date while he utilized the remainder of his 4850 (industrial disability leave) time. CalPERS staff explained to Hamilton how to complete the application and informed him of the documents he would need to bring when submitting his retirement application package.

4. PUB 35 advises members that they may apply for disability retirement while still employed and advises members to apply "as soon as you believe you are unable to perform your usual job duties." It also advises, "if you have a workers' compensation claim, you should not wait until your condition is 'permanent and stationary' under workers' compensation requirements to submit your application. Delaying your application for retirement may affect important benefits you may be entitled to receive."

5. On June 20, 2018, CalPERS sent Hamilton a retirement estimate indicating his estimated IDR benefits would be \$6,112.81, based on a final compensation amount of \$10,800.40 and an effective retirement date of December 31, 2018.

6. On October 22, 2018, Hamilton again visited CalPERS's San Jose Regional Office. CalPERS staff again reviewed with Hamilton his retirement options, explained how to complete the IDR application, and informed him of the documents he would need to submit to complete a retirement application package. Hamilton was told that he could submit his application up to 120 days prior to the date of his retirement. On that same day, CalPERS once again provided Hamilton a copy of PUB 35.

7. On April 25, 2019, Hamilton called CalPERS to inquire about IDR. CalPERS staff explained the process to obtain a retirement benefits estimate and recommended that he obtain an estimate for both service retirement and IDR. CalPERS staff again explained the process for submitting an application, what documents he would need to submit to complete a retirement application package, and the timeframe to receive a determination as to whether his IDR application was approved following receipt of a complete retirement application package. On that same day, CalPERS sent Hamilton another copy of PUB 35.

8. On July 26, 2020, Hamilton submitted an online service retirement application, with an effective retirement date of August 1, 2020.

9. On July 29, 2020, Vanda Morrow McCauley, senior human resources administrator for the City, spoke with Hamilton on the telephone, and he reported to her that he was going to file for a service pending IDR retirement. She told him to check the "Service Pending Disability Retirement" box on his application.

10. Shortly thereafter Hamilton cancelled his July 26, 2020, application for service retirement. He reports this was probably in response to his conversation with McCauley.

11. On August 2, 2020, Hamilton submitted a second online service retirement application, with an effective retirement date of July 31, 2020.

12. By letter dated August 2, 2020, CalPERS informed Hamilton that his service retirement application had been received and that his effective retirement date would be July 31, 2020. In addition, Hamilton was informed of his right to apply for disability retirement. The August 2, 2020, letter states:

You may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. To apply for a disability retirement, you must complete a Disability Retirement Election Application. Please note that your retirement date cannot be earlier than the day following your last day on pay status.

13. By letter dated August 3, 2020, CalPERS informed Hamilton that he would receive his first retirement warrant on August 10, 2020. CalPERS informed Hamilton that his monthly retirement benefit would be \$8,449.35. In addition, the letter informed Hamilton that if he wanted to change his retirement date or cancel his retirement application, he would need to do it within 30 days of the issuance of his first benefit payment, or his choice would become irrevocable.

14. On August 3, 2020, Hamilton called CalPERS stating he wanted to change his retirement from a service retirement to an IDR. CalPERS staff answered questions about the IDR application. In addition, notes from the CalPERS representative state that the representative explained to Hamilton what supporting documents he needed to submit in order to complete a disability retirement package and advised him that the supporting documents needed to be submitted within 21 days of CalPERS receiving the application.

15. On August 10, 2020, Hamilton contacted CalPERS and staff confirmed the service retirement benefit amount he would receive.

16. On September 23, 2020, Hamilton was examined for the second time by James B. Stark, M.D., as an agreed medical examiner of Hamilton's right knee injury for the purposes of his workers' compensation claim. On that date, Dr. Stark reported that

Hamilton should be reexamined in January 2021 for “final impairment considerations,” but it was:

not too early to initiate industrial disability retirement proceedings. I do not anticipate measurable improvement in the foreseeable future to the extent that [Hamilton] could return to fire suppression activities.

The copy of this report received in evidence from Hamilton bears a “received” stamp dated October 2, 2020. The report is addressed to Hamilton’s counsel in this proceeding and references a workers’ compensation case number. In his post-hearing brief, Hamilton contends that he received the document on October 2, 2020, without further explanation. There is no contrary evidence.

17. On March 19, 2021, Hamilton contacted CalPERS to request a disability retirement application. CalPERS mailed Hamilton another copy of PUB 35.

18. On March 30, 2021, CalPERS received Hamilton’s IDR application signed on March 19, 2021, with a requested effective retirement date of July 31, 2020. The application bears a notary public certification of Hamilton’s signature dated March 29, 2021. It also bears a date and time stamp indicating it was received by CalPERS on March 30, 2021. In filing the application, disability was claimed on the basis of a “bilateral knee replacement” condition.

19. By letter dated April 26, 2021, CalPERS requested information from Hamilton regarding his request to change from service retirement to industrial disability retirement.

20. By letter dated May 13, 2021, Hamilton, through his counsel, provided responses to this request. Hamilton admitted that he knew he was substantially incapacitated as of January 8, 2020; and that shortly thereafter he was informed by his doctor that he would no longer be able to work as a firefighter. Hamilton reported that he mistakenly filled out a service retirement application instead of an IDR Application in July or August 2020. He contended that the time period for him to file an IDR Application was tolled pursuant to *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917.

21. By letter dated May 17, 2021, the City also provided responses to a CalPERS request for information. The City's responses indicate that it went through the interactive disability process with Hamilton, informed him that he should check the "Service Pending Disability Retirement" box on his application, and that it would not object to CalPERS accepting Hamilton's disability retirement application. The City also reported that Hamilton had a workers' compensation claim in progress at the time he stopped working (date of injury: February 7, 2018).

22. On June 22, 2021, CalPERS sent Hamilton a letter informing him that CalPERS had determined that (a) his member status with CalPERS ceased on July 31, 2020; (b) his IDR application was not timely submitted; and (c) he did not meet the criteria under Government Code section 20160 that allows the correction of a mistake. (All subsequent statutory references are to the Government Code, unless otherwise stated.)

23. Hamilton timely appealed CalPERS's determination and this proceeding followed.

Additional Evidence Presented at Hearing

24. Timothy Grigsby, Associate Government Program Analyst for CalPERS, testified at hearing. Grigsby reports that the COVID-19 pandemic caused some delays in applications and CalPERS offices were physically closed to the public for some unspecified period. However, he reports that by August 2020, CalPERS was operating without delays and telephone and virtual appointments were available throughout the period in which CalPERS offices were physically closed.

25. Hamilton testified at hearing. He was a firefighter and paramedic for the City for approximately 18 years. On February 7, 2018, Hamilton suffered an injury to his right knee while working as a firefighter. He underwent surgery to that knee in May 2018. Hamilton reports that by May 18, 2018, he knew that his injury was "career-ending" and that he needed further surgeries on both knees. Nevertheless, he was promoted to fire inspector and arson investigator.

26. On January 8, 2020, Hamilton underwent a partial knee replacement surgery, but was able to return to work as a fire inspector on a temporary modified duty assignment, which ended as of June 30, 2020.

27. Hamilton reports that when he told a CalPERS representative on August 3, 2020, that he wanted to change his retirement from a service retirement to an IDR, the representative told him that he could not fill out the IDR application without certain medical records. However, Hamilton was still receiving medical treatment for his knee conditions. Hamilton reports that no medical doctor had yet opined that he was disabled.

28. Hamilton reports that, after August 3, 2020, he called CalPERS on three occasions, but no one answered the telephone. He visited the CalPERS San Jose

Regional Office, but reports that it was “completely shut down.” He believes the office was shut down for at least one year due to the pandemic.

29. Hamilton reports that he did not attempt to contact McCauley for assistance in filing an IDR application after August 3, 2020, because she works for the City, not CalPERS, and also because the City was “on lockdown” due to the pandemic and he was not sure if they were answering telephone calls.

30. Hamilton reports that he has a “documented learning disability” and it takes him additional time to complete tasks such as completing a retirement application. He did not submit any corroborating evidence of this condition or provide more details.

31. Hamilton reports that he tried to complete an IDR application on his own, but needed help. At both of his in-person visits, he was told he could bring his documents in and CalPERS staff would go through the application with him, step by step. There is no evidence Hamilton attempted to get assistance from any other source after his three attempts to call CalPERS.

32. Hamilton’s workers’ compensation claim is still pending. He presented no evidence to explain what prompted him to file the IDR application in March 2021.

Ultimate Factual Findings

33. Hamilton retired effective July 31, 2020, pursuant to the application for service retirement he submitted on August 2, 2020.

34. Hamilton submitted his IDR application on March 30, 2021, seven months and 29 days after his retirement. The notary certification is dated March 29, 2021, and the March 30, 2021, CalPERS “received” stamp is credible.

35. Hamilton's August 2, 2020, election of service retirement instead of service pending disability retirement or IDR was the result of a mistake. His testimony was credible and supported by McCauley's testimony that he reported to her his intention to file for IDR, and the fact that he called CalPERS on August 3, 2020, stating he wanted to change his retirement from a service retirement to an IDR.

36. CalPERS contends that Hamilton knew of his right to make the correction when he stated the intention to do so on August 3, 2020, but it is found that Hamilton mistakenly but sincerely understood the representative to state that he needed a physician's report of disability to apply for IDR. In addition, CalPERS's August 2, 2020, letter to him discussed filing for disability retirement, but did not mention that he was already past the deadline to do so.

37. However, regarding this mistaken belief, Hamilton failed to make the inquiry that would be made by a reasonable person in like or similar circumstances. PUB 35 contains express instructions to apply for disability retirement "as soon as you believe you are unable to perform your usual job duties" and "you should not wait until your condition is 'permanent and stationary.'" CalPERS's August 3, 2020, letter to Hamilton warned him that his retirement election would become "irrevocable" if not changed within 30 days of the issuance of his first benefit payment. Also, Hamilton reports that he tried to call CalPERS three times and attempted to visit the regional office, but he did not attempt to contact McCauley or anyone else for assistance.

38. Hamilton discovered his right to make the correction no later than when he received Dr. Stark's September 23, 2020, report, opining that it was "not too early to initiate industrial disability retirement proceedings" and that Dr. Stark did not anticipate that Hamilton "could return to fire suppression activities." It is found that he received this letter, through counsel, on October 2, 2020. (See Factual Finding 16.)

39. Hamilton failed to request, claim, or demand to correct the mistake within a reasonable time after he discovered the right to make the correction. He submitted his IDR application on March 30, 2021, five months and 28 days after he discovered the right to make the correction on October 2, 2020. Hamilton's evidence is insufficient to show that this period of delay was reasonable once he possessed the medical record he believed was necessary to file his application for IDR.

LEGAL CONCLUSIONS

1. CalPERS was established by state law in 1932 to provide retirement benefits for state employees. The California Employees' Retirement Fund, managed by CalPERS, is a trust fund devoted to providing benefits to members, retired members and their survivors and beneficiaries. (§§ 20151, 20170, 20171.) CalPERS and its benefits are governed by the Public Employees' Retirement Law (PERL) (§ 20000 et seq.).

2. Hamilton bears the burden to show by a preponderance of the evidence that his IDR application was timely or should otherwise be accepted by CalPERS. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.)

3. 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 ("*Button*").)

Hamilton's Application Was Not Timely

4. Pursuant to section 21154, an application for IDR:

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.

5. Hamilton quotes *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1044, and correctly argues that these subdivisions “each independently state a time within which an application may be filed.” Hamilton further quotes the court: “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.” Hamilton argues that his application was timely because he was “continuously physically incapacitated to perform his 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).”

6. However, with exceptions inapplicable here, application for retirement for disability may be made only by the “member or any person in his or her behalf” (§ 21152), and a person ceases being a member of CalPERS “[u]pon retirement, except while participating in worktime for partial service retirement” (§ 20340, subd. (a).)

7. In *Button*, the court held that the application to convert a service retirement to a disability retirement was not timely because it was submitted after the

employee retired and therefore after he ceased to be a member of CalPERS. The court explained that based on the use of the term "member" in three similar sections of the PERL (§§ 21023, 20390 and 21024):

[t]he three sections read together, as well as 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. (122 Cal.App.3d at p. 735.)

8. Hamilton retired effective July 31, 2020. (Factual Finding 33.) Under section 20340, Hamilton ceased being a member on July 31, 2020, the effective date of his retirement. Hamilton submitted his application for IDR on March 30, 2021. (Factual Finding 34.) Accordingly, Hamilton's March 30, 2021, application for IDR was not timely.

Mistake, Inadvertence, Surprise, or Excusable Neglect

9. Hamilton argues that CalPERS must accept his application because his failure to apply for an IDR was the result of mistake, inadvertence, surprise, or excusable neglect.

10. Pursuant to section 20160, subdivision (a), the board may correct the errors or omissions of a retired member:

provided that all the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking the 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 the right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of these terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking the correction with a status, right, or obligation not otherwise available under this part.

Failure by a member . . . 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).)

11. Hamilton's August 2, 2020, election of service retirement instead of service pending disability retirement or IDR was the result of mistake, inadvertence, surprise, or excusable neglect. (Factual Finding 35.) However, this error was not correctable under section 20160, subdivision (a), because Hamilton failed "to make the inquiry that would be made by a reasonable person in like or similar circumstances." (Factual Finding 37.)

12. Even if it were a correctable error, no relief under section 20160 could be granted because Hamilton failed to request, claim, or demand to correct the error within a reasonable time after discovery of the right to do so. (Factual Finding 39; § 20160, subd. (a)(1).)

Equitable Tolling

13. Hamilton argues that his filing of a workers' compensation claim equitably tolled the statute of limitations for filing an IDR application. The premise of equitable tolling is that "a plaintiff should not be barred by a statute of limitations unless the defendant would be unfairly prejudiced if the plaintiff were allowed to proceed." (*Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 923 (*Collier*)). In *Collier*, the court found equitable tolling appropriate where a former firefighter's disability retirement application to the Pasadena Fire and Police Retirement System (Pasadena Retirement System) was untimely, but he had provided timely notice to the City of Pasadena of his intention to file such an application; he had previously filed a workers' compensation claim against the city for the same injury and therefore the city was not prejudiced by the delay in filing his disability retirement application; and he filed his disability retirement application within a reasonable period of time after the period of tolling concluded. Hamilton argues that the facts of this case are no different and the deadline for filing his IDR application should be equitably tolled.

14. The three core elements of equitable tolling are: "(1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim." (*Collier*, 142 Cal.App.3d at p. 924.)

15. Regarding the first element, the *Collier* court explained:

the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this

means that the defendant in the first claim is the same one being sued in the second. (*Collier*, 142 Cal.App.3d at p. 924.)

In *Collier*, the court regarded the City of Pasadena and the Pasadena Retirement System as the same or highly related parties.

Only if the retirement pension board is a completely separate defendant from the City of Pasadena which was contesting the compensation claim could the filing of the first claim possibly fail as timely notice. To take that position this court would have to accept an artificial compartmentalization of a single corporate entity, the City of Pasadena, which defies common sense. The City of Pasadena operates this pension plan. The City of Pasadena is the employer involved in the workers' compensation claim. The same city attorney's office represented the city with respect to both claims. We have no difficulty holding that notice to the city in its capacity as an employer defendant in a workers' compensation case constituted timely notice to the city in its capacity as a retirement plan administrator. (*Collier*, 142 Cal.App.3d at p. 927.)

The court later emphasized the privity between "these two arms of the Pasadena government" and in dicta, stated:

We are not disposed to indulge the fiction that Pasadena's fire department and its fireman's pension program are separate defendants. But if we were, the notice requirement

was still satisfied. Here we have the rather unusual situation where notice to one defendant results in the timely collection of the very evidence needed by the second defendant and where the first is only too happy to share all that evidence with the second. (*Collier*, 142 Cal.App.3d at p. 929.)

16. Here, the retirement system in question (CalPERS) is not a creature or offshoot of the defendant in the workers' compensation matter (presumably the City of Palo Alto). It is a completely separate entity. Further, Hamilton did not prove privity between the two entities or that this is the "unusual" situation where "the first is only too happy to share all that evidence with the second." (*Collier*, 142 Cal.App.3d at p. 929.) The filing of Hamilton's workers' compensation claim did not constitute notice to CalPERS to gather evidence related to Hamilton's contemplated IDR application. Therefore, Hamilton failed to establish the notice element of equitable tolling. Hamilton has not established a sufficient basis for equitable tolling of the deadline for filing his IDR application.

17. Hamilton failed to establish any basis to order CalPERS to accept his untimely application for IDR.

ORDER

CalPERS is not required to accept respondent Thomas R. Hamilton's untimely application for industrial disability retirement, submitted to CalPERS on March 30, 2021.

DATE: 06/30/2022

Regina Brown

for MICHAEL C. STARKEY

Administrative Law Judge

Office of Administrative Hearings