

ATTACHMENT E

THE PROPOSED DECISION

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

**In the Matter of the Appeal Regarding Health Benefits
Eligibility of:**

KAI M. ON, Respondent

Agency Case No. 2024-0049

OAH No. 2024050130

PROPOSED DECISION

Sean Gavin, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on September 4, 2024, in Sacramento, California.

Cristina Andrade, Senior Attorney, represented complainant Sharon Hobbs, Chief of the Disability and Survivor Benefits Division of the California Public Employees' Retirement System (CalPERS).

Respondent Kai M. On appeared without an attorney.

Evidence was received, the record closed, and the parties submitted the matter for decision on September 4, 2024.

ISSUES

Is respondent eligible to enroll in CalPERS retiree health benefits?

If not, is respondent ineligible because he made an error or omission as a result of mistake, inadvertence, surprise, or excusable neglect correctable by Government Code section 20160 which would allow CalPERS to accept his application for disability retirement?

FACTUAL FINDINGS

1. Respondent established membership with CalPERS through his employment with the Department of Motor Vehicles (DMV). By virtue of his employment, respondent is a state miscellaneous member eligible for CalPERS health benefits under the Public Employees' Medical and Hospital Care Act (PEMHCA).

2. On February 2, 2013, CalPERS received an employer-originated application for disability retirement submitted by DMV on respondent's behalf (DMV application). On February 13, 2013, CalPERS notified respondent of the DMV application and provided him Publication 35, titled "A Guide to Completing Your CalPERS Disability Retirement Election Application" (PUB-35), which included an application for disability retirement. CalPERS requested that respondent complete and return his portion of the disability retirement application. Within PUB-35 was information about CalPERS health coverage eligibility, including, as relevant to this matter, the language: "To be eligible, you must [r]etire within 120 days of your separation from employment." PUB-35 also included the warning: "If your retirement

effective date is more than 120 days after separation from employment, you are not eligible for coverage at retirement or at any future date.”

3. Respondent did not complete his portion of the disability retirement application. On May 7, 2013, CalPERS sent respondent a letter notifying him if he did not provide information with which CalPERS could process the DMV application within 30 days, it would cancel the DMV application. Respondent did not reply or provide the requested information. As a result, on July 3, 2013, CalPERS notified respondent the DMV application was canceled and if he wished to reapply for disability retirement in the future, he would need to complete a new application.

4. On September 5, 2013, DMV issued respondent a Notice of Medical Termination by which it terminated his employment effective September 30, 2013. DMV later amended the effective date of termination to April 4, 2014. Respondent appealed the medication termination to the State Personnel Board (SPB). After a hearing, on September 25, 2014, the SPB upheld the medical termination.

5. On March 23, 2021, respondent submitted to CalPERS an application for service retirement with an effective retirement date of June 15, 2021. CalPERS processed the application and began to issue respondent retirement payments.

6. On October 4, 2023, CalPERS received a letter from respondent that included the subject line: “RE: Fake CalPERS Retirement Payment, DMV Payroll Fraud, and Impersonate/Fake Emails from CalPERS, SCO, and other government agencies’ employees.” In his letter, respondent alleged he retired in 2021 and had received “fake CalPERS retirement payments since July 2021.” He asserted he was “waiting for my real CalPERS retirement payment and health insurance to take care of my health issues.” He

also summarized his efforts to address his concerns, which included visiting the offices of various government employees and their family members.

7. On October 13, 2023, CalPERS responded to respondent's letter. CalPERS informed respondent it had reviewed his claim of fraud and determined no fraud was occurring. As relevant to this matter, the letter also notified respondent, "You do not currently have health benefits because you retired beyond 120 days from your separation date with the DMV." The letter further informed respondent he had two options. First, he could continue to receive benefits based on his March 23, 2021 application. Second, he could schedule an appointment with CalPERS staff to discuss completing a disability retirement application for an earlier retirement date, "which may provide you with health benefits."

8. Respondent contacted CalPERS and requested a meeting. After the meeting, on November 30, 2023, CalPERS sent respondent a letter summarizing his status and options. Regarding his eligibility for health benefits, the letter explained, "You inquired about the continuation of CalPERS health benefits into retirement. Pursuant to California Code of Regulation[] section 599.501(c), to be eligible for health benefits as an annuitant, you must have an effective date of retirement no more than 120 days after your date of separation from employment." The letter included a printout of the text of the cited regulation.

9. On December 7, 2023, respondent sent CalPERS a letter in which he explained he did not know about all the benefits for which he could have been eligible. He wrote, in relevant part:

Health benefit is very important for a retiree especially over 55-year-old. Not all retirees know about the "120 days" rule.

The first letter from CalPERS should inform me that I would not entitle CalPERS health benefit. Even I didn't sign up for the retirement education classes, CalPERS staffs had enough time to advise me to meet with CalPERS staff to discuss the options that how I could get my health insurance such as reinstate. By doing that, I could have worked for CA State again before I was 55-year-old and would get my CalPERS retirement health benefits. (Spelling and grammar in original.)

10. Based on respondent's letter, CalPERS determined he had forfeited his right to health benefits accidentally. Therefore, CalPERS sent respondent a letter on April 17, 2024, in which it explained, in relevant part:

You were permanently separated from employment at the Department of Motor Vehicles on April 4, 2014. Under the California Code of Regulations section 599.501, subdivision (c) you had to retire within 120 days of separation to retain health benefits in retirement. On June 15, 2021, you service retired. Because you retired more than 120 days after your permanent separation from state service you are not eligible for health benefits.

At the time your employer's application was canceled, you did not recognize that you were forfeiting your retirement health benefits by not complying with our request to complete a disability retirement application. You did not discover your mistake until you service retired in 2021 and

realized you were ineligible to receive health benefits. Your mistake is correctable under Government Code section 20160. CalPERS will correct the mistake and provide you with the opportunity to submit a disability retirement application.

If your disability retirement application is approved, you will receive disability retirement benefits retroactive to April 5, 2014, monthly disability retirement benefits, and prospective health benefits that include 100% of the employer contribution.

11. After receiving CalPERS's letter, respondent informed CalPERS that he did not want to apply for disability retirement. This hearing followed.

12. At hearing, three CalPERS employees testified about both the general process of applying for disability retirement and health benefits as well as respondent's February 2013 DMV application and his own retirement application in March 2021. Wendy Soerianata, a Staff Services Manager II in the Disability and Survivor Benefits Division, oversees three units, including the one that processes disability retirement benefits. She explained that disability retirement is a benefit based on ongoing substantial incapacity. Members can apply anytime. When CalPERS receives an employer-originated application, it sends the member a letter seeking additional information. If after two attempts the member does not complete their portion of the application and provide the requested information, CalPERS cancels the application. A cancellation is not the same as a denial. Members can reapply after an employer-originated application is canceled. In respondent's case, after DMV applied on his behalf, CalPERS canceled the DMV application because respondent did not

complete his portion of the application or provide the requested information. Ms. Soerianata believes respondent can still apply for disability retirement if he wishes.

13. Tara Hench is an Associate Governmental Program Analyst (AGPA) in CalPERS's Retirement Benefits Division. She confirmed that respondent service retired in June 2021, which was more than 120 days after his employment with DMV ended.

14. Gabrielle Reitter is an AGPA in CalPERS's Health Account Management Division. One of her job duties is to determine retirees' eligibility for health benefits. She explained the State would pay a greater share of respondent's health coverage if he were to disability retire than if he were eligible for health coverage after a service retirement. She also confirmed respondent is ineligible for health coverage because he retired more than 120 days after he separated from his state employment.

15. Respondent also testified at hearing. He explained he decided not to complete his portion of the DMV application or submit requested information because he was concerned about how a disability retirement would affect his life in the future. For example, respondent worried accepting a disability retirement might negatively affect his ability to buy insurance. He did not know that declining to disability retire would disqualify him from health benefits. However, now that he knows, he would still choose not to apply for disability retirement. Specifically, he believes the regulations CalPERS cited do not disqualify him from receiving health benefits as a service retiree. Furthermore, he believes there are other methods, such as reinstating his employment, that will enable him to receive health benefits without converting his retirement into a disability retirement.

LEGAL CONCLUSIONS

1. The CalPERS Health Program is governed by the Public Employees' Retirement Law (PERL, Gov. Code, § 20000 et seq.), the PEMHCA, and their implementing regulations. PEMHCA requires CalPERS to provide health benefits for, among others, state employees and annuitants, subject to eligibility rules as prescribed in Board Regulations. (Gov. Code, §§ 22800, subd. (a), 22830.)

2. Under PEMHCA, "[a]n employee or annuitant who is dissatisfied with any action or failure to act in connection with his or her coverage or the coverage of his or her family members under this part shall have the right of appeal to the board and shall be accorded an opportunity for a fair hearing." (Gov. Code, § 22848.)

3. Under the Board's Regulations, found in the California Code of Regulations, title 2, section 599.501:

(a) Each employee or annuitant other than those excluded by subsections (b) or (c) below, is eligible to be enrolled in a health benefits plan at the times and under the conditions prescribed in this subchapter, [. . .].

[¶] . . . [¶]

(c) Annuitants whose effective date of retirement is more than 120 days after their date of separation from employment are not eligible.

4. PEMHCA defines the terms "employee" and "annuitant." "Employee" means "An officer or employee of the state or of any agency, department, authority, or

instrumentality of the state, including the University of California.” (Gov. Code, § 22772, subd. (a)(1).) The statute also includes other definitions, none of which applied to respondent as of March 2021, when he applied for service retirement. (*Id.*, subds. (a)(2)-(6), (b).) “Annuitant” means, “A person, other than a National Guard member defined in Section 20380.5, who has retired within 120 days of separation from employment and who receives a retirement allowance under any state or University of California retirement system to which the state was a contributing party.” (Gov. Code, § 22760, subd. (a).) The statute also includes other definitions, none of which applied to respondent as of March 2021, when he applied for service retirement. (*Id.*, subds. (b)-(j).)

5. In this appeal, respondent had the burden of proving by a preponderance of the evidence that CalPERS erroneously denied his eligibility for health benefits. (Evid. Code, §§ 115 [“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence”] and 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”]; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) 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.)

6. Respondent did not meet his burden. At the time he applied for service retirement in March 2021, he did not meet the definition of either employee or annuitant identified in Legal Conclusion 4, above. Therefore, he was not eligible to be enrolled in a CalPERS health benefits plan. (Cal. Code Regs., tit. 2, § 599.501, subds. (a), (c).)

7. CalPERS contends respondent would have been eligible to enroll in a health benefits plan in or near February 2013 if he would have complied with CalPERS's request to complete his portion of the DMV application and supply the required information. CalPERS further contends respondent's failure to finalize the DMV application, and therefore his resulting failure to maintain his eligibility for health benefits, was the result of an error or omission.

8. Under the PERL, the Board may correct errors or omissions of any active or retired member, provided that: (1) the party seeking correction does so "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"; and (3) the correction will not provide the party seeking correction with a status, right, or obligation not otherwise available. (Gov. Code, § 20160, subd. (a)(1)-(3).) The party seeking correction has "the burden of presenting documentation or other evidence to the board establishing the right to correction." (*Id.*, subd. (d).) The burden of proof is a preponderance of the evidence because the statute does not specify a different burden. (Evid. Code, § 115.)

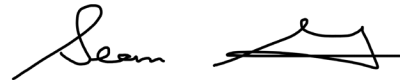
9. Here, respondent does not contend his decision not to pursue disability retirement, either in 2013 or now, was an error or omission. Rather, as he credibly explained at hearing, he chose not to pursue disability retirement based on his belief that doing so might negatively affect his ability to seek other benefits in the future. That was a conscious choice, and the evidence did not support the conclusion that respondent's voluntary choice was the result of an error or omission. Nor did the evidence prove, assuming respondent's choice was the result of an error or omission, that such error or omission was caused by mistake, inadvertence, surprise, or

excusable neglect. (Gov. Code, § 20160, subd. (a)(2).) Finally, the evidence did not prove respondent timely sought to correct his mistake. (Gov. Code, § 20160, subd. (a)(1).) Therefore, there is no legal basis to find that respondent may now change his retirement election from service to disability.

ORDER

CalPERS's denial of respondent Kai M. On's request for health benefits is AFFIRMED and respondent's appeal is DENIED.

DATE: October 3, 2024

A handwritten signature in black ink, appearing to read "Sean Gavin", with a horizontal line drawn through the bottom of the signature.

SEAN GAVIN

Administrative Law Judge

Office of Administrative Hearing