

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Statement of Issues Regarding:

ALICIA D. THOMAS, Respondent

and

LONG BEACH UNIFIED SCHOOL DISTRICT, Respondent

Agency Case No. 2021 - 0383

OAH No. 2021050670

PROPOSED DECISION

Robert Walker, Administrative Law Judge, Office of Administrative Hearings , State of California, heard this matter on October 4, 2021, and May 23, 2022. The proceedings were conducted by video conference.

Preet Kaur, Senior Attorney, California Employees' Retirement System, (CalPERS) represented the complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division.

Alicia D. Thomas, respondent, appeared and participated in the proceedings.

No appearance was made by or on behalf of respondent Long Beach Unified School District, (School District or District).

The record was closed and the matter was submitted for decision on May 23, 2022.

DEFAULT

As to the School District, the matter proceeded as a default.

SUMMARY

Respondent became disabled, and she discontinued state service on July 1, 2018. As of that date, she was eligible for disability retirement. However, one must be 50 years old to qualify for service retirement. Because of her age, she would not be eligible for service retirement until July 2, 2020.

Government Code section 21252, subdivision (a), provides that, if a member submits an application for retirement within nine months after the date he or she discontinued service, the application will be deemed to have been submitted on the last day for which salary was payable. Thus, if one submits an application within nine months, the effective date of retirement is backdated. However, if one does not submit an application within nine months, the effective date of retirement is the beginning of the month in which the member submitted the application. This subdivision applies to service retirement, disability retirement, and industrial disability retirement.

Disability retirement has no age requirement. If a member is 50 or older at the time he or she discontinues service because of a disability, he or she can apply for service retirement and disability retirement at the same time. Also, if the member will become 50 within nine months of discontinuing service because of a disability, he or

she can wait until he or she turns 50 and apply for both service and disability retirement at the same time – so long as the application is filed within nine months of discontinuing service because of a disability. However, if at the time one discontinues service because of a disability, he or she will not be 50 years old within nine months,¹ it is important not to wait until he or she becomes 50 before applying for disability retirement. Because if one waits until past nine months, one loses the right to have the effective date of the disability retirement backdated.

Respondent waited until she was eligible to apply for service retirement before she applied for disability retirement. She applied for both retirements in June 2020. This was almost two years after she discontinued state service. In her application, she requested a service retirement date of July 2, 2020, which was when, because of her age, she was eligible for service retirement. She requested that her disability retirement be backdated to July 3, 2018.

CalPERS granted respondent's application for disability retirement and her application for service retirement. However, CalPERS denied respondent's request to backdate her disability retirement. Respondent appealed, and the appeal is the subject of the present proceeding. Respondent contends that her failure to apply for disability

¹ Government Code section 21154 provides that an application for disability retirement shall be made while the member is in state service or within four months after the discontinuance of state service, etc. There may be issues concerning the difference between the nine-month requirement of Government Code section 21252, subdivision (a), and the four-month requirement of Government Code section 21154. If there are such issues in this case, they were not addressed in the hearing.

retirement within nine months after the date she discontinued state service was the result of an error or omission.

However, her failure to meet the nine-month deadline was not the result of an error or omission. It was the result of respondent's failure to make a reasonable inquiry to determine when she should submit her application for disability retirement. Consequently, respondent cannot recoup the almost two years of disability retirement benefits she could have obtained had she timely applied.

FACTUAL FINDINGS

Jurisdictional Matters

1. In this decision, Alicia D. Thomas will be referred to as respondent. Respondent worked for the School District as a plant supervisor, supervising the work of custodial employees. Respondent testified that she later worked as a custodian. By virtue of her employment, respondent was a school miscellaneous member of CalPERS.

2. Between November 17, 2016, and August 21, 2019, respondent communicated with CalPERS a number of times seeking information about retirement, disability retirement, and requests for estimates of retirement benefits.

3. On July 1, 2018, respondent stopped working because of a physical disability. She was not old enough to apply for service retirement, but there is no age requirement for applying for disability retirement.

4. On August 21, 2019, CalPERS received respondent's retirement estimate request regarding a projected retirement date of September 16, 2019.

5. On December 16, 2019, respondent inquired as to the status of her disability retirement application, and CalPERS informed her that CalPERS had not received a disability retirement application from her.

6. On March 12, 2020, respondent went to a CalPERS regional office and met with a CalPERS representative who provided respondent with a disability retirement overview, an options overview, and a copy of her disability retirement estimate. Respondent contends that the representative told her that she would be eligible for disability retirement as of July 1, 2018, and would be paid for the period back to that date.

7. On May 18, 2020, CalPERS received an unsigned Service Pending Disability Retirement Application. The application for disability retirement was based on an orthopedic condition concerning respondent's right shoulder. Respondent requested that the effective date of the disability retirement be backdated to July 3, 2018, and she requested a service retirement date of July 2, 2020. CalPERS also received an August 13, 2019, School District report showing respondent's "last day on pay" as April 27, 2018; a "separation date" as July 1, 2018; and a "termination date" as July 1, 2018. On June 17, 2020, CalPERS returned the application to respondent because it was not signed.

8. On June 26, 2020, CalPERS received respondent's signed Service Pending Disability Retirement Application. The application was dated June 17, 2020. Again, respondent requested that the effective date of the disability retirement be backdated to July 3, 2018, and she requested a service retirement date of July 2, 2020. CalPERS also received another copy of the August 13, 2019, School District report. CalPERS approved respondent's application for service retirement. Respondent retired for service effective July 2, 2020, and she has been receiving service retirement benefits.

9. Between July 17, 2020, and August 20, 2020, CalPERS made four requests that respondent provide additional information and medical records concerning her request for an earlier disability retirement date of July 3, 2018. On July 30, 2020, CalPERS sent a letter to the School District requesting additional information concerning respondent's request for an earlier disability retirement date of July 3, 2018. Neither respondent nor the School District responded to these requests.

10. On November 9, 2020, CalPERS notified respondent and the School District that respondent's application for disability retirement had been approved based on an orthopedic (right shoulder) condition. CalPERS set an effective date for the disability retirement of June 1, 2020, which was the first day of the month in which CalPERS received respondent's application. In a separate letter, also dated November 9, 2020, CalPERS notified respondent that her request for an earlier effective date of July 3, 2018, for her disability retirement was denied.

11. By a letter dated December 4, 2020, respondent appealed CalPERS's denial of her request for an earlier retirement date for her disability retirement. Respondent contends that her failure to submit the application for disability retirement within nine months after she discontinued service was the result of an error or omission and should be corrected.

Testimony of Mari Cobbler

12. Mari Cobbler testified as follows: Ms. Cobbler is an Associate Governmental Program Analyst for CalPERS. She reviewed respondent's appeal and determined whether CalPERS should reverse its decision not to set an earlier effective date for respondent's disability retirement.

TESTIMONY CONCERNING DETERMINING THE EFFECTIVE DATE OF RETIREMENT

13. Government Code section 21252, subdivision (a), establishes what the effective date of retirement will be. The date depends on whether the application is submitted to CalPERS within nine months after the member discontinued state service. If the application is submitted within nine months, the effective date is the last day for which salary was payable, i.e., if the application is submitted within nine months, the effective date of retirement is backdated. However, if the application is submitted more than nine months after the member discontinued service, the effective date is the beginning of the month in which the application is submitted.

14. Respondent discontinued service on July 1, 2018. CalPERS received respondent's application on June 26, 2020, which was more than nine months after she discontinued service. In fact, it was almost two years after she discontinued service. Therefore, CalPERS cannot backdate the effective date of retirement. Because respondent did not submit the application within nine months after she discontinued service, the effective date must be the beginning of the month in which CalPERS received the application, which in this case is June 1, 2020. Regarding service retirement, respondent requested an effective date of July 2, 2020, so there is no issue regarding the effective date of the service retirement.

TESTIMONY CONCERNING CORRECTING AN ERROR OR OMISSION

15. Ms. Cobbler also considered whether Government Code section 20160 concerning correction of errors or omissions might be available to justify reversing CalPERS's decision not to provide an earlier effective date for respondent's disability

retirement. Ms. Cobbler concluded there was no error or omission within the terms of Government Code section 20160.

16. On June 27, 2018, respondent communicated with CalPERS regarding disability retirement. CalPERS sent her a publication titled "A Guide to Completing Your Disability Retirement Election Application." (PUBLICATION-35) It includes all of the forms needed to submit an application for disability retirement. At page 3, it provides:

You should apply for disability retirement as soon as you believe you are unable to perform your usual job duties because of an illness or injury that is of a permanent or extended duration and expected to last at least 12 months.

17. At page 177, the publication provides:

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.

18. In addition to sending the publication on June 27, 2018, CalPERS sent copies to respondent on November 17, 2016, and June 27, 2018. Thus, CalPERS sent the publication three times. Respondent did not receive all of those mailings because she failed to maintain a current address with CalPERS, but she received the publication on at least two occasions.

19. On September 10, 2018, respondent called and talked with a CalPERS representative about filing an application for disability retirement.

20. Respondent was told she could not apply for service retirement until she reached a certain age. However, CalPERS gave her copies of a publication that advised that one should apply for disability retirement as soon as one believes he or she is unable to perform his or her usual job duties because of an illness or injury. The publication further advised that, if one did not apply within nine months, the effective date of one's disability retirement would be tied to the date of the application, i.e., it would not be backdated.

21. If respondent had a question about when she should apply for disability retirement, she should have asked. A reasonable person in similar circumstances would have made that inquiry. Respondent's failure to make that inquiry is not an error or omission.

Respondent's Testimony

22. Respondent suffered an injury and was off work in 2016, but she was not disabled. She returned to her prior position. It was in 2018 that she was told she had a 30 percent injury. As of June 2018, she no longer was with the School District.

23. In April 2020, respondent went to a CalPERS regional office and met with a CalPERS representative who told her that, if her application for disability retirement was approved, it would be backdated to July 1, 2018. Respondent understood that she would be submitting an application, which would be subject to approval.

24. Respondent inquired in December 2020 and was told CalPERS did not have her application. CalPERS said respondent could submit a copy of the application CalPERS did not receive.

25. Respondent did not thoroughly handle things. She was sick and on medication. She did the best she could. Respondent had been confused.

26. Respondent testified that she had a right to ask for CalPERS publications but had no obligation to read them. Someone should have told her about the nine-month requirement. Sending out a publication is not enough. CalPERS should have set an appointment to have someone explain the requirements to respondent. CalPERS did not take responsibility for helping respondent in spite of the fact that she was disabled.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Government Code section 20160, subdivision (d), provides that the party seeking correction of an error or omission has the burden of presenting documentation or other evidence to the board establishing the right to correction. Respondent has the burden of proving that she is entitled to have her disability retirement application backdated to July 1, 2018.

2. The standard of proof is a preponderance of the evidence. (Evid. Code, § 500.)

Statutory Authority

3. Government Code 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.

4. Government Code section 20160 provides:

(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. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

Analysis

5. Respondent submitted the application for disability retirement more than nine months after the date she discontinued service. Pursuant to the terms of Government Code section 21252, the effective date of her disability retirement is the beginning of the month in which she submitted the application – June 1, 2020.

6. Within the terms of Government Code section 20160, subdivision (a)(3), respondent failed to make the inquiry a reasonable person would make in similar circumstances. A reasonable person would consider the possibility that there might be a deadline for submitting an application for disability retirement. A reasonable person would set about to determine what deadline, if any, applied. CalPERS sent respondent PUBLICATION-35. At page 3, it provides:

You should apply for disability retirement as soon as you believe you are unable to perform your usual job duties because of an illness or injury that is of a permanent or extended duration and expected to last at least 12 months.

7. At page 177, the publication provides:

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.

8. Respondent communicated with CalPERS representatives many times. She had numerous opportunities to inquire about a deadline. She knew she could meet with a CalPERS representative; she met with one. She could have set up a meeting to inquire about a deadline. Respondent also could have read the publications concerning disability retirement that CalPERS sent her.

9. Within the terms of Government Code section 20160, subdivision (a)(3), respondent failed to make the inquiry a reasonable person would make, and her failure to apply for disability retirement within nine months after the date she discontinued service was not an error or omission correctable under section 20160.

ORDER

Respondent's appeal is denied. CalPERS correctly determined the effective date of respondent's disability retirement as June 1, 2020.

DATE: June 20, 2022

Robert Walker

Robert Walker (Jun 20, 2022 16:07 PDT)

ROBERT WALKER

Administrative Law Judge

Office of Administrative Hearings