

Sacramento County Case No.: 34-2016-80002303-CU-WM-GDS

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

Philip Thorman, Petitioner

vs.

Board of Administrative Appeals for the California Public Employees
Retirement System ("CalPERS").

REPLY BRIEF

After The Decision of the Board of Administration For CalPERS
of November 20, 2015, adopting the Proposed Decision of
Administrative Law Judge Ed Washington dated September 29, 2015.

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September 1, 2016

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I. REPLY ARGUMENT

Respondent CalPERS does not contest the argument in Petitioner's Opening Brief (Section IV.A) that it had a fiduciary duty to inform Petitioner *as to when* he had to file an application. Thus, this point is conceded.

Respondent does not actively dispute the argument in Petitioner's Opening Brief (Section IV.B) that CalPERS's "Publication 35" pamphlet failed to give adequate notice to Petitioner. This publication is written in the permissive, not mandatory form. It was the fiduciary duty of CalPERS to make sure its "Publication 35" pamphlet was correct. CalPERS failed in this duty and this failure caused the problem with Petitioner's application.

Respondent tacitly admits that Petitioner's *understanding* that he should first be determined by his employer, NID, to be permanently disabled before he applied to CalPERS was reasonable under the circumstances (Opening Brief IV, pp.10-12). Petitioner tried to be an honest employee and abide by the law as he understood it. Indeed, as pointed out in the Opening Brief at 3n1, the laws governing when and how his employer, NID, went about determining if he was, in fact, permanently disabled (GC §§ 20026, 21156), conflict with CalPERS interpretation of GC §21252(a)as to when Petitioner should have applied.

Respondent also tacitly concedes that NID filed an application on behalf of Petitioner in September 2013 that had the correct starting date (January 2012), but that CalPERS apparently misplaced this application and processed Petitioner's instead. (Opening Brief IV.C). Presumably this is because CalPERS has no reasonable or *bona fide* explanation for misplacing the NID application. If CalPERS had not lost the NID application which had the right date, then Petitioner's later filed application would have (and should have)

been irrelevant.

Petitioner innocently misunderstood that he should have filed an application as soon as he “believed” that he might be disabled. This is exactly the type of error that was the result of “mistake, inadvertence, surprise, or excusable neglect” that GC §20160(a)(2) was intended to rectify. CalPERS is inexplicably trying to circumvent the express intention of the legislature.¹ (Opening Brief 4n2).

II. CONCLUSION

Respondent spends many pages talking about the testimony of Petitioner. Petitioner was, as he has admitted, confused and mistaken about when he needed to apply. CalPERS, however, simply misses the point: it had the fiduciary duty to inform Petitioner in clear and unequivocal terms about when an application needed to be filed. It would have been trivial for CalPERS to put some working examples into its “Publication 35” that were readily understandable. CalPERS, failed to take this simple precaution. Further, CalPERS asserts a punitive and non-remedial interpretation to a non-punitive and remedial statute that was intended to correct situations like this. This goes against the clear public policy of the state. Finally, CalPERS misplaced the application filed by NID on behalf of Thorman that had the correct date.

¹ Indeed, this court can easily resolve the apparent conflict between GC §20026 & §21156, which require an employee to go through a formal employee controlled process for determining if he/she is permanently disabled, with the language of GC §21252(a) to find that, to the extent of any conflict between them, the intent of the legislature in the former statutes is more specific and supercedes the intent of the latter. However, Petitioner does not think it necessary for the court to reach this point to resolve the case.

This Court should grant the Petition, overrule the final decision of the CalPERS' Board, and order that CalPERS pay Thorman his disability pay commencing from January 15, 2012, plus interest.

Respectfully Submitted,

September 1, 2016

Patrick H. Dwyer,
Attorney for Petitioner

Certificate of Word Count

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the entire Petition (i.e., Sections I through Section II) is approximately 672.

Patrick H. Dwyer,
Attorney for Petitioner

Date: September 1, 2016

PROOF OF SERVICE

I hereby certify under penalty of perjury that I am at least 18 years of age, not a party to the action, and that a copy of Philip Thorman's Reply Brief, in the matter of *Thorman v. CalPERS*, Case No. 34-2016-80002303-CU-WM-GDS, was served as follows.

By United States first class mail, postage pre-paid, to:

- (a) Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701
- (a) Matthew G. Jacobs, General Counsel, Rory J. Coffey, Senior Staff Attorney, California Public Employees Retirement System, Lincoln Plaza North, 400 Q Street, Sacramento, CA 95811;
- (b) Karen Fassler Gillespie, Nevada Irrigation District, 1036 W Main St, Grass Valley, CA 95945

I declare under penalty of perjury under the laws of the State of California that the foregoing certification of Patrick H. Dwyer is true and correct.

Patrick H. Dwyer

September 1, 2016
Location: Penn Valley, CA 95946