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OPINION	:	No. 80-905
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of	:	<u>FEBRUARY 5, 1981</u>
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The Board of Administration of the Public Employees' Retirement System requests an opinion on questions that we have phrased as follows:

1. May a member of the Public Employees' Retirement System be retired for disability, pursuant to the application of the member or of his employer, during such time as the member is receiving temporary disability payments pursuant to Labor Code section 4853, under the circumstance that the member desires to purchase additional service credit for the entire period of time that he is receiving such temporary disability payments, as may be authorized by Government Code sections 20930 and 20931?

2. Does a member of the Public Employees' Retirement System have a right, subsequent to his retirement for disability pursuant to Government Code sections 21021 and 21025, to purchase additional service credit for the period of time that he is receiving temporary disability payments pursuant to Labor Code section 4853?

3. Does the Board of Administration of Public Employees' Retirement System have the authority to determine the actual separation date of a member by his employer where it has cause to believe that an incorrect separation date has been reported to it by the employer?

## CONCLUSIONS

1. A member of the Public Employees' Retirement System must be retired for disability "forthwith" upon a determination by the Board of Administration of the Public Employees' Retirement System that he is incapacitated for the performance of duty in his employment and that he is eligible for disability retirement, irrespective of the fact that the member is receiving temporary disability payments and irrespective of the member's desire to elect to purchase additional service credit for the entire period of time that he may be receiving such temporary disability payments, as may be authorized by Government Code sections 20930 and 20931.

2. A member of the Public Employees' Retirement System has no right, subsequent to his retirement for disability pursuant to Government Code sections 21021 and 21025, to purchase additional service credit for any period of time that he is receiving temporary disability payments pursuant to Labor Code section 4853.

3. The Board of Administration of the Public Employees' Retirement System is required, pursuant to Government Code section 21200.1, to determine the last day for which a member was paid "salary" as a condition of the Board's establishing the earliest possible effective date of a member's retirement. The Board must exercise this authority in any instance where it has cause to believe that an employer has reported incorrectly the last day for which a member has been paid "salary" since a member may not simultaneously receive a "salary" pursuant to the employment that qualifies him for retirement and receive a retirement allowance from the Public Employees' Retirement System. The definition in Government Code section 20200.1 of the "earliest possible effective date" of a member's retirement from the Public Employees' Retirement System requires the term "salary" to have two different meanings depending upon whether the member designates the "effective date" of his retirement or whether the Board determines that effective date in the absence of such a designation by the member seeking to retire. Except as the separation date and the last day for which an employee was paid salary in the employment from which he desires to retire may coincide, the determination of a correct "separation date" is irrelevant to any duty of the Board to administer the provisions of the Public Employees' Retirement Law.

## ANALYSIS

The questions presented related to the following factual situation. In December 1975, Mr. H, a state employee, submitted to the State Public Employees' Retirement System (hereinafter PERS) his application for disability retirement to be effective that month. Mr. H was employed by the Department of Transportation, Division of Highways. The Division of Highways notified PERS that Mr. H was separated<sup>1</sup> from employment on December 31, 1975, and that his last day on salary status was December 1, 1975. Upon receipt and consideration of the necessary medical reports attendant upon a medical examination relating to his disability, PERS approved Mr. H's retirement for disability January 6, 1977, with an effective date of December 2, 1975. Mr. H, therefore, became entitled to two years additional service credit pursuant to the provisions of Government Code<sup>2</sup> section 20816 (AB 2164; Stats. 1975, ch. 1167) which allowed such additional credit to members of PERS who retired on or after July 1, 1975, and before December 31, 1975.

Thereafter, on August 17, 1977, Mr. H requested that his application for disability retirement be cancelled. Mr. H's request that his application for disability retirement be cancelled was denied by PERS on the basis that PERS had retired him for disability on January 6, 1977, with an effective date of December 2, 1975.

Mr. H was receiving temporary disability payments pursuant to Labor Code section 4853, subsequent to December 2, 1975, his "effective date" of retirement, and subsequent to January 5, 1977, the date of PERS' determination that he be retired for disability. Mr. H contends that he is entitled to purchase additional "service credit" for such time as he was receiving temporary disability payments, as authorized by Government Code sections 20930 and 20931.

PERS mailed Mr. H his first retirement warrant on August 1, 1979, for an amount calculated according to Mr. H's service with the state through December 1, 1975, the effective date of his disability retirement, plus two additional years of service credit as authorized by section 20816.

The first issue is whether Mr. H, as an employee-member of PERS, may be separated from service *within the meaning of the public employees' retirement law*, during such time as the member is receiving temporary disability payments as authorized by Labor Code section 4853. The significance of an issue regarding the "separation" date of a member will be developed in the subsequent analysis.

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<sup>1</sup> The record does not establish the reason for Mr. H's separation from service at that time.

<sup>2</sup> All unidentified section references are to the Government Code.

In interpreting the provisions of the Public Employees' Retirement Law, we are mindful that pension laws are to be liberally construed to carry out their beneficial purposes (*Adams v. City of Modesto* (1960) 53 Cal. 2d 833, 840; *England v. City of Long Beach* (1945) 27 Cal. 2d 343, 346; *Lesem v. Board of Retirement* (1960) 183 Cal. App. 2d 289, 298), and that ambiguities in pension laws should be resolved in favor of the members of a retirement system. (*Wendland v. City of Alameda* (1956) 46 Cal. 2d 786; *Lesem v. Board of Retirement, supra*, at p. 298.) However, the primary rule of statutory interpretation is that: "[T]he legislative purpose and policy should be promoted and in ascertaining the legislative intent, the purpose sought to be achieved and the evils to be eliminated will be considered. The mere literal construction will not prevail over the apparent legislative intent." (*Freedland v. Greco* (1955) 45 Cal. 2d 462, 467; *Lesem v. Board of Retirement, supra*, at p. 298; see *State Employees' Retirement System v. Workmen's Comp. Appeals Bd.* (1968) 267 Cal. App. 2d 611.)

Section 21021 provides that:

"[A]ny member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he is credited with five years of state service, regardless of age."

Section 21020 provides that:

"[A]s used in this part, 'disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended and uncertain duration, as *determined by the board* on the basis of competent medical opinion." (Emphasis added.)

Section 21023 provides in part that:

"Application to the board for retirement of a member for disability may be made by:

"(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

".....

"(d) The member or any person in his behalf."

Section 21024 provides that:

“The application shall be made only (a) while the member is in state service, or (b) while the member, who makes contributions under Section 20891.1 or for whom contributions will be made under Section 20894.5, 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 he is physically or mentally incapacitated to perform his duties from the date of discontinuance of state service to the time of application or motion. *On receipt of an application for disability retirement of a member, other than a local safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether he is incapacitated for the performance of duty.* On receipt of such application with respect to a local safety member, the board shall request the governing body of the contracting agency employing such member to make such determination.” (Emphasis added.)

Section 21025 provides that:

*“If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member the governing body of the contracting agency employing such member, that the member is incapacitated physically or mentally for the performance of his duties in the state service and is eligible to retire for disability, the board shall forthwith retire him for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his retirement for disability or within 30 days after the member is notified of his eligibility for retirement on account of disability, in which event the board shall retire the member of service. The governing body of a contracting agency upon receipt of the request of the board pursuant to section 21024 shall certify to the board its determination under this section that the member is or is not so incapacitated.”* (Emphasis added.)

Thus, upon a determination that a member is disabled, the Board of PERS is directed by section 21025 to retire the member “forthwith” on disability unless the member is eligible for and elects to be retired “for service.” The determination that a member is eligible for disability retirement and his consequent retirement for disability “forthwith” does not, per se, determine the “effective date” of such retirement. Section 21200.1 provides that:

*“Retirement shall be effective and the retirement allowance shall begin to accrue as of the date designated in the member’s application as the*

*effective date of retirement, or upon the day following the last day for which salary is payable if that day postdates the day designated by the person as the effective date* or if the member has not designated an effective date. In no event shall the retirement become effective or the retirement allowance begin to accrue earlier than the first day of the month in which the member's application is received at the office of the board, in Sacramento, California, or, if the member has been incompetent to act on his own behalf continuously from the last day for which salary was payable, one year prior to the month in which an application by the guardian of his estate is so received."

Thus, section 21200.1, *supra*, provides to a member a right to select the "effective" date of his retirement provided that the date so selected is no earlier than the day following the last day for which "salary" was payable, and provided further that the date so selected cannot be earlier than the first day of the month in which the member's application is received by PERS in Sacramento.

The "right" of a member to select an "effective date" for his retirement is applicable to both disability retirements and to nondisability retirements, i.e., "service" retirements. Thus, the "effective date" of Mr. H's retirement was of his own choosing, pursuant to his right as accorded to him by section 21200.1, in order that he might take advantage of section 20816 50 as to gain an additional two years of service credit for purposes of determining his retirement allowance.

However, Mr. H, as a member of PERS, had another right, to wit, the right to purchase additional "credit for public service" which might operate to increase his retirement allowance. Thus, section 20931 provides that:

*"A member may elect at any time prior to retirement, in accordance with regulations of the board, to receive credit for public service in addition to his current and prior service credit. An election shall be effective only if accompanied by a lump-sum payment of the contributions and interest required for such credit or by authorization for immediate institution of payroll deduction of installment payment of such contributions and interest. The right of election is subject to Sections 20809 and 20861, and shall be ineffective with respect to any time or employment for which the member subsequently becomes entitled to or eligible to elect to receive service credit in another system supported in whole or in part from public funds, in which case accumulated contributions on deposit for such period of service credit shall be paid to the member. (Emphases added.)*

Section 20930 provides in part that:

“‘Public service’ for purposes of this article means the following:  
“.....

“(j) Absence from state service because of illness which arose out of and in the course of employment and for which the member received temporary disability benefits under the Labor Code during such absence and did not receive full compensation, as distinguished from such disability benefits for the period of absence.”

Referring to the factual recitals set forth hereinbefore, Mr. H selected an “effective” date for his disability retirement, contingent upon the Board determining that he was eligible for disability retirement, that was the earliest possible date pursuant to the provisions of section 21200.1, i.e., the day following the last day in which he received salary while employed with the state.

It appears that this decision with regard to an effective date was to his benefit because it entitled him to two years’ additional service credit pursuant to section 20816. However, it further appears that Mr. H continued to receive, subsequent to his disability retirement, temporary disability payments pursuant to Labor Code section 4853. If Mr. H were to have continued to receive temporary disability payments for a period of time in excess of the two years’ credit he received pursuant to section 20816, it might be to his advantage to elect to purchase such additional credit pursuant to sections 20930 and 20931 in lieu of receiving the two years’ service credit he received pursuant to section 20816 upon his retiring prior to December 31, 1975.

However, section 20931 requires that the election to purchase such additional public service credit—as defined by section 20930(j)—must be made “*prior to retirement.*” In this case, Mr. H made his request to be allowed to purchase such additional public service time subsequent to his being determined to be eligible for disability retirement, consequent to which determination of eligibility for disability retirement he was retired by the Board “forthwith”<sup>3</sup> pursuant to section 21025, with an effective date of December 2, 1975, as selected by Mr. H pursuant to section 21200.1.

In support of his request that he be allowed to purchase additional public service credit for such time as he was receiving temporary disability payments—as may be authorized by sections 20930 and 20931, Mr. H contends that he could not legally be

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<sup>3</sup> There is no issue presented concerning an election so select a “service” retirement in lieu of a “disability” retirement as authorized by section 21025.

separated from service within the meaning of the Public Employees' Retirement Law, prior to the expiration of the time during which he received such payments. If Mr. H could not legally be separated from service during such time as he was receiving temporary disability payments then, it is contended, he could not legally be retired during such time nor could his retirement" for disability be made effective on the date he had selected. Accordingly, he contends that he still may exercise the option provided by section 20931 of purchasing additional public service time for such period of time as he was eligible pursuant to section 20930.

Section 21023.5 provides that:

"Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in section 20393."

However, this section does not operate so as to restrict Mr. H's right as a matter of law to select an effective date that is otherwise authorized pursuant to section 21200.1, *supra*. Section 21023.5, *supra*, requires an employer to apply to PERS, pursuant to section 21023, *supra*, to have a disabled employee retired for disability rather than terminating such employee's employment. Section 21023.5, *supra*, operates to prevent a discharge of an employee from employment for disability by an employer if PERS determines that, in fact, the employee is not disabled. (57 Ops. Cal. Atty. Gen. 86 (1974).) However, this section does not force an employee to receive payments for temporary disability in lieu of retiring for disability. (§ 21021.) Thus, if Mr. H, as of December 1975, were to believe that he was disabled within the meaning of the Public Employees' Retirement Law, he was entitled to apply for disability retirement and to select an effective date without regard to the provisions of section 21023.5. This he did.

As we have already noted, a member of PERS has a statutory right to select his retirement "effective" date, upon a determination that he is otherwise eligible to retire, whether for disability or for service. That provision, section 21200.1, *supra*, provides restrictions upon the earliest date that may be selected as an effective date. Other provisions of the Public Employees' Retirement Law operate so as to permit the member to select a later date as an effective date other than the earliest date. Thus, section 21025.2 provides that:

"Notwithstanding any other provision of this article, the retirement of a member who has been granted or is entitled to sick leave or who is entitled



to compensating time off for overtime, shall not become effective until the expiration of such sick leave with compensation and the expiration of such compensating time off with compensation, *unless the member applies for or consents to his retirement as of an earlier date*, or unless, with respect to sick leave, the provisions of a local ordinance or resolution or the rules or regulations of the employer provide to the contrary.” (Emphasis added.)

Section 21025.5<sup>4</sup> provides that:

Notwithstanding any other provision of this article, the retirement for disability of a member, other than a local safety member, who has been granted or is entitled to a leave of absence with compensation, which shall include nonindustrial disability insurance benefits payable pursuant to Chapter 3.6 (commencing with Section 18135) of Part 1 of this division, shall not become effective prior to the expiration of such leave of absence with compensation, *unless the member applies for or consents to his retirement as of an earlier date*. (Emphasis added.)

We need not consider whether either of these two sections are in fact applicable to Mr. H on the basis of an argument that the receiving of temporary disability payments pursuant to the Labor Code is either “sick leave” or a “leave of absence with compensation.” (See, e.g., 55 Ops. Cal. Atty. Gen. 426 (1972).) Assuming but not conceding the applicability of either of these two sections, their effect is to allow the affected employee to continue to earn service credit while meeting the conditions therein specified. However, these sections, by their express terms allow an employee to apply for and to consent to a different effective date than is otherwise specified in the statute.

It has been established that Mr. H wishes to claim additional service credit for the period of time during which he was receiving temporary disability payments. Section 21202 provides, in that context, that:

“The benefits payable . . . under this system shall not be modified on account of any amounts paid to a retired member or beneficiary (as defined in this part), under Division 4 of the Labor Code.”

The reference in section 21202 to division 4 of the Labor Code is a reference to the provisions relating to worker’s compensation, which reference includes Labor Code section 4853, the section that authorizes the payment of the temporary disability payments received by Mr. H. Thus, pursuant to section 21202, Mr. H may receive retirement benefits

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<sup>4</sup> But see Government Code sections 18140, 20022 and 20221.

and temporary disability payments simultaneously since his retirement benefits may not be “modified” (i.e., decreased) by virtue of his receiving temporary disability payments. Thus, the Legislature has not mandated a delay of one’s retirement for disability pending termination of temporary disability payments.

This analysis substantiates the conclusion that the Board may retire a member for disability during the time that a member is receiving temporary disability payments pursuant to Labor Code section 4853, irrespective of the fact that the member may be eligible to purchase additional service credit pursuant to sections 20930 and 20931. The condition precedent to such retirement for disability while receiving temporary disability payments is (1) an application for disability retirement submitted by the member or by the employer (§ 21023), (2) the designation by the member of a permissible “effective date” for his retirement (§ 20200.1), (3) a determination by the Board that the member is eligible for disability retirement by reason of a qualifying disability (§ 21025) and (4) no election by the member to change his designation of the “effective date” of his retirement prior to his being retired for disability (§§ 20931, 21202). Each of these factors having occurred, Mr. H’s retirement for disability complied with the applicable provisions of the Public Employees’ Retirement Law. (See, e.g., 60 Ops. Cal. Atty. Gen. 140 (1977).)

While it is clear that Mr. H selected his own effective date, as he was authorized to do, he contends that he is authorized to change his mind and to select another date, thus allowing him to obtain the benefit of the additional service credit for which he became eligible pursuant to section 20930. The short answer to such a contention is that his right to change his mind-whatever that right may have been-must be deemed terminated, upon the determination of PERS that he was eligible for disability retirement, by his disability retirement. (§§ 20931, 21202.) Thus, it is clear that Mr. H is not authorized to claim any additional service credit for any period of time subsequent to his retirement. (§ 20931.)

Finally, it is contended that Mr. H’s employer is willing to report a different separation date with respect to Mr. H’s qualifying employment than was reported originally to PERS, on the basis that during an intervening period of time Mr. H was eligible for and was receiving temporary disability payments. An issue is thus raised concerning whether PERS has a duty to receive or to solicit such a corrected report of the separation date of the employee from his employment.

Section 21200.1, *supra*, provides in relevant part that:

“Retirement shall be effective and the retirement allowance shall begin to accrue as of the date designated in the member’s application as the effective date of retirement, or upon the day following the last day for which

salary is payable if that day postdates the day designated by the person as the effective date or if the member has not designated an effective date. . . .”

Thus, section 21200.1 allows a member to select an “effective date” for his retirement and it directs the Board to select an “effective date” in the absence of a designation by the member of an effective date, provided that in neither instance may the effective date be earlier than the day following the last day for which salary is payable if an application for retirement has been timely filed with PERS.

However, the determination as to what constitutes “the last day for which salary is payable” within the meaning of section 21200.1, is a different date when the member designates that day as an effective date and when the Board designates that day under the circumstance that the member fails to designate an effective date. Several provisions of the Public Employees’ Retirement Law operate to extend the “effective date” of a member’s retirement to include the expiration of “sick leave” and of “compensating time off with compensation” (§ 21025.2) and of “a leave of absence with compensation” (§ 21025.5) as may therein be authorized, unless the “member applies for or consents to his retirement as of an earlier date.”

Thus, if a member selects an “effective date,” pursuant to section 20200.1, the Board must determine whether that date is subsequent to the last day that the member was paid “salary,” i.e., the last day that the member worked at his employment for which he was paid salary. If the member does not select an “effective date,” then pursuant to section 20200.1 the Board must determine the “effective date” for his retirement by determining whether the last day that the member worked for which he was compensated was extended by any absences from employment “with compensation” that are required to be included by a special provision applicable to that member. In neither case is the “date of separation” from employment legally significant per se.

It is apparent from the provisions of section 21200.1 that a member of PERS may not be both receiving “salary” while continuing to work for his employer and receiving retirement benefits from the system. Thus, if PERS were to become aware that an applicant for retirement were receiving “salary” for any period of time after the effective date of his retirement, PERS would have an obligation, pursuant to section 21200.1 to ascertain the last date that the applicant received salary, irrespective of the reported separation date. But section 21200.1 only prevents the establishment of an effective date for retirement that is prior to the day following the last day for which the applicant received salary. No provision of law prevents an applicant from selecting an effective date at the expiration of or during the time within which the applicant is receiving sick leave or leave with compensation. To the contrary, the statutes expressly authorize the applicant to select an effective date for his retirement despite the occurrence of any of such events. (See, e.g., §§ 21200.1, 21025.2,

21025.5.) However, this right does not survive the “retirement” of the employment as otherwise authorized by laws.<sup>5</sup> Thus, the affected employee has no right to change his mind concerning the effective date of his retirement once he is retired. Thus, in the absence of any indication that Mr. H was drawing salary subsequent to his separation date, a “change” in the reported separation date by his employer would be irrelevant to the determination by PERS of Mr. H’s eligibility for retirement, to his correct amount of service credit and to the amount of retirement allowance to which he is entitled consequent to his being retired by PERS for disability.

In this instance, the “effective date” was a date selected by Mr. H. The “effective date” was the day following the last day that he received “salary” related to his employment, which day was not his separation date (that date was Dec. 31, 1975) and the fact that Mr. H was receiving temporary disability payments did not operate to vitiate his selection of an effective date of his disability retirement. (§ 21200.1.) Mr. H’s retirement for disability terminated any right Mr. H had to purchase additional service credit, section 20931, or to change his mind concerning the “effective date” of his retirement. (See § 20931.)

We resolve the questions presented accordingly. A member of the Public Employees’ Retirement System must be retired for disability “forthwith” upon a determination by the Board of Administration of the Public Employees’ Retirement System that he is incapacitated for the performance of duty in his employment and that he is eligible for disability retirement, irrespective of the fact that the member is receiving temporary disability payments and irrespective of the member’s desire to elect to purchase additional service credit for the entire period of time that he may be receiving such temporary disability payments, as may be authorized by Government Code sections 20930 and 20931.

A member of the Public Employees’ Retirement System has no right, subsequent to his retirement for disability pursuant to Government Code sections 21021 and 21025, to purchase additional service credit for any period of time that he is receiving temporary disability payments pursuant to Labor Code section 4853.

The Board of Administration of the Public Employees’ Retirement System is required, pursuant to Government Code section 21200.1, to determine the last day for which a member was paid “salary” as a condition of the Board’s establishing the earliest possible effective date of a member’s retirement. The Board must exercise this authority in any instance where it has cause to believe that an employer has reported incorrectly the last day for which a member has been paid “salary” since a member may not

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<sup>5</sup> We are not concerned herein with any issue concerning reinstatement from retirement, see section 21100 *et seq.*

simultaneously receive a “salary” pursuant to the employment that qualifies him for retirement and receive a retirement allowance from the Public Employees’ Retirement System. The definition in Government Code section 20200.1 of the “earliest possible effective date” of a member’s retirement from the Public Employees’ Retirement System requires the term “salary” to have two different meanings depending upon whether the member designates the “effective date” of his retirement or whether the Board determines that effective date in the absence of such a designation by the member seeking to retire. Except as the separation date and the last day for which an employee was paid salary in the employment from which he desires to retire may coincide, the termination of a correct “separation date” is irrelevant to any duty of the Board to administer the provisions of the Public Employees’ Retirement Law.

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