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OPINION	:	No. 81-1204
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of	:	<u>SEPTEMBER 17, 1982</u>
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THE HONORABLE CARL J. BLECHINGER, EXECUTIVE OFFICER,
BOARD OF ADMINISTRATION, PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
has requested an opinion on the following question:

Does the Public Employees' Retirement Law authorize a revocation of an election to retire for service, and consideration of a new election to retire for disability, after the statutory time for such election has elapsed, where the change in status will not affect the amount of the benefit, but where the change is requested because the retirant asserts it will provide a tax advantage?

CONCLUSION

The Public Employees' Retirement Law does not authorize the board of administration of the Public Employees' Retirement System to waive the statutory time

limit for election of alternate benefits, where the change in status will not affect the amount of the benefit.

ANALYSIS

Retirement benefits for state employees and employees of local contracting agencies are administered under the Public Employees' Retirement Law (pt. 3 of div. 5 of tit. 2 of the Gov. Code, commencing with § 20000; hereafter "Act") which establishes the Public Employees' Retirement System (§ 20002¹; hereafter "PERS"). The responsibility for administration of the Act rests with the board of administration (§§ 20005, 20103; hereafter "board"). Section 20123 invests the board with a duty to determine benefits for service and disability retirement and authority to modify those benefits within the limitations of the Act and board rules. The board is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under the Act. (§ 20124.)

Retirement of employees covered by the Act may be based upon length of service (§ 20950) or disability (§ 21021). Disability retirement must usually be applied for within four months after the discontinuance of employment. (§ 21024.) If a member of PERS is eligible for both service retirement and disability retirement, and application is made for disability retirement, PERS will retire the member for disability. However, the member may, within 30 days after notification of eligibility for disability retirement, or prior to the effective date of disability retirement, elect to retire for service. (§ 21025.)

If an error has been made in calculations of required contributions or benefits, the board is authorized to correct it by section 20165.²

¹ All unidentified section references are to the Government Code.

² Section 20165:

"If more or less than the correct amount of contribution required of members, the state, or any contracting agency, is paid, proper adjustment shall be made in connection with subsequent payments, or such adjustments may be made by direct cash payments between the member, state, or contracting agency concerned and the board. Adjustments to correct any other errors in payments to or by the board, including adjustments of contributions, with interest, which are found to be erroneous as the result of corrections of dates of birth, may be made in the same manner. Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled. Losses or gains resulting from error in amounts within the limits set by the State Board of Control for automatic writeoff, and losses or gains in greater amounts specifically approved for writeoff by the State Board of

Furthermore, section 20180 provides:

"Whenever, during the employment of any employee by the State, the University, or any contracting agency, or during the membership of a member in this system, or during the time this system remains under any obligation to or in respect to a retired member or his beneficiary, the board finds that, because of inadvertence, oversight, mistake of fact, mistake of law, or other cause, any action required by this part to be taken or performed by an employee, his public employer, a member or beneficiary, or this system was not taken or performed at the time it should have been taken or performed, the board shall take or perform such action, or shall order it to be taken or performed by the person whose duty it was to perform it. If, in any such case, the board finds that (1) the facts and circumstances are such that by adjustments pursuant to Section 20165, payments into or from the retirement fund, and correction of the books, accounts, and records of this system, or any of them, the action can be taken or performed as of the date it should have been taken or performed, and the status, rights, and obligations of the employee or member, his public employer, and this system can be made the same that they would have been if the action had been taken or performed at the proper time, and (2) that the purposes of this part will be effectuated if the action is taken or performed as of the date it should have been taken or performed, the board shall take or perform it as of that time, or order it to be taken or performed as of that time, and shall cause the books, accounts, and records of this system to be corrected accordingly, so as to

Control, shall be debited or credited, as the case may be, to the reserve against deficiencies in interest earned in other years, losses under investments, and other contingencies.

"No adjustment shall be made because less than the correct amount of normal contributions was paid by a member if, upon application of the member made within 90 days of discovery of the error by the system, the board finds that the error was not known to the member and was not the result of erroneous information provided by him to the system or to his employer and such failure to adjust will not preclude action under Section 20180 correcting the date upon which the person became a member.

"The actuarial equivalent under this section shall be computed on the basis of the mortality tables and actuarial interest rate in effect under the system on December 1, 1970, for retirements effective through December 31, 1979. Commencing with retirements effective January 1, 1980, and at corresponding 10-year intervals thereafter, or more frequently at the board's discretion, the board shall change the basis for calculating actuarial equivalents under this article to agree with the interest rate and mortality tables in effect at the commencement of each such 10-year or succeeding interval."

make the status, rights, and obligations of the employee or member, his public employer, and this system the same in every respect that they would be if the action had been duly taken or performed at the proper time. If the board finds that (1) the facts and circumstances are such that the action cannot be taken or performed as of the date it should have been taken or performed, or that (2) if it is so taken or performed, the status, rights, and obligations of the employee or member, his public employer, and this system cannot be made the same that they would be if the action had been taken or performed at the proper time, or that (3) the purposes of this part will not be effectuated if the action is taken or performed as of the date it should have been taken or performed, the board shall take or perform the action, or order it to be taken or performed, as of the time the action is actually taken, and the status, rights, and obligations of the employee or member, his public employer, and this system shall be those which result from the action at the time it is actually taken." (Emphasis added.)

The question presented involves a member of PERS who, fully aware of his medical condition and the availability of disability retirement benefits, applied for and received service retirement benefits. His application for service retirement was not made pursuant to section 21025.³ No timely application for disability retirement was made pursuant to section 21024.⁴ The retirant has now obtained information which leads him to believe that receipt of disability retirement benefits would qualify him for more favorable

³ Relevant language in section 21025 states:

"If the medical examination and other available information show to the satisfaction of the board, or in the 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 for service. . . ."

⁴ With respect to the time during which applications for disability retirement may be filed, section 21024 states:

"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 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"

tax treatment, a possibility of which he was unaware at the time he elected to receive service retirement benefits. A change from service to disability retirement status would not result in any change in retirement allowance or any other PERS-related benefit. The member alleges that revocation of his original election to retire for service and consideration of a new election to retire for disability is authorized by section 20180 and must be permitted by the board. The board contends that it does not possess the authority to take that action because the time limit mandated by section 21024 for applying for disability retirement has not been met.

In construing the terms of the Act we apply the customary rules of statutory construction used by the courts to ascertain its meaning. The controlling rule of statutory construction requires us to determine the intent of the Legislature so as to effectuate the purpose of the law. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698; *Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645.) In order to ascertain this intent, a statute must be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula School Dist.* (1978) 21 Cal.3d 650, 659; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) Where the provisions of a statute are susceptible to two or more reasonable interpretations, the interpretation that will harmonize rather than conflict with other provisions should be adopted. (*People v. Kuhn* (1963) 216 Cal.App.2d 695, 698.) In addition the provisions of pension statutes are to be liberally construed in favor of the member to achieve the purpose of providing benefits to an employee. (*Cavitt v. City of Los Angeles* (1967) 251 Cal.App.2d 623, 626.)

Section 20180 has three essential elements: (1) a condition precedent to the correction of a mistake, that an action *required by other sections of the Act* was not taken, (2) a requirement that such a mistake must be corrected, and (3) the correction may be retroactive or prospective only. However, there is a potential conflict with section 21024 because the correction of a mistake under section 20180 may be taken after the time limit set for application of disability retirement has passed.

In resolving this potential conflict and ambiguity, we first look at the courts' resolution of similar conflicts under the Act. The cases that have interpreted section 20180 have construed the language in that section to provide benefits rather than adopting a construction that would have denied benefits, and construe it to apply to situations which result in more PERS-related benefits than originally contemplated.

In two cases recently interpreting section 20180, the action "required to be taken" that was not taken was the correct classification of the employee in order to determine retirement benefits. In *Campbell v. Board of Administration* (1980) 103

Cal.App.3d 565, PERS had misclassified bailiffs as miscellaneous members instead of safety members. The board reversed its classification and retroactively assessed each party the difference in contributions that would have been made by these employees as safety members. The members sought relief from the assessments under section 20165. The court upheld the board's determination that the forgiveness portion of section 20165 applied only to clerical or mechanical errors in calculation, and not to misclassification. The court indicated that sections 20180 and 20165 work together to correct errors:

" . . . Section 20180 indicates that errors in the system arising *for any reason* should be rectified, if possible by the adjustment procedure set forth in section 20165." (*Id.*, at p. 571; original emphasis.)

The case of *Boxx v. Board of Administration* (1981) 114 Cal.App.3d 79 also involved a misclassification. Boxx did not qualify for any benefits as a miscellaneous member but would have qualified for some benefits if he were a safety member. The court found that PERS had agreed to provide retirement benefits for Boxx and that he was denied these benefits because of a mistake: incorrect classification by PERS (*id.*, at p. 90), and that this mistake was correctable under sections 20180 and 20165.

Two other cases interpreting section 20180 are much closer in their factual circumstances to the question under consideration in this opinion. In *Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559, the court held that PERS must act under section 20180 to change Rodie's retirement status from disability to service. Rodie received a disability retirement from PERS and also received federal disability benefits. In accordance with statute PERS reduced Rodie's state benefits in the amount of the federal benefits. Rodie later discovered that if he had elected service retirement he could retain federal disability payments and his service retirement benefits would not have been reduced. He sued PERS for change to service retirement and the court held that the change must be made under section 20180. The court found that the "action required to be taken" under the Act was to determine benefits for service and disability retirement (§ 21023) and if PERS *miscalculated*, it failed to determine benefits in accordance with its legislative mandate to afford benefits upon the employee's status and service. The court stated:

" . . . We can discern no reason for treating an employee's mistaken choice between two types of retirement to which he is entitled by reason of past services differently from any other mistake *depriving him of benefits to which he is fairly entitled*. (*Id.*, at p. 566; emphasis added.)

Section 20180 was also at issue in *Button v. Board of Administration* (1981) 122 Cal.App.3d 730. Button elected to receive service retirement benefits, not being aware at the time that he had a latent disability which may have qualified him for a more

advantageous disability retirement. His disability was later discovered and was found to have arisen out of his employment with a contracting agency of PERS. The court held that if the board found Button to have been disabled at the time of his retirement, then it must change his status under section 20180. The board argued that section 20180 applies only when the action was "required to be taken" in the first instance, and Button did not establish that PERS was *required* to grant him disability at the time he retired. The court rejected this argument by observing that the board would have been required to process his application and make a determination if he was eligible for a disability retirement. The court inferentially held that the board would have been *required* to grant him disability if it had found Button disabled at that time relying upon the rule expressed in *Cavitt* that pension statutes are to be liberally interpreted so as to provide benefits for the employee and his family. Thus, the court concluded that PERS failed to perform the required action of correctly determining benefits. This failure arose from a mistake of fact; the employee, and consequently PERS, did not know that a potential disability existed.

In order to resolve the applicability of section 20180 to the question presented, we must first determine what action, required to be taken by other provisions of the Act, was not taken. Unlike *Rodie*, there was no reliance upon PERS calculations or miscalculations which resulted in the member electing a lesser benefit. It is evident that the only act PERS failed to perform was determining the tax consequences of electing alternate retirement benefits. A rigorous review of the Act reveals no requirement that PERS provide personal financial counseling or determine the tax treatment of any benefit. In fact, the board is a body not expert in tax law, and it would be unwarranted to suggest that the tax consequences of retirement benefits have any role in the board's deliberations. PERS specifically disclaims the responsibility of providing tax advice and admonishes members to seek advice from the Internal Revenue Service, the Franchise Tax Board, or private tax consultants.⁵ In this instance there was no mistake in any action required of PERS that would invoke the provisions of section 20180.

Section 20180 also applies to actions which the Act requires members to perform. In this situation, section 21024 requires the timely filing of an application for disability retirement. Unlike *Button*, the failure to act was not caused by a mistake due to lack of knowledge of eligibility for, or availability of, alternate benefits. The member was aware of his physical condition and the availability of disability retirement benefits, but he

⁵ See, for example: "Disability Retirement," PERS publication PERS-ADM-DO-22, May 1981; "Planning Your Retirement: A Step-By-Step Guide," PERS publication PERSTPS-DO-1, October 1981; "Benefits for State Miscellaneous Members," PERS publication PERS-ADM-DO-2; "Federal Taxation of PERS Monthly Allowances (other than disability allowances)," PERS publication PERS-TPS-DO-14, December 1981.

elected service retirement benefits. And, unlike *Rodie* and *Button*, the failure to act did not result in the member receiving fewer PERS benefits.

The question, then, is whether the member's decision not to apply for disability retirement benefits within the statutory time limit presents a special circumstance that not only invokes section 20180, but also overrides the time limit of section 21024. An examination of section 20180 in isolation clearly mandates corrections, whenever discovered, of failures to take action required by the Act. The following scenario, based upon the situation presented, would be plausible:

A member of PERS, who is aware that he has a medical condition which would qualify him to apply for disability retirement, elects to retire for service. The PERS benefit and other related benefits are the same for both service and disability retirement. More than four months after retiring for service, the retirant then requests revocation of the original application for service retirement, claiming that choice was a mistake due to his failure to obtain information on the relevant tax consequences. PERS, utilizing section 20180, permits the correction of the mistake, and ignores the time limit for application for disability retirement in section 21024. The retirant then finds that receipt of disability retirement benefits burdens him with a significantly greater tax liability. He requests revocation of the election of disability retirement benefits, again due to his ignorance of tax laws, and requests reinstatement of service retirement benefits. PERS, utilizing section 21080, permits the correction. Three years later, the tax laws are revised, making disability retirement benefits more advantageous from a tax standpoint. Retirant requests a correction in his status again. Ad infinitum.

Clearly, section 20180 cannot be considered in a vacuum: it must be considered in conjunction with all other portions of the Act. Certainly the Legislature must have intended section 21024's time limit to serve some purpose. We can analogize this situation with the provisions of Code of Civil Procedure section 473 which permit a court to:

"... relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

The application for relief must be made "within a reasonable time," not exceeding six months.

"The reason of this rule is obvious: there must be some finality in legal proceedings, and a period beyond which they cannot extend. The safety and

tranquility of parties require that their interest should not be constantly suspended, and their repose liable to be disturbed at any moment by the discretion of the Court." (*Carpentier v. Hart* (1855) 5 Cal. 406, 407.)

The functioning of PERS and the administration of the Act should not remain in suspense due to an interpretation of section 20180 which authorizes unlimited correction of errors and complete disregard for time limits specified in the Act.

The potential conflict between the broad correctional powers granted in 20180 and the specific time limit of section 21024, examined in light of the rules of statutory construction and the liberal construction of pension statutes to provide benefits, must exist only when special circumstances arise which will bestow or increase benefits to the member. As the *Button* court emphasizes:

"The three sections [21023, 21024, 20390] 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*. (*Button v. Board of Administration, supra*, 122 Cal.App.3d at p. 735; emphasis added.)

The election between alternate retirement benefits is a serious action. While the board must be responsible for providing the member with correct information concerning benefits, the member must be responsible for obtaining relevant information not required to be provided by the board.

PERS currently pays retirement benefits to over 150,000 persons. To permit each to change status, after the time period for election has expired, even though that change would not result in an increase in benefits, would not be compatible with the rules of statutory construction. And, as the *Button* court stresses, under normal circumstances, a retirant may not change status. We conclude that the question presents no special circumstance which would warrant a revocation of the original election to retire for service and a new election to retire for disability. The member was aware of his medical condition and the availability of alternate benefits when he made his choice, and a change in status would not provide new or additional benefits. The change is precluded by section 21024, and the board has no authority to waive the time limit.
