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DISCIPLINARY APPEAL OF TERMINATION STILL POSSIBLE AFTER RETIREMENT

By Robert Rabe

We recently had a client ask us if they could proceed with their disciplinary appeal, if they retired **after** being fired¹. Although at one time it was uncertain what would occur in such a situation, recently passed statutes and judicial and administrative decisions have clarified the law in this area.

Government Code §20969.3 requires a CalPERS member, who is terminated (fired) on or after January 1, 2017, and is subsequently reinstated pursuant to an administrative or judicial proceeding, to also be reinstated back into PERS, *with all retirement benefits that the member otherwise would have accrued*. Contributions to CalPERS in the amount that would have been contributed, either by the member or on behalf of the member by the employer, must be made for any period salary is awarded, and the member will receive service credit for that period.

Government Code §21198 provides that if a CalPERS member *retires* after being fired and is subsequently reinstated to their former position pursuant to an administrative or judicial proceeding, the member shall also be reinstated into CalPERS -

effective the date any salary is to be paid. Any amount paid by CalPERS to the person during retirement, if for the same period salary is awarded, must be repaid by the member to CalPERS.

For State of California employees, Government Code §19584 provides that if there is a State Personnel Board ruling to reinstate the employee to his/her former position following being fired, there must also be a *reinstatement of all benefits, including retirement*, for that period of time the Board finds the adverse action was improperly in effect.

In a Precedential Decision, *In re Kareemah M. Bradford*, 17-01, the CalPERS Board of Administration rejected the argument that an employee, who was wrongfully terminated **prior** to January 1, 2017, could not receive service credit for the time period she received retroactive salary payments, because Government Code §20969.3 only applied to those employees who were terminated on or after that date. The Board concluded that, while §20969.3 did not apply, neither did it prohibit CalPERS from granting service credits to an employee who was wrongfully terminated prior to January 1,

¹Since the client was a CalPERS member, this Training Bulletin may be of interest to an employee of an agency which contracts with PERS for retirement benefits for its eligible employees.

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2017. The Board reviewed prior law and concluded that a period of wrongful termination is akin to a paid leave of absence during which an employee is excused from work, ruling that “the retroactive payment awarded to her for the period of her wrong[ful] [] termination satisfies the definition of ‘compensation earnable’ and therefore reportable to CalPERS for retirement purposes.” *When the issue is retirement benefits, any person wrongfully terminated must now be treated the same, no matter what date they were fired.*

In *Byrd v. State Personnel Bd.* (2019) 36 Cal.App.5th 899, the Court noted that where an employee has been fired and later reinstated pursuant to an administrative or judicial proceeding, Government Code §21198 allows CalPERS to return the parties to the status quo. The Board should generally attempt to accomplish this by reinstating employees to their prior job classifications and ensuring that “the pension benefits are applied in the same manner as if the employees had not been involuntarily terminated.”

So, the answer is “yes” - an employee *may* appeal, even if they retire following their termination, with the understanding that they may have to repay CalPERS the amount paid to them during the retirement period, should they be awarded back pay for that same period.

Stay Safe!

Robert Rabe is Stone Busailah, LLP’s writs and appeals specialist. His 41 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.