

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Thomas R. Hamilton (Respondent) was last employed by Respondent City of Palo Alto (Respondent City) as a Firefighter/Paramedic/Inspector. By virtue of his employment, Respondent was a local safety member of CalPERS.

Respondent originally submitted a service retirement (SR) application to CalPERS on July 26, 2020, with an effective retirement date of August 1, 2020. Respondent cancelled that application and submitted a second SR application on August 2, 2020, with an effective retirement date of July 31, 2020. Respondent has been receiving service retirement benefits since August 10, 2020.

Prior to submitting his service retirement applications, Respondent repeatedly communicated with CalPERS to ask questions about applying for industrial disability retirement (IDR) benefits. Starting on May 17, 2018, Respondent visited CalPERS' San Jose Regional Office to receive counseling and information regarding submitting an IDR application. At that meeting, he submitted a "Retirement Allowance Estimate Request" form requesting an IDR estimate with a projected retirement date of December 31, 2018. At this visit, CalPERS' staff provided Respondent with "A Guide to Completing Your CalPERS Disability Retirement Election Application" publication (PUB 35) which contains information regarding IDR retirement, explains how to fill out and submit necessary forms for an IDR application, contains all forms needed, and provides information on who to contact if there are any issues in understanding and/or filling out the application and forms. CalPERS' staff also explained to Respondent that he could choose to submit an SR pending IDR application, explained how to complete the application, and informed him of the necessary documents.

On October 22, 2018, Respondent again visited CalPERS' San Jose Regional Office. CalPERS' staff provided Respondent with a copy of his June 20, 2018 estimate of IDR benefits should he retire effective December 31, 2018. CalPERS again reviewed Respondent's retirement options, his timeframe for submitting either an SR or IDR application, explained the difference between the two types of retirement, explained how to complete the applications, informed him of the documents he would need to submit to complete an IDR application and provided him with a PUB 35.

On April 25, 2019, Respondent called CalPERS to inquire about IDR. CalPERS' staff explained how to obtain a second benefits estimate and recommended that he obtain an estimate for both SR and IDR. CalPERS' staff again explained how to submit an IDR application, what documents he would need to complete his application, the timeframe to receive a determination on his IDR application and mailed him a copy of PUB 35.

After Respondent submitted his August 2, 2020 SR application, CalPERS informed Respondent in writing that he may be eligible to apply for disability retirement. By letter dated August 3, 2020, CalPERS informed Respondent that he would receive his first retirement warrant on August 10, 2020. CalPERS' letter informed Respondent that if he wanted to change his retirement date or cancel his retirement application, he would

need to do it within 30 days of the issuance of his first benefit payment, or his choice would be irrevocable.

On August 3, 2020, Respondent called CalPERS stating he wanted to change his retirement from SR to IDR. CalPERS' staff answered Respondent's questions and explained what supporting documents he needed to submit to complete the change.

On August 10, 2020, Respondent contacted CalPERS to confirm the gross and net retirement benefit amount he would receive. During this call, CalPERS confirmed the type and amount of SR benefits he would receive.

On March 19, 2021, Respondent contacted CalPERS to request an IDR application. Respondent finally submitted an IDR application on March 19, 2021, which CalPERS received on March 30, 2021.

The sole issue for resolution in this case is whether Respondent made a correctable mistake which would have entitled him to apply for IDR benefits and retroactively change his retirement status from SR to IDR.

CalPERS determined that Respondent did not submit a timely IDR application because: (a) Respondent's member status with CalPERS ceased on July 31, 2020, pursuant to Government Code section 20340;<sup>1</sup> (b) Respondent's IDR application was not timely submitted under section 21154; and (c) Respondent does not meet the criteria under section 20160 that allows for the correction of a mistake.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on May 5, 2022. Respondent was represented by counsel at the hearing. Respondent City did not appear at the hearing.

At the hearing, CalPERS presented evidence that Respondent became aware of his right to apply for IDR on May 17, 2018 (his first visit to the San Jose Regional Office). At that meeting, CalPERS provided Respondent with a PUB 35, answered his questions and counseled him on the application process. Respondent was provided with the same information and another PUB 35 on October 22, 2018, and April 25, 2019. Respondent nevertheless submitted an SR application on August 2, 2020.

On August 3, 2020, CalPERS sent Respondent a letter informing him that he may be eligible to apply for DR. CalPERS' letter informed Respondent that he would receive his first retirement warrant on August 10, 2020, and if he wanted to change his retirement status, he would need to do it within 30 days of the issuance of his first benefit payment, or his SR election would become irrevocable.

CalPERS' evidence established that on August 3, 2020, Respondent called CalPERS requesting to change his retirement from SR to IDR. During that phone call, CalPERS counseled him of the steps he needed to take and the application that he needed to file.

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<sup>1</sup> Unless otherwise specified, all further statutory references are to the California Government Code.

Despite the information, the publications and the counseling Respondent received, he did not submit his IDR application until March 30, 2021. CalPERS argued that Respondent's IDR application was not timely because it was received more than four months after he ceased being a member. In addition, Respondent's IDR application was received more than six months after he knew, or should have known, of his right to apply for IDR, so he did not meet the criteria for correctable mistake in section 20160.

Respondent testified on his own behalf that he was injured on February 7, 2018, and by May 18, 2018, he knew that his injury was career-ending. Respondent testified that he worked in a modified duty assignment until June 30, 2020, and once he could no longer work in the modified assignment, he filed for SR. Respondent stated that he attempted to fill out an IDR application on his own, but he needed help to complete it.

Respondent called Vanda McCauley, a Senior HR Administrator for Respondent City, as a witness. Ms. McCauley testified that she spoke with Respondent on July 29, 2020 and informed him to check the "Service Pending Disability Retirement" box on his application. She further testified, following this phone call, Respondent never contacted her again for help to file for IDR, but if he had done so she would have assisted him.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent bears the burden to show by a preponderance of the evidence that his IDR application was timely filed or should otherwise be accepted by CalPERS. The ALJ found that Respondent's IDR application was not timely filed because Respondent ceased being a member when he service retired effective July 31, 2020, per section 21154.

The ALJ rejected Respondent's argument that CalPERS must accept his IDR application because his failure to apply for an IDR was a correctable mistake. The ALJ agreed that Respondent's August 2, 2020 election of SR instead of SR pending IDR was a mistake, but this mistake was not correctable because he failed "to make the inquiry that would be made by a reasonable person in like or similar circumstances," a requirement under section 20160. Furthermore, the ALJ found that Respondent failed to "request, claim, or demand to correct the error within a reasonable time after discovery of the right to do so." The ALJ concluded that Respondent failed to establish any basis to order CalPERS to accept Respondent's untimely IDR application.

For all the above reasons, staff argues that the Proposed Decision should be adopted by the Board.

September 21, 2022

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John Shipley  
Senior Attorney