

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Linda Christine George (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated August 28, 2023. For reasons discussed below, staff argues the Board should deny the Petition and uphold its decision.

Respondent began work for the State of California in 1985. By virtue of her employment, Respondent is a state miscellaneous member of CalPERS.

In 2001, Respondent worked for the Department of Social Services (DSS). In 2014, DSS served Respondent with a Notice of Adverse Action (NOAA) terminating her employment. Respondent appealed the termination. In September 2014, DSS and Respondent negotiated a settlement under which DSS agreed to pay Respondent \$30,000, withdraw the NOAA, and remove certain matters from her personnel file. In exchange, Respondent agreed to "voluntarily resign" effective September 30, 2014, and to never again apply for or accept employment with DSS. In the settlement, DSS agreed to cooperate with any application for disability retirement filed by Respondent within the six months of her resignation.

### First Disability Retirement Application

Respondent subsequently (May 2015) applied for disability retirement from her position with DSS. In June 2015, CalPERS informed Respondent that she is not eligible for disability retirement pursuant to *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); *In the Matter of Application for Disability Retirement of Vandergoot* (2013) CalPERS Precedential Dec. No. 12-01 (*Vandergoot*).

Respondent appealed CalPERS' determination. Her appeal was heard by an Administrative Law Judge (ALJ) at the Office of Administrative Hearings. The ALJ denied Respondent's appeal, finding that CalPERS' determination that Respondent is not eligible for disability retirement pursuant to *Haywood et al.* was correct. In November 2016, the Board adopted the ALJ's proposed decision. Respondent appealed and the matter ultimately concluded with a court of appeal decision affirming CalPERS' determination. (*Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*)).

### Second Disability Retirement Application

In October 2015, while her appeal was pending, Respondent accepted employment with the Department of Rehabilitation (DOR) as a Program Technician II. Respondent's employment at DOR lasted about two months. On November 17, 2015, Respondent

again applied for disability retirement due to claimed "bilateral upper arms, neck herniated disc, bilateral ankle ligament issues, endometriosis, GERD [gastroesophageal reflux disease], DM2 [type 2 diabetes], insomnia, anxiety, [and] bilateral thumb arthritis" conditions.

In March 2016, CalPERS notified Respondent that her disability retirement application based on orthopedic (neck, arms, thumbs, shoulders, and bilateral upper extremities) conditions was denied. CalPERS informed Respondent that the documentation she provided relating to her bilateral ankle ligament issues, endometriosis, GERD, DM2, insomnia, or anxiety was incomplete and therefore not considered when evaluating her application. Respondent appealed.

Respondent's appeal was heard by an ALJ on March 24, 2017. Despite being properly noticed of the date and time of hearing, neither Respondent nor DOR appeared, and the matter proceeded as a default against Respondent and DOR pursuant to Government Code section 11520. The ALJ concluded that CalPERS' determination to deny Respondent's application for disability retirement was correct. The Board adopted the ALJ's Proposed Decision on June 27, 2017.

#### Service Retirement Application

On August 4, 2017, Respondent applied for service retirement. By letter dated August 14, 2017, CalPERS acknowledged that it received the application and that Respondent's effective retirement date was August 1, 2017. The letter also stated "You may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. To request a service pending disability retirement, you must complete a Disability Retirement Election Application." Respondent did not apply for service pending disability retirement.

Respondent retired for service effective August 1, 2017, and has been receiving a monthly retirement allowance since approximately September 1, 2017.

#### Third Disability Retirement Application

On September 13, 2021, Respondent applied for disability retirement effective July 28, 2017, based on her "bilateral upper arms and neck, anxiety, PTSD [post-traumatic stress disorder], diabetes, DM2" conditions. The application erroneously identified DSS as her employer. On September 22, 2021, CalPERS notified Respondent that her application had been cancelled.

#### Fourth Disability Retirement Application

On December 24, 2021, Respondent applied for disability retirement from DOR based on her "PTSD, severe anxiety, diabetes [and] glaucoma/cataracts" conditions. She requested her disability retirement be effective November 1, 2015, which she identified as her last day on the DOR payroll.

CalPERS requested additional information from Respondent and DOR regarding Respondent's retirement status. After reviewing the facts and information received, CalPERS determined it could not accept Respondent's application because it was untimely, and she did not make a correctable mistake that would permit CalPERS to change her service retirement to a disability retirement. CalPERS notified Respondent and DOR of its determination and their right to appeal by letter dated June 29, 2022.

Respondent appealed this determination and exercised her right to a hearing before an ALJ with the Office of Administrative Hearings. A hearing was held on July 6, 2023. Respondent represented herself at the hearing. There was no appearance by or on behalf of DOR, so the matter proceeded as a default against DOR.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet, answered Respondent's questions, and clarified how to obtain further information on the process.

At the hearing, CalPERS presented documentation of Respondent's application history and testimony of a CalPERS employee from the Disability Retirement Section, to explain CalPERS' decision. CalPERS' witness testified that Respondent had knowledge of the disability retirement application process at least since she retired for service in 2017, but probably earlier since Respondent's prior disability retirement applications and appeals gave her knowledge of the process. Further, Respondent has a long history of communicating with CalPERS about applying for disability retirement going back to 2013. Considering this history, CalPERS determined that Respondent did not make a correctable mistake pursuant to Government Code section 20160 that would allow it to accept her late application for disability retirement.

Respondent testified on her own behalf. Most of Respondent's testimony and evidence concerned her disagreement with the Court of Appeal's decision in *Martinez* relating to her first appeal. With respect to her late application for disability retirement, Respondent testified she did not know she could apply for disability retirement again until 2021, when CalPERS told her any member has a right to have an application reopened. She did not understand that right when she applied for service retirement in 2017.

Respondent also testified that she was ill and taking medication in 2017, which affected her understanding of her rights. She testified she never received many of CalPERS' exhibits, including the notice of the administrative hearing on March 27, 2017, for her second appeal. Respondent stated that she moved frequently, experienced periods of homelessness, and changed her last name, all of which affected her receipt of mail. She testified she would have appeared at the administrative hearing had she known of it.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that the evidence does not support a finding that Respondent's late filing of her disability retirement application arose from an objectively reasonable mistake. When she applied for service retirement in 2017,

Respondent already had considerable experience with the disability retirement process, having applied unsuccessfully for disability retirement from both DOR and DSS. The ALJ further noted that, on August 14, 2017, CalPERS informed Respondent in writing that she could apply for service pending disability retirement if she was unable to work because of an illness or injury. Despite this notice, Respondent waited over four years to apply for disability retirement again.

The ALJ further found that the notice of hearing related to her second appeal was correctly addressed to Respondent. As to Respondent's assertion that she was impaired by illness and medication in 2017, the ALJ noted that Respondent's alleged impairment did not preclude her from applying for service retirement in 2017.

In the Proposed Decision, the ALJ concludes that the evidence does not support a finding that Respondent's late filing of her current disability retirement application arose from an objectively reasonable error. Therefore, she did not prove her error was "the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in section 473 of the Code of Civil Procedure." (Gov. Code, § 20160, subd. (a)(2).) Absent such proof, she has not shown a right to relief under section 20160. Therefore, the ALJ denied Respondent's appeal.

In her Petition for Reconsideration, Respondent asks the Board to reconsider the Proposed Decision. However, Respondent provides no additional information to support her Petition for Reconsideration.

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the November 15, 2023, meeting was well reasoned and based on the credible evidence presented at hearing.

Staff recommends the Board deny Respondent's Petition for Reconsideration.

January 16, 2024

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