

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Donald W. White (Respondent) was employed as a Correctional Officer by Respondent Sierra Conservation Center, California Department of Corrections and Rehabilitation (Respondent CDCR). By virtue of his employment, Respondent was a state safety member of CalPERS.

On September 27, 2012, Respondent submitted his first application for industrial disability retirement (IDR), which he subsequently withdrew.

On October 29, 2019, Respondent submitted an application for service retirement (SR) with an effective retirement date of November 20, 2019. The same day, CalPERS acknowledged receipt of his SR application, and advised Respondent, "You may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. To apply for a disability retirement, you must complete a Disability Retirement Election Application." On December 16, 2019, CalPERS advised Respondent that his SR application was processed. CalPERS advised Respondent, "If you want to change your retirement date or cancel your retirement application, you must make the request within 30 days of the issuance of your first retirement check or your choice becomes irrevocable."

In response to Respondent's inquiry on October 12, 2020, CalPERS sent him a copy of "A Guide to Completing Your CalPERS Disability Retirement Application" (PUB-35) and instructed him that if he wanted to change from SR to IDR "he will need to include a statement as to why he did not apply for IDR at the time he applied" for retirement. PUB-35 sets forth the eligibility requirements for disability retirement, the deadlines to apply, blank copies of necessary forms, and detailed instructions. PUB-35 specifies that medical information can be submitted by the member's treating physician.

On April 26, 2021, Respondent submitted a second IDR application, requesting to change his retirement status from service to disability retirement. In general, a member cannot change his retirement status after he retires, unless the late application was a result of a mistake, inadvertence, surprise or excusable neglect (Gov. Code § 20160).

On May 27, 2021, CalPERS sent Respondent and Respondent CDCR letters inquiring about Respondent's request to change from service to disability retirement. On June 10, 2021, Respondent CDCR responded to CalPERS' inquiry, stating that Respondent had not notified Respondent CDCR about a disabling condition, and was not off work due to a disabling medical condition since 2013. On June 16, 2021, Respondent wrote about his unsuccessful efforts to find a workers compensation surgeon for his knee since 2019. He stated that his workers' compensation attorney advised him to apply for service retirement immediately, which he could change to disability within 2 years. Respondent acknowledged that he was aware that he could apply for IDR since 2012. After review of the circumstances surrounding Respondent's late application, CalPERS determined he did not make a correctable mistake and canceled his late IDR application.

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 June 29, 2022. Respondent represented himself at the hearing. Respondent CDCR's representative appeared at the hearing.

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

At the hearing, CalPERS presented evidence regarding Respondent's late application, and whether he made a correctable mistake. CalPERS reviewed all communications and information pertaining to Respondent. CalPERS' review demonstrated that Respondent had full knowledge of the IDR application process, since he received information about IDR on at least six separate occasions between the period 2012 to 2021. CalPERS provided evidence that Respondent completed at least three 1-1 retirement counseling sessions with CalPERS staff, that CalPERS provided Respondent with several copies of PUB-35, that CalPERS provided him with at least two retirement estimates, that CalPERS answered numerous phone call inquiries, and that CalPERS advised him in writing not to wait to apply for disability if he felt he was disabled.

Respondent testified on his own behalf. He admitted that he knew he could apply for IDR since 2012, but he was confused about the deadline because of incorrect advice he received from his worker's compensation attorney and due to alleged misinformation from CalPERS. Respondent's statements were unsupported by any evidence. Respondent also testified that he assumed only a workers' compensation doctor could fill out his physician's report.

After considering the evidence and arguments, the ALJ denied Respondent's appeal. The ALJ found that Respondent was aware of his IDR eligibility for more than 8 ½ years before he finally submitted his application. Respondent communicated frequently with CalPERS and told CalPERS in July 2018, that SR benefited him more than IDR. The ALJ found that although Respondent relied on his attorney's advice to his detriment, he did not seek a correction within a reasonable time, and his failure to timely address his misconceptions about the IDR application process were unreasonable. The ALJ ultimately found Respondent failed to meet his burden of proof and affirmed CalPERS' decision to cancel Respondent's late 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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Senior Attorney