

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

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

Stacy Esau (Respondent) worked for Respondent, California Department of Corrections and Rehabilitation (CDCR) as a Painter II-Correctional Facility (Painter II). Due to her employment, Respondent is a state safety member of CalPERS, pursuant to Government Code section 21151. She submitted an application for Industrial Disability Retirement, received by CalPERS in March 2008, claiming disability on the basis of orthopedic conditions related to her neck and right upper extremity and indicating June 20, 2005, as her last day on CDCR's payroll.

Staff arranged for Respondent to be examined by an Independent Medical Examiner, Joseph B. Serra, M.D., a board-certified Orthopedic Surgeon. Dr. Serra initially opined that Respondent was not substantially incapacitated for the performance of her duties as a Painter II. As a result, staff denied Respondent's application for Industrial Disability Retirement. Respondent submitted a timely appeal of staff's determination, but returned to work as a Painter II at CDCR on January 1, 2009. A hearing was scheduled for March 30, 2010, to determine whether Respondent was substantially incapacitated for the performance of her duties as a Painter II. Prior to the hearing, Respondent submitted a report from a neurological evaluator dated February 9, 2010. Based on the opinions in the neurological report, Dr. Serra changed his opinion, and determined that Respondent was substantially incapacitated.

In light of Dr. Serra's updated opinion, the March 30, 2010, hearing was taken off calendar, and staff notified Respondent that her Industrial Disability Retirement application was now approved. In response, Respondent requested an effective retirement date of June 20, 2005. Staff determined that because Respondent's last day on CDCR's payroll was April 19, 2010, her effective retirement date is April 20, 2010. Therefore, a hearing was scheduled on November 29, 2011, to determine whether Respondent is entitled to an earlier effective retirement date. Prior to that hearing, staff informed Respondent that, to receive an earlier retirement date, CDCR would have to agree to reverse out all of her payroll transactions subsequent to June 20, 2005. At the November 29, 2011 hearing, a representative from CDCR attended and agreed to reverse out the payroll so that Respondent's retirement date could be changed to June 21, 2005. Consequently, the hearing went off calendar again.

After five months passed without a change to her effective retirement date, Respondent filed a complaint in San Joaquin County Superior Court against CalPERS and CDCR seeking an order determining the amount of benefits she is owed based upon an effective retirement date of June 21, 2005. At that time, CalPERS learned that the representative from CDCR did not have the authority to reverse Respondent's payroll so that her effective retirement date would be consistent with the last day for which salary was payable. Thus, CalPERS could not adjust Respondent's Industrial Disability Retirement benefits to reflect an effective retirement date of June 21, 2005. After demurrers were filed by CalPERS and CDCR, the Superior Court concluded that the issue of Respondent's effective retirement date should be addressed by an

Administrative Law Judge (ALJ) at the Office of Administrative Hearings. Accordingly, this matter proceeded to hearing on October 19, 2012.

California Government Code section 21252 provides that a member's effective date of retirement is considered to be the "last day for which salary was payable."

At the hearing, all parties were represented by counsel. Respondent testified about her employment with the CDCR, the industrial injury she sustained and the reports from her workers' compensation doctors, who imposed work restrictions and opined that she could not continue to work as a Painter II unless the restrictions were accommodated. Respondent also testified about the various meetings she had with CDCR personnel to discuss her employment options, which included returning to work for CDCR with reasonable accommodation and filing for disability retirement. During her testimony, Respondent stated that she was told by CDCR personnel that she was not eligible for Industrial Disability Retirement. Respondent also contended that CDCR should have filed for Industrial Disability Retirement on her behalf.

A personnel representative from CDCR also testified at the hearing. The representative testified about the meetings she had with Respondent to discuss her employment options. In her notes of those meetings, CDCR's representative wrote that Respondent indicated she felt she could continue working and wanted to return to work as a painter, or in another class in plant operations. The notes written by the representative also included a discussion of "disability/industrial disability."

Based on the testimony presented at the hearing and the evidence submitted by the parties, including post-hearing briefs, the ALJ found that Respondent's effective date of retirement is April 19, 2010. As the ALJ explained, there is no evidence to establish that Respondent would have obtained an earlier effective retirement date if she had applied for Industrial Disability Retirement in 2005. Rather, it was the denial of her Industrial Disability Retirement application that caused Respondent to return to work, thereby leading to her last day on payroll of April 19, 2010. Therefore, in accordance with Government Code section 21252, and the Board's decision *In the Matter of the Application for Disability Retirement of Ernesto Chavez, Respondent and the Department of Consumer Affairs, Respondent* (decided June 13, 2012), April 19, 2010 is Respondent's effective date of retirement.

The Proposed Decision is consistent with the law and the facts. For the reasons stated above, staff argues that the Board should adopt the Proposed Decision, as modified, by the following typographical correction:

1. Replacing the name "CalPERS" in paragraph 13, line 8, page 9 with the name "CDCR".

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

August 21, 2013



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RENEE SALAZAR  
Senior Staff Attorney