

**ATTACHMENT C**  
**RESPONDENT(S) ARGUMENT**

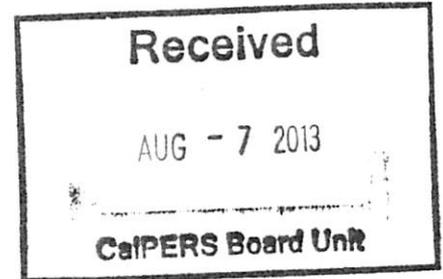
Law Offices of  
**Kenneth N. Meleyco**



Kenneth N. Meleyco

August 6, 2013

VIA FACSIMILE (916) 795-3972 & FIRST-CLASS MAIL



Cheree Swedensky, Assistant to the Board  
CalPERS EXECUTIVE OFFICE  
Post Office Box 942701  
Sacramento, California 94229-2701

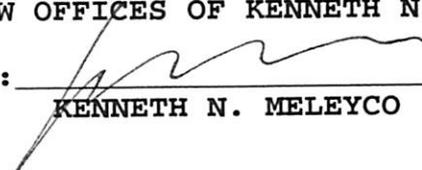
**Re: In the Matter of the Application for Industrial  
Disability Retirement of STACY A. ESAU, Respondent,  
and DEPARTMENT OF CORRECTIONS AND REHABILITATION  
(DEUEL VOCATIONAL INSTITUTION), Respondent.**

Dear Ms. Swedensky:

Enclosed please find Respondent Stacy A. Esau's Argument to  
ALJ's Proposed Decision.

Sincerely,

LAW OFFICES OF KENNETH N. MELEYCO

By:   
KENNETH N. MELEYCO

KNM: jy  
Enclosure

cc: Loren E. Dieu, Office of the Attorney General [via E-mail]

cc: Renee Salazar, CalPERS [via E-mail]

Telephone  
(209) 476-0851

2155 West March Lane, Suite 1-C  
Stockton, California 95207-6420  
E-mail: kmeleyco@sbcglobal.net

Facsimile  
(209) 476-9429

1 KENNETH N. MELEYCO, ESQ., CSB #57785  
2 LAW OFFICES OF KENNETH N. MELEYCO  
3 2155 WEST MARCH LANE, SUITE 1-C  
4 STOCKTON, CALIFORNIA 95207-6420  
5 TELEPHONE: (209) 476-0851  
6 FACSIMILE: (209) 476-9429

7  
8 ATTORNEY FOR RESPONDENT  
9 STACY A. ESAU

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the  
Application for Earlier  
Effective Date of Retirement  
of

STACY A. ESAU,

Respondent,

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND  
REHABILITATION, DEUEL  
VOCATIONAL INSTITUTION,

Respondent.

AGENCY CASE NO. 9155

OAH NO. 2009070102

RESPONDENT STACY A. ESAU'S  
ARGUMENT TO ALJ'S PROPOSED  
DECISION

1 In his proposed decision, the ALJ concluded the effective date for Stacy Esau's industrial  
2 disability retirement was April 19, 2010. In doing so, the proposed decision determines that  
3 CalPERS and CDCR do not have to honor their agreement to pay Stacy money that the PERS  
4 legally and morally owed her.

5 The Legislature imposed specific duties on CalPERS and employers who participate in the  
6 PERS to prevent disabled employees like Stacy from going without income while their "disability  
7 status" is being resolved. Had both CDCR and CalPERS performed their duties, Stacy would not  
8 have gone without income from June 2005 through January 2009. Both entities recognized this,  
9 which is why both entities stipulated to paying her the money they knew she was owed. The  
10 effective retirement date was simply a proxy for calculating that amount, nothing more. By  
11 finding that the effective date of retirement to be April 19, 2010, and by not addressing the nearly  
12 four-year period Stacy went without income because CDCR, a participant in the PERS, failed to  
13 perform its duties under the PERS Law, the proposed decision allows the PERS to avoid paying  
14 Stacy the money it has a fiduciary obligation to pay. Although she objects to the proposed  
15 decision in its entirety, Stacy raises three specific objections to the decision.

16 First, the ALJ used the Board's holding in *In the Matter of the Application for Disability*  
17 *Retirement of Ernesto A. Chavez, respondent and the Department of Consumer Affairs,*  
18 *respondent*, to find that the effective date of retirement for Stacy was April 19, 2010. But *Chavez*  
19 is inapplicable. Ernesto Chavez received compensation for the entire period it took PERS and the  
20 DCA to resolve his disability status. The issue was whether his effective retirement date began  
21 after his leave balances were exhausted. He received compensation in the form of a disability  
22 allowance, leave, and salary for the entire period it took CalPERS to deny and then later approve  
23 the application DCA filed on his behalf. At no point in the process was he left without some form  
24 of income, whether from PERS or through DCA.

25 The issue in *Chavez* was whether the effective retirement date began before or after  
26 Ernesto Chavez exhausted his leave balances. Stacy's case is not that simple. After a doctor  
27 found that she was permanently disabled, Stacey could not return to work as a Painter II and there  
28

1 were no other available positions for which she qualified in CDCR. As a result, she was left  
2 without any form of income from June 2005 to January 2009. The only similarity between Stacy's  
3 case and Ernesto Chavez's is that CalPERS erroneously denied her application, forcing her to  
4 return to the job that injured her, and then later granted the application after CalPERS corrected its  
5 error. To analogize her case to Mr. Chavez's ignores the nearly four-year period CDCR, and  
6 consequently CalPERS, avoided the statutory and mandatory obligation to ensure Stacy received  
7 compensation while the sluggish bureaucratic process resolved her disability status. From June  
8 2005 through January 2009, Stacy received *nothing*. That is the real issue here and the one that  
9 must be resolved by the Board.

10           Cunningly, CalPERS and CDCR presented this matter as if it merely concerned a technical  
11 issue like Stacy's retirement date. But from the beginning of this litigation all parties, including  
12 CalPERS and CDCR, were using the retirement date merely as *a proxy* for calculating the money  
13 the PERS owed Stacy. In fact, the parties stipulated that the PERS system owed Stacy over  
14 \$150,000 and used the retirement date of June 2005 as a means of settling the debt. The issue is  
15 whether CalPERS has the power to pay her, and Government Code section 20160 provides that  
16 authority. For that reason, *Chavez* is inapposite.

17           Second, the ALJ's interpretation of section 20160 is too narrow. The ALJ stated in part  
18 that section 20160 could not be used to pay Stacy the money the system owes her because  
19 CalPERS took no action based on CDCR's omission or failure to file an application and pay her  
20 while it was pending. (Proposed Decision p. 10.) Specifically, the ALJ narrowly construed the  
21 definition of "correct all action taken as a result..." to mean that CalPERS must have specifically  
22 taken some action when CDCR failed to file an application back in 2005. But CalPERS did take  
23 action based on CDCR's failure and omission. Specifically, CalPERS determined that Stacy's  
24 effective date of retirement was later than June 2005 when she unequivocally qualified for  
25 industrial disability retirement. Stacy is owed money by the PERS and would have been paid that  
26 money had CDCR performed its duty. "At issue are [Stacy's] fundamental, *vested* pension  
27 rights." (*Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559,568 [emphasis added].)  
28

1 The PERS Law must be "... liberally interpreted in favor of the applicant so as to effectuate, rather  
2 than defeat, their avowed purpose of providing *benefits* for the employee and [her] family ...."  
3 (*Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565, 571 [internal citations and  
4 quotations omitted].) Section 20160 should be liberally interpreted to allow the system to pay  
5 Stacy what it owes her. The Legislature's mandate for liberal interpretation of the PERS Law is  
6 especially implicated here when the Legislature stated unambiguously that in passing Government  
7 Code section 25113 (under PERS Law) and section 19253.5 the purpose was for the provisions to  
8 work *in tandem* to provide for those employees whose leave credits were exhausted before their  
9 disability application could be resolved:

10 While most employees are covered by some form of paid leave during the  
11 application process, their leave credits are sometimes exhausted, which leaves the  
12 employee without either income or a retirement allowance while the application is  
13 pending. [¶] This bill would require a state employer, if the employee cannot  
14 perform in his or her position or any other position in the agency, to apply for  
15 disability benefits on the employee's behalf. [¶] This bill would also require the  
16 employer to pay a temporary retirement disability allowance ... The employer will  
17 be reimbursed for the temporary allowance by PERS from the back retirement  
18 benefits if the application is granted. If the application is not granted, the employer  
19 may deduct the amount of the allowance from the back salary due the employee.

20 *Gonzalez v. Department of Corrections and Rehabilitation* (2011) 195 Cal.App.4th 89, 95  
21 [quoting Sen. Com. on Public Employment and Retirement, Analysis of Sen. Bill No. 1073 (1999–  
22 2000 Reg. Sess.) Apr. 14, 1999, § 11].) Given this clear purpose, when an employee is left  
23 without income, the Legislature would prefer an interpretation and application of section 20160  
24 that furthers the PERS's purpose of "providing *benefits* for [Stacy] and [her] family." (*Campbell*  
25 *v. Board of Administration, supra*, 103 Cal.App.3d at p. 571.)

26 In fact, the version of Government Code section 21252, subdivision (a), in effect at the  
27 time Stacy's application was filed requires CalPERS to use section 20160 to set the effective  
28

1 retirement date of applications filed more than nine months after separation. (Gov. Code § 21252  
2 (eff. January 1, 2004 through December 31, 2009).) That is precisely what Stacy is asking  
3 CalPERS to do in this case, use section 20160 to correct her effective retirement date so that she  
4 receives all the benefits to which she is entitled under the PERS even though her application was  
5 filed more than nine months after CDCR told her she could not return to work.

6 In June 2005, a qualified and competent doctor concluded that Stacy was permanently  
7 disabled. (Respondent's Exhibit 6 p. 6.) Around June 2005, Deborah Jacobs expressed that Stacy  
8 would not be able to find a job within CDCR for which she qualified, stating, "... yeah, go ahead,  
9 but I don't hold out much hope for anything that you're qualified for." (R.T. 30.) Jacobs even  
10 mockingly suggested Stacy apply for Jacobs' position as a return-to-work coordinator, a position  
11 for which Stacy was not qualified. (R.T. 29-30.) Therefore, by June 2005, Jacobs knew Stacy  
12 could not find another position in CDCR and that she was permanently disabled. Neither  
13 condition changed from June 2005 to May 20, 2010. After the application was filed in 2008,  
14 CalPERS sent Stacy to an orthopedic surgeon to evaluate a nerve condition. (Exhibit 19.)  
15 Initially, he found that she was not disabled. (Exhibit 19.) But he changed his opinion after he  
16 reviewed a qualified neurologist's report, which found Stacy to be disabled. (Exhibit 26; Exhibit  
17 28.)

18 If the same conditions existed in June 2005, as they did in May 2010, when CalPERS  
19 approved the application for industrial disability retirement, even if the application would have  
20 been denied initially, under PERS, Stacy still would have received some compensation for the  
21 entire period it took to resolve her disability retirement status and finally approve her application.  
22 (Govt. Code §§ 19253.5, 25113.) That is what the Legislature intended when it passed  
23 Government Code sections 19253.5 and 25113.

24 Finally, throughout the proposed decision, the ALJ noted that Stacy wanted to continue  
25 working and did not want to retire. (Proposed decision at p. 4, 5.) While Stacy testified she  
26 wanted industrial disability retirement and preferred working if she was ineligible for it (R.T. 55,  
27 R.T. 54, R.T. 48, R.T. 45), whether she wanted to retire or not retire is irrelevant in this case.  
28

1 Under the statutory scheme, CDCR was required to file a disability application on her behalf if she  
2 was eligible and it could not accommodate her with an available position--whether Stacy agreed or  
3 not. (*Gonzalez v. Department of Corrections and Rehabilitation, supra*, 195 Cal.App.4th at p. 96  
4 ["if the agency determines that an employee who is eligible for disability retirement is medically  
5 unable to perform his or her current job functions or those of any other position in the agency, the  
6 agency must apply for disability retirement on the employee's behalf."].)

7 In sum, Government Code section 20160 provides substantial power for CalPERS to  
8 correct errors to pay money a member is owed by the PERS. If section 20160 can be used to  
9 change, years later, a member's election of disability retirement over service retirement because he  
10 received wrong legal advice, then surely CalPERS' power to correct errors is broad enough for it  
11 to pay Stacy money the system would have had to pay her if CDCR had performed its duty. (See  
12 *Rodie v. Board of Administration, supra*, 115 Cal.App.3d at p. 563 [member sought change in  
13 retirement status to service retirement three years after he selected disability retirement based on  
14 misinterpretation of law].) During the period Stacy filed her application, the Legislature intended  
15 section 20160 to be used to correct those errors *and* omissions that caused disability retirement  
16 applications to be filed more than nine months after the employee last worked at the state agency.  
17 Stacy was entitled to compensation from the date she qualified for industrial disability retirement  
18 and the date she actually received her retirement. CDCR's failure and omission does not erase  
19 that debt and section 20160 permits CalPERS to settle the debt PERS owes Stacy. Therefore,  
20 Stacy respectfully requests that this Board order it to do so.

21 **DATED: August 6, 2013**

**LAW OFFICES OF KENNETH N. MELEYCO**

22 By: \_\_\_\_\_  
23 **KENNETH N. MELEYCO**  
24 **Attorney for Respondent**  
25 **STACY A. ESAU**

26  
27  
28

1 **PROOF OF SERVICE**

2 I am a citizen of the United States and a resident of  
3 the County of San Joaquin. I am over the age of eighteen years  
4 and not a party to the within above-entitled action; my business  
5 address is 2155 West March Lane, Suite 1C, Stockton, California  
95207-6420. On **August 6, 2013**, I served a copy of the within  
**RESPONDENT STACY A. ESAU'S ARGUMENT TO ALJ'S PROPOSED DECISION**  
on the parties in said action as follows:

6 The Honorable Karl S. Engeman [via First Class mail only]  
OFFICE OF ADMINISTRATIVE HEARINGS  
7 2349 Gateway Oaks Drive, Suite 200  
Sacramento, California 95833-4231

8 Loren E. Dieu  
Deputy Attorney General  
9 1300 "I" Street, Suite 125  
Post Office Box 944255  
10 Sacramento, California 94244-2550

11 Renee Salazar  
Senior Staff Counsel  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
12 Post Office Box 942707  
Sacramento, California 94229-2707

13 XX (By REGULAR MAIL) by placing a true copy thereof  
14 enclosed in a sealed envelope with postage thereon  
15 fully prepaid, in the United States post office mail  
box at Stockton, California, addressed as indicated  
above.

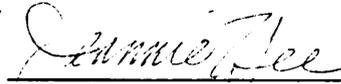
16 \_\_\_\_\_ (By FEDERAL EXPRESS) by placing a true copy thereof  
17 enclosed in a sealed envelope, prepared, deposited  
18 with the Federal Express carrier/box at Stockton,  
California, addressed as indicated above.

19 \_\_\_\_\_ (By PERSONAL SERVICE) by delivering by hand and  
20 leaving a true copy with the person and/or secretary  
at the address shown above.

21 \_\_\_\_\_ (By FACSIMILE) by placing a true copy thereof into a  
22 facsimile machine addressed to the person and address  
shown above.

23 XX (By E-MAIL) by scanning and sending by electronic mail  
to the E-mail address of the person shown above.

24 I, JEANNIE YEE, declare under penalty of perjury under  
25 the laws of the State of California that the foregoing is true  
and correct, and that this declaration was executed in Stockton,  
26 California, on August 6, 2013.

27   
28 \_\_\_\_\_  
JEANNIE YEE