ATTACHMENT B

STAFF'S ARGUMENT

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Walter G. Howell (Respondent) was employed as a Groundskeeper by the Davis Joint Unified School District (District). By virtue of his employment with the District, Respondent was a local miscellaneous member of CalPERS subject to Government Code section 21150.

Respondent had been employed by the District until his separation on March 23, 2005. On September 22, 2006, Respondent submitted an application for disability retirement on the basis of orthopedic (right knee and low back) conditions. Respondent requested an earlier effective retirement date of March 25, 2005; however, it was established at the hearing that the correct date was March 24, 2005, which was the first day after his last day on payroll at the District.

CalPERS obtained medical reports and information concerning Respondent's orthopedic conditions and the reason for the late-filed disability retirement application. On October 9, 2008, CalPERS informed Respondent that his application for disability retirement was approved. The effective date of his retirement was November 1, 2006, which was the first day of the month in which the application was received.

By separate letter dated October 9, 2008, CalPERS informed Respondent that his request for an earlier effective retirement date was denied because he failed to establish that he made a correctable mistake at the time he separated from his employment. Respondent was advised of his appeal rights and, through his counsel, Respondent filed a timely appeal and request for hearing. A hearing was held with an Administrative Law Judge (ALJ) on November 21, 2013.

Government Code section 21252 (Effective Date of Retirement) provides, in relevant part, as follows: "A member's written application for retirement, if submitted to the board within nine months after the date the member discontinued his or her state service, and, in the case of retirement for disability, if the member was physically or mentally incapacitated to perform his or her duties from the date the member discontinued state service to the time the written application for retirement was submitted to the board, shall be deemed to have been submitted on the last day for which salary was payable. The effective date of a written application for retirement submitted to the board more than nine months after the member's discontinuance of state service shall be the first day of the month in which the member's application is received at an office of the board or by an employee of this system designated by the board."

Respondent testified at the hearing and was represented by counsel, who also assisted him in filing a workers' compensation claim for his injuries. On March 23, 2005, Respondent was examined by Jeffry A. Metheny, M.D., an Orthopedic Surgeon. Dr. Metheny prepared a Primary Treating Physician's Permanent and Stationary Report, in which he states that as of March 23, 2005, Respondent was permanent and stationary. Dr. Metheny also determined that Respondent was no longer able to

perform the duties of his position. At the hearing, Respondent testified that Dr. Metheny did not inform him that he was precluded from performing the duties of his position, nor did he recall whether he received a copy of Dr. Metheny's report.

On March 28, 2005, Kathy Ware, Personnel Technician for the District, sent Respondent a memorandum and separation documents. The memorandum stated in part as follows: "You may qualify for disability retirement with CalPERS, and a copy of the disability retirement booklet is attached for your review/use. If you have any questions about this process, I urge you to call CalPERS Member Services at (888) 225-7377 or visit the CalPERS office at 2750 Gateway Oaks Drive, Room 140, Sacramento (across from Chevy's on the River)." The letter also stated that Respondent could contact Ms. Ware if he has any questions, and her telephone number was provided. Ms. Ware testified at the hearing. Ms. Ware met with Respondent concerning his separation from the District.

At the hearing, Respondent testified that he knew he could not go back to work after he received the March 28, 2005, memorandum from Ms. Ware. He also admitted that when he received the memorandum he was fully aware of his option to apply for disability retirement. He also stated that he chose not to apply for disability retirement at that time, nor make an inquiry concerning applying for disability retirement, because he loved his job and hoped to return to work.

In February 2006, Respondent stopped receiving workers' compensation permanent disability benefits. On April 20, 2006, counsel for Respondent sent a letter to CalPERS requesting the "Employment After Retirement" booklet and "Retirement Allowance Estimates" for disability and service retirement. On September 25, 2006, counsel for Respondent sent a letter and completed "Retirement Allowance Estimate Request" form to CalPERS. On November 2, 2006, CalPERS sent Respondent written estimated monthly allowances for service and disability retirement. On November 27, 2006, counsel for Respondent sent CalPERS the completed disability retirement application.

On February 28, 2007, a CalPERS Retirement Program Specialist testified that she sent both Respondent and the District separate letters requesting additional information regarding Respondent's request for an earlier effective disability retirement date. On March 16, 2007, David Tooker, Interim Assistant Superintendent for Human Resources for the District, confirmed in a letter to CalPERS that Respondent was provided information concerning disability retirement both orally and by writing.
Mr. Tooker included copies of the March 9 and 28, 2005, memorandums sent to Respondent concerning his separation from service.

Respondent had testified earlier that at the time he separated from the District, he was not aware of the rule that required the filing of an application for retirement within nine months of separating from employment in order for the effective date of retirement to be the last day for which salary was payable; otherwise, he "probably" would have made a different decision regarding the timing of his application. CalPERS' witness testified that there is no information in the CalPERS disability retirement booklet that notifies an

applicant of the rule that an employee must submit an application for retirement within nine months of separating from employment in order for the effective date of retirement to be the last day for which salary was payable; however, she stated that the booklet states that an individual should apply for a disability or industrial disability retirement as soon as they believe that they are unable to perform the job duties because of an illness or injury that is expected to be permanent.

Respondent has the burden of presenting evidence establishing that in filing his application he made an error or omission that was a result of mistake, inadvertence, surprise or excusable neglect, which would warrant granting his appeal for an earlier effective retirement date. The ALJ found that Respondent had failed to meet his burden despite the fact that Respondent contended that he was not informed of the rule that required him to submit his application for retirement within nine months of separating from his employment with the District in order for the effective date of retirement to be March 24, 2005. Respondent admitted that as of March 28, 2005, he knew he could not go back to work, and that he was fully aware of his option to apply for disability retirement.

The ALJ found that Respondent was not informed of the nine-month rule and that this fact is not grounds to grant Respondent's application. Respondent was notified by the District in March 2005, that he may qualify for disability retirement. He was urged to contact CalPERS and was told that he could contact the District if he had any questions. The CalPERS disability retirement booklet Respondent was provided by the District states that an individual should apply for disability retirement as soon as the individual is unable to perform the job duties and urges individuals to contact CalPERS with any questions.

The ALJ further found that Respondent was provided with ample information concerning disability retirement. Additionally, Respondent had counsel available to assist him as early as June 2004. Respondent chose not to inquire into the option of disability retirement until his workers' compensation ended. As a result, the facts and circumstances of Respondent's case do not support a finding of mistake, inadvertence, surprise, or excusable neglect.

Government Code section 20160 governs requests by CalPERS members to correct a claimed error. It provides the following, in relevant part:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission 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.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part. Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

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(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

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After considering Respondent's testimony, the ALJ concluded that Respondent's failure to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an error or omission correctable under Government Code section 20160. Respondent's request for an earlier effective disability retirement date must be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

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.

February 20, 2014

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