

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Philip Thorman (Respondent) was employed by Respondent Nevada Irrigation District (District). The District contracted with CalPERS to provide retirement benefits to its employees. By virtue of his employment, Respondent was a local miscellaneous member of CalPERS. Respondent submitted an application for disability retirement on September 19, 2013. Staff reviewed relevant medical reports and approved Respondent to receive disability retirement benefits. Staff determined that the effective date of Respondent's retirement would be September 1, 2013, the first day of the month in which the application for disability retirement was submitted. Respondent requested that the effective date of his retirement be January 16, 2012. Staff reviewed Respondent's file, communicated with the District, and determined that there was no basis (i.e. correctable mistake by Respondent), that would justify granting Respondent's request for an earlier effective retirement date. CalPERS provided Respondent and the District with notice of CalPERS' determination. Respondent appealed CalPERS' determination and a hearing was held on July 9, 2015. Post-Hearing briefs were submitted by Respondent and CalPERS. The matter was submitted for decision on August 28, 2015.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process. Respondent was represented by counsel at the hearing and after the hearing with the submission of Post-Hearing Briefs.

Respondent's last day on paid service with the District was January 16, 2012. Respondent claimed that he was not aware that he could submit an application for disability retirement before September 2013.

Government Code, section 21252(a) provides, in relevant part, that a member's application for disability retirement should be submitted within nine months of the date he or she discontinues service. Further, if the application for disability retirement is submitted more than nine months after the date he or she ends service, then the effective date for retirement will be the first day of the month in which the member's application is received by CalPERS.

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.

(Emphasis added.)

The provisions of Government Code section 20160 could allow an earlier effective retirement date if there was an adequate showing that Respondent's failure to submit his application for disability retirement was due to an "error or omission [that] 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."

After considering all of the testimony and evidence, the Administrative Law Judge (ALJ) found that Respondent was fully aware that he could, and should have, applied for disability retirement before September 2013:

- Respondent contacted CalPERS in January 2012 because "I thought it would be wise to research my disability [retirement] options." CalPERS prepared and mailed to Respondent a disability retirement estimate.  
(See Factual Finding No. 5.)
- In April 2012, Respondent's coworkers encouraged him to apply for disability retirement benefits. Co-workers told Respondent that "anytime [he is] off work and on disability that is pending [he] could at least apply for [disability retirement]...."  
(See Factual Finding No. 6.)
- In June 2012, Respondent wrote to CalPERS, asking, in part, "to know the procedure if I'm able to use the Disability Retirement benefits."  
(See Factual Finding No. 7.)
- In October 2012, pursuant to his request for information from CalPERS, Respondent received the CalPERS Publication 35, "*A Guide to Completing Your CalPERS Disability Retirement Election Application.*" The Guide included the following statements:
  - You, or someone on your behalf such as your employer, may file a **Disability Retirement Election Application** for your retirement. You should apply for disability or industrial disability retirement as soon as you believe you are unable to perform your usual job duties because of an illness or injury that is expected to be permanent or last longer than six months.  
...
  - If you have a workers' compensation claim, you should not wait until your condition is 'permanent and stationary' under workers' compensation requirements to submit your application for disability or industrial disability retirement.

- ...
- If you are applying for disability or industrial disability retirement, a retirement date is not necessary to process your application. You may select a specific date, leave it blank, or write in 'expiration of benefits.' (See Factual Finding No.8; Bold in the original.)
  - In October 2012, Respondent's Podiatrist recommended that he "look into permanent disability retirement."  
(See Factual Finding No. 9.)

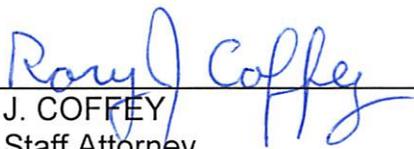
Accordingly, the ALJ found as follows:

Despite numerous indications that respondent knew he could file for disability retirement as early as January 2012, he waited until September 2013 to apply because he was unsure whether he should follow the guidance of his coworkers and podiatrist, was 'afraid of being labeled as a bad employee,' and he remained hopeful that his condition would improve to a degree that would allow him to return to work. Respondent's decision to wait until September 2013 to apply for disability retirement was an informed and considered choice. Accordingly, respondent's request for an earlier effective date of disability retirement must be denied. (See Factual Finding No. 19.)

The ALJ concluded that Respondent's appeal should 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.

November 18, 2015

  
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RORY J. COFFEY  
Senior Staff Attorney