

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA

In the Matter of the Application for Industrial  
Disability Retirement Application of:

JAMES F. ARBOGAST, JR.,

Appellant/Respondent,

and

CALIFORNIA HIGHWAY PATROL,

Employer/Respondent.

CalPERS No. 2014-0892

OAH No. 2015041188

**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on October 13, 2015.

Christopher Phillips, Senior Staff Counsel, represented petitioner, Diane Alsup, Acting Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS), State of California.

Scott A. O'Mara, Attorney at Law, represented applicant/respondent, James F. Arbogast, Jr., who was present throughout the administrative hearing.

No appearance was made by or on behalf of employer/respondent, California Highway Patrol.

On January 3, 2016, following the submission of written closing argument, the record was closed and the matter was submitted.

**SUMMARY**

Mr. Arbogast and his attorneys provided CalPERS with appropriate, timely documents necessary to compel CalPERS to consider Mr. Arbogast's application for an industrial disability retirement on its merits; the failure to present documents in a timely

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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manner, if any, was the result of mistake, inadvertence, or excusable neglect. No prejudice resulted from any delay in presenting required documents.

## FACTUAL FINDINGS

1. California Highway Patrol officers who can no longer perform their usual duties as a result of an industrial disability are entitled to an industrial disability retirement. “Disability” and “incapacity for performance of duty” as a basis for such a retirement mean a disability of permanent or extended and uncertain duration, as determined by CalPERS’s Board of Administration, on the basis of competent medical opinion.<sup>1</sup>

CHP officers who qualify for an industrial disability retirement enjoy many valuable rights, including tax and health insurance benefits.

2. At issue is whether CalPERS should consider James F. Arbogast, Jr.’s application for an industrial disability retirement on its merits, or whether CalPERS should reject Mr. Arbogast’s application because an application or some documents may not have been presented in a timely manner.

3. In May 1983, Mr. Arbogast became employed as a CHP patrol officer. In that capacity, he was a CalPERS state safety member. During his employment with the CHP, Mr. Arbogast suffered knee and low back injuries. Medical doctors treated and documented his orthopedic condition.

4. On April 8, 2011, Mr. Arbogast submitted to CalPERS an application for a service retirement pending CalPERS’ decision on his application for an industrial disability retirement. In that application, he represented he was going to retire on June 29, 2011; his disability was a result of a total right knee replacement and degenerative disease of the lumbar spine; he was working at the time; and while he loved his job, his disabilities “have caused a concern for my safety and my partner’s [safety].”

5. CalPERS stipulated to the disabling nature of Mr. Arbogast’s injuries for purposes of this proceeding only, and stipulated Mr. Arbogast was permanently incapacitated from performing the usual and customary duties of a CHP officer on April 8, 2011, the date he filed his application.

6. According to a CalPERS retirement program specialist, in April 2011, a “30-day rule” was in effect that required Mr. Arbogast and others to furnish CalPERS with supporting documents within 30 days of filing an application for a disability retirement. Required supporting documents included workers’ compensation information, medical

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<sup>1</sup> *California Department of Justice v. Board of Administration of California Public Employees’ Retirement System* (2015) 242 Cal.App.4th 133, 139.)

reports, and a job description.<sup>2</sup> CalPERS' website contained an explanation of the 30-day rule. Additional information concerning the 30-day rule was set forth in *A Guide to Completing Your CalPERS Disability Retirement Election Application* (Publication 35), a document CalPERS was supposed to provide to applicants seeking a disability retirement.

7. The version of *A Guide to Completing Your CalPERS Disability Retirement Election Application* (Publication 35) currently in effect warns applicants:

- Make sure your employer, physician, and workers' compensation carrier (if any) complete and submit forms to CalPERS in a timely manner. Let them know you have deadlines to meet.
- You must submit a complete application package, which means you provide us all the required forms and other documents we need to begin processing your request.
- If we receive an incomplete application package, you will only have 21 calendar days to provide us with any remaining documents – even if your employer or doctor is causing the delay.
- If you do not provide all the needed information within 21 calendar days, CalPERS will cancel your application.
- If your application is cancelled, and you believe you are still eligible for a disability retirement, you will need to submit a new application package to start the process over again.

*A Guide to Completing Your CalPERS Disability Retirement Election Application* (Publication 35) does not warn applicants that CalPERS will not consider a new application package for an industrial disability retirement unless the new package is submitted before the member begins drawing service retirement benefits unless the late submission is the result of a mistake, inadvertence, or excusable neglect.

8. The retirement specialist who met with Mr. Arbogast did not recall the meeting. He probably would have given Mr. Arbogast the *Guide to Completing Your CalPERS Disability Retirement Election Application* (Publication 35) in the ordinary course of the meeting.

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<sup>2</sup> Page 4 of CalPERS's current *A Guide to Completing Your CalPERS Disability Retirement Election Application* (Publication 35) was introduced. It contained the more recent "21-day" rule that has replaced the "30-day" rule.

9. CalPERS sent a letter to Mr. Arbogast, dated May 28, 2011, asking for additional information so CalPERS could begin processing his application. Shortly thereafter, Mr. Arbogast retained O'Mara & Hampton, a law firm, to assist him in obtaining an industrial disability retirement.

CalPERS' May 28, 2011, letter did not warn Mr. Arbogast his original application would be cancelled after he began drawing service retirement benefits; it did not warn him CalPERS would not consider a new application package unless he first established his failure to submit that package before he began drawing a service retirement was the result of a mistake, inadvertence, or excusable neglect.

10. Sometime after May 28, 2011, CalPERS cancelled Mr. Arbogast's application. Petitioner did not establish who cancelled the application, the omission that resulted in the cancellation, how that omission was relevant to the processing of the application, how it resulted in prejudice, or the actual date the application was cancelled.

11. By letter dated July 1, 2011, CalPERS informed Mr. Arbogast his disability retirement application had been cancelled due to an incomplete package. (Statement of Issues, Paragraph V.)<sup>3</sup>

12. Mr. Arbogast retained O'Mara & Hampton several weeks before CalPERS notified him that his industrial disability retirement application had been cancelled. When Mr. Arbogast filed his original application in April 2011, CalPERS was taking somewhere between 12 and 18 months to process industrial disability retirement applications. O'Mara and Hampton was familiar with the extended period of time that was customary for CalPERS to process industrial disability retirement applications.

By letter dated June 22, 2011, O'Mara & Hampton notified CalPERS of its representation of Mr. Arbogast. The letter advised of the law firm's review of CalPERS's letter, dated May 28, 2011, seeking additional information, Mr. Arbogast's recent knee surgery, and the law firm's intent to resubmit "the entire application package upon receipt of medical evidence." The letter requested CalPERS contact O'Mara and Hampton if there was any need to discuss the case.

13. On June 29, 2011, Mr. Arbogast formally retired from state service. According to a letter issued by CalPERS's Benefit Services Division, dated June 16, 2011, "Your first regular warrant will arrive on or shortly after 08/01/2011, and will cover the period of 07/01/2011 through 07/31/2011."

Mr. Arbogast did not receive a CalPERS retirement warrant before August 1, 2011.

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<sup>3</sup> Mr. Arbogast retained O'Mara & Hampton before CalPERS sent the July 1, 2011, letter. CalPERS did not provide a copy of that letter to O'Mara & Hampton. Despite repeated requests for status updates, CalPERS did not advise O'Mara & Hampton that CalPERS had cancelled Mr. Arbogast's original application package until January 21, 2013.

14. On August 16, 2011, O'Mara & Hampton provided CalPERS with various documents including a copy of the original disability retirement election application Mr. Arbogast signed on April 8, 2011, a report of separation, employer information, a request addressed to Mr. Arbogast's workers' compensation carrier, a direct deposit authorization, a physician's report of disability, an authorization for the release of medical information, a birth certificate, and a marriage certificate. The submission of these documents can be characterized as a supplement to the original application, a new application, or a request for a change in retirement status.

15. On September 20, 2011, O'Mara & Hampton provided CalPERS with an amended disability retirement application form that included a change of beneficiary.

16. On November 20, 2012, O'Mara & Hampton requested CalPERS provide information concerning "the status of the application for disability retirement." CalPERS did not respond.

17. On January 3, 2013, O'Mara & Hampton, requested CalPERS provide "a status of the application for disability retirement." CalPERS did not respond.

18. On January 14, 2013, Julia Dommel, an attorney with O'Mara & Hampton, visited CalPERS's regional office in San Diego to determine the status of Mr. Arbogast's application. The San Diego office told her the San Diego office could not access information needed to resolve the issue and she should contact CalPERS's headquarters in Sacramento.

On January 21, 2013, Ms. Dommel telephoned CalPERS's headquarters and spoke with "Stacy." Ms. Dommel inquired about the status of Mr. Arbogast's application. Stacy said she could not provide an immediate response, but said she would call back with an answer. In a voicemail left for Ms. Dommel following that call, Stacy said Mr. Arbogast's application had been cancelled. That voicemail was the first time O'Mara & Hampton received notice that CalPERS had cancelled Mr. Arbogast's application.

On January 22, 2013, Ms. Dommel telephoned CalPERS's headquarters to follow up. She was placed on hold for one hour and 19 minutes before she was able to speak with a staff member. Ms. Dommel spoke with "Dianne," who transferred her call to a supervisor named "Beverly."

Beverly told Ms. Dommel that CalPERS's records indicated O'Mara & Hampton contacted CalPERS concerning Mr. Arbogast's application in July and September 2011, but there was no further information in CalPERS's system regarding those contacts. Beverly told Ms. Dommel to file another application on Mr. Arbogast's behalf, together with supporting documents.

19. On March 5, 2013, Attorney O'Mara prepared a letter that was hand-delivered to CalPERS's San Diego regional office. The letter advised of his representation of Mr. Arbogast. The letter described the history of Mr. Arbogast's application. The letter enclosed

another disability retirement application; a workers' compensation carrier request form; an employee information form; three physician reports; a description of the physical demands of the job; a job description; and copies of letters from O'Mara & Hampton to CalPERS dated June 22, 2011, September 20, 2011, November 20, 2012, and January 3, 2013.

20. On July 18, 2013, O'Mara & Hampton sent a letter to CalPERS requesting information concerning the status of Mr. Arbogast's application. CalPERS did not respond to that letter.

21. On May 13, 2014, an O'Mara & Hampton employee spoke with Kevin Fine, a CalPERS disability claim manager, who confirmed CalPERS receipt of all necessary documents. Mr. Fine said Mr. Arbogast's application was being reviewed by "second upper level management."

22. By letter dated June 20, 2014, sent directly to Mr. Arbogast, CalPERS advised Mr. Arbogast that his file had been carefully reviewed and "your request to change your retirement status from service to industrial disability retirement is respectfully denied." CalPERS's letter claimed Mr. Arbogast failed to establish a correctable mistake to support the filing of a new application package. The letter stated, "Based upon review of your case, the evidence suggests that you had knowledge of the application process and, therefore, were unable to establish that a correctable mistake was made." The letter advised Mr. Arbogast of his right to appeal from the denial.

23. By letter dated July 16, 2014, Mr. Arbogast, through his attorney, appealed. In the appeal letter, Mr. O'Mara asserted Government Code section 20160 was inapplicable "as no mistake was made at the time Arbogast retired for service" and "there was no 'correctible mistake' with respect to Mr. Arbogast's retirement application nor was his initial industrial disability retirement application submitted after he retired for service."

On the basis of these and similar comments, petitioner asserts that Mr. Arbogast failed to establish a correctible error or omission related to the original application and the application must be denied because it was not filed in a timely manner.

24. According to Paragraph VIII of the Statement of Issues:

Because respondent Arbogast's 2013 industrial disability application is a "change in retirement status" and was not timely pursuant to [Government Code] section 21452, CalPERS requested information concerning the late filing to determine if he made a mistake in not filing the industrial disability retirement application before receipt of the first payment of his service retirement allowance. After review of the information provided by respondent Arbogast, and after considering Government Code section 20160 and the case of *Robert Button v. Board of Administration of the Public Employees Retirement*

*System* (1981) 122 Cal.App.3d 730 . . . CalPERS determined that [Government Code] section 20160 does not apply to excuse respondent's late application by reason of mistake.

25. The statement of issues did not mention the August 16, 2011, application for an industrial disability retirement that O'Mara & Hampton filed with CalPERS. That application – whether deemed a new application, a supplement to the original application, or a request for a change in retirement status – was filed within 30 calendar days after CalPERS made the first payment to Mr. Arbogast from his retirement account.

26. Any delay in providing relevant information to CalPERS was minimal and did not result in prejudice. The late submission of any document, including the application filed on August 16, 2011, did not create an unfunded liability. Further, any failure to provide required information in a timely manner or the failure to characterize the August 16, 2011, application as a request for a change in retirement status involved a mistake, inadvertence, or excusable neglect that was, at least in part, occasioned by CalPERS's failure to advise Mr. Arbogast and O'Mara & Hampton of its contention that Mr. Arbogast could not submit a new application after he received his first service retirement payment without showing negligence, inadvertence, or excusable neglect.

27. A preponderance of the evidence established Mr. Arbogast provided CalPERS with sufficient and timely information to support his right to pursue an industrial disability retirement on the merits; any failure to submit an application or any other document in a timely manner was the result of mistake, inadvertence, or inexcusable neglect; any delay in presenting a required application or information did not result in prejudice. Mr. Arbogast's right to obtain an industrial disability retirement should be based on the substantive merits of his claim and should not be denied on the premise asserted in the statement of issues.

## LEGAL CONCLUSIONS

### *Interpretation of the Public Employees' Retirement Law*

1. Pension provisions should be liberally construed and all ambiguities should be resolved in favor of the pensioner. This rule of liberal construction is applied to effectuate obvious legislative intent and should not blindly be followed so as to eradicate the clear language and purpose of the statute. (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 473.)

2. The Public Employees' Retirement System legislation serves two objectives: to induce persons to enter and continue in public service, and to provide subsistence for disabled or retired employees and their dependents. Disability pension laws are intended to alleviate the harshness that would accompany the termination of an employee who has become medically unable to perform his duties. Generally, PERS legislation is to be

construed liberally in favor of the employee to achieve these objectives. (*Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 459.)

*Burden of Proof*

3. As in ordinary civil actions, the party asserting the affirmative at administrative hearing has burden of proof, including both the initial burden of going forward and the burden of persuasion by preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044.)

*Relevant Statutory Authority*

4. Government Code section 21152 provides in part:

Application to the board for retirement of a member for disability may be made by:

[¶] . . . [¶]

(d) The member or any person in his or her behalf.

5. Government Code section 20026 provides:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

6. Government Code section 21154 provides in part:

The application [for disability retirement] shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member . . . the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty . . . .

7. Government Code section 21453 provides:

An election, revocation, or change of election shall be made within 30 calendar days after the making of the first payment on account of any retirement allowance or, in the event of a change of retirement status after retirement, within 30 calendar days after the making of the first payment on account of any retirement allowance following the change in retirement status.

“Change in retirement status” includes, but is not limited to, change from service to disability retirement . . . .

For purposes of this section, payment shall be deemed to have been made on the date a warrant is mailed, or the date funds are electronically transferred to a bank, savings and loan association, or credit union account for deposit in the member's account.

This section shall not be construed to authorize a member to change his or her retirement status after the election, revocation, or change of election provided in this section.

8. Government Code section 20160 provides in 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 . . . 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.

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of . . . any state agency or department, or this system.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission . . .

(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).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

### *Appellate Authority and Discussion*

9. Government Code section 21154: In enacting Government Code section 21154, the Legislature plainly stated four separate times, set off by commas, when an application for disability retirement may be filed: while the applicant is: (a)

working; (b) in military service; (c) filing within four months after termination of service; or (d) physically and mentally incapacitated. There is no conflict between these time periods, and each independently states a time within which an application may be filed. The use of the word 'or' indicates an intention to use it disjunctively so as to designate alternative or separate categories. The plain and commonsense meaning of the statutory language controls. Disability is often of uncertain duration. If the employee is able to prove that he or she has been continuously disabled from the date of discontinuance of state service to the time of the application for disability retirement, his application is timely under clause (d). If the employee is not able to prove continuous disability, he or she must file within four months of leaving service, or while on an approved leave of absence under clause (c). (*Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1044.)

10. Discussion of the Application of Government Code section 21154: Pursuant to the stipulation in this matter, Mr. Arbogast was physically incapacitated from performing the usual and customary duties of a CHP officer on a continuous basis from the date he retired from state service until his new application package, which may also be characterized as a supplement to the original application package, was filed on August 16, 2011, and thereafter. The application filed on August 16, 2011, was timely filed under Government Code section 21154.

11. Discussion of the Application of Government Code section 21453: Under Government Code section 21453, Mr. Arbogast was required to file a change of election, including a change from a service to a disability retirement, within 30 calendar days after the making of the first retirement allowance payment. CalPERS provided Mr. Arbogast with the first payment from his retirement account on or after August 1, 2011. Mr. Arbogast, through counsel, filed another application for a disability retirement on August 16, 2011, that, under the circumstances, may be deemed a change in retirement status from a service retirement to a disability retirement. The August 16, 2011, application was filed within the 30 calendar day period of limitation. The application filed on August 16, 2011, was timely under Government Code section 21453.

12. Government Code section 20160 and Excusable Neglect: Section 20180 [the predecessor to Government Code section 20160] decreed that CalPERS' interests in administrative and actuarial efficiency were not of overriding importance so as to allow honest mistakes to remain uncorrected. Section 20180 applied to post-retirement changes in status. (*Button v. Board of Administration* (1981) 122 Cal.App.3d 730, 737.)

"Excusable neglect" is defined as "neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances." A party seeking relief based on a claim of mistake, inadvertence, or excusable neglect must establish diligence in investigating and pursuing the claim and must establish the necessary elements justifying relief by the preponderance of the evidence. (*Department of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293.)

13. Application of Government Code section 20160: Assuming, *arguendo*, that Mr. Arbogast or his attorneys failed to file a new application for an industrial disability retirement in a timely manner, or failed specifically to characterize the August 16, 2011, application as a request to change retirement status, relief for such a mistake must be granted under Government Code section 20160. A preponderance of the evidence established that any delay was the result of a mistake, inadvertence, or excusable neglect by or on behalf of Mr. Arbogast or his attorneys, who acted in the manner a reasonably prudent person would have acted under the same or similar circumstances. Mr. Arbogast was diligent in obtaining competent counsel when he was advised that his application had been cancelled, and he reasonably believed that his attorneys would take all steps necessary to prosecute his application for an industrial disability retirement. O'Mara & Hampton provided CalPERS with immediate notice of its representation when retained, and asked CalPERS whether there was any problem with the application that needed to be discussed. There was no response to that request and no reason to believe there was a problem.

O'Mara & Hampton filed an application for an industrial disability retirement on Mr. Arbogast's behalf in August 2011, together with required supporting documents, within 30 days of Mr. Arbogast's receipt of his first service retirement payment. It was reasonable for O'Mara & Hampton to believe that CalPERS received the August 2011 application the law firm mailed to CalPERS and that CalPERS was going to act on it. CalPERS lost or misplaced that application. O'Mara & Hampton had no reason to believe CalPERS would lose or misplace that application.

O'Mara & Hampton requested that CalPERS advise the law firm of the status of Mr. Arbogast's application on several occasions. It was reasonable for O'Mara & Hampton initially to believe there was no problem with Mr. Arbogast's application because CalPERS was taking 12 to 18 months to process such applications. CalPERS did not notify O'Mara & Hampton it "cancelled" the application until January 2013, after which CalPERS directed O'Mara & Hampton to file another application. The law firm did so.

CalPERS did not raise the issue of a correctable mistake, inadvertence, or excusable neglect under Government Code section 20160 until June 2014. It was not reasonable for Mr. Arbogast or O'Mara & Hampton to anticipate the need to show mistake, inadvertence, or excusable neglect since an application for disability retirement and supporting documents were timely filed.

#### *Determination of Issues*

14. Cause exists under Government Code section 21154 to remand this matter to CalPERS for a determination of Mr. Arbogast's application for an industrial disability retirement on the merits. Mr. Arbogast was physically incapacitated on a continuous basis from performing the usual and customary duties of a CHP officer from the date he retired until he filed an application package on August 16, 2011, and thereafter. The application filed on August 16, 2011, was timely filed.

15. Cause exists under Government Code section 21453 to remand this matter to CalPERS for a determination of Mr. Arbogast's application for a change in his retirement status from a service retirement to a disability retirement status and for a determination of that application on its merits. The August 16, 2011, application may be properly classified as a request for a change in retirement status as well as an application for retirement. The August 16, 2011, application was filed within the 30 calendar day period of limitation set forth in Government Code section 21453.

16. Cause exists under Government Code sections 21154, 21453, and 20160 to remand this matter to CalPERS for a determination of Mr. Arbogast's application for an industrial disability retirement. If Mr. Arbogast or his attorneys failed to timely file any document necessary for CalPERS to process Mr. Arbogast's application for an industrial disability retirement, any such failure or omission was the result of a mistake, inadvertence, or excusable neglect. Mr. Arbogast and his attorneys acted in the manner a reasonably prudent person would have acted under the same or similar circumstances. Any delay occasioned by a mistake, inadvertence, or excusable neglect did not result in prejudice. CalPERS's interests in administrative and actuarial efficiency do not override the retirement system's obligation as a fiduciary to correct honest mistakes. Mr. Arbogast is entitled to have his application determined on its merits. Remanding this matter to CalPERS for such a determination is fair, just and equitable under the circumstances.

#### ORDER

The Board of Administration may order a medical examination of James F. Arbogast, Jr., and shall thereafter determine under Government Code section 21154, on the basis of competent medical opinion, whether Mr. Arbogast was incapacitated for performance of duty as a California Highway Patrol Officer as a result of a disability of permanent or extended and uncertain duration when he filed his application for an industrial disability retirement.

Dated: January 26, 2016

  
JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings