

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION AFTER REMAND

Respondent Daniel A. Pfau (respondent Pfau) was employed by the City of Alhambra (respondent City) as a Police Sergeant until he retired for service effective December 31, 2008. By virtue of his employment, respondent Pfau was a local safety member of CalPERS.

On December 30, 2008, respondent Pfau submitted an application for service retirement.

On November 12, 2009, respondent Pfau contacted CalPERS to ask about the status of his application for disability retirement. Respondent Pfau was informed by CalPERS staff that he never filed a disability retirement application, but that one would be mailed to him. Respondent Pfau was provided Publication 35, which contains all the information necessary to file for disability retirement, as well as a disability retirement application, and was informed that he needed to submit the disability retirement application to CalPERS as soon as possible.

On October 23, 2013, respondent Pfau signed an application for service pending disability retirement (Application). CalPERS received the Application on November 5, 2013. On April 11, 2014, CalPERS notified respondent Pfau that his application was denied because he failed to establish that he made a correctable mistake pursuant to Government Code section 20160.

Respondent Pfau appealed CalPERS' determination, exercising his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. The ALJ presided over a one-day hearing in Glendale, California on April 7, 2016. Deputy Attorney General Michael J. Hui appeared on behalf of CalPERS. Respondent Pfau was represented at the hearing by attorney Dann L. Duncan. Respondent City was represented by attorneys Traci I. Park and Scott M. Nenni.

At the conclusion of the hearing, the record was held open for the parties to simultaneously file closing briefs by April 29, 2016, and reply briefs by May 13, 2016.

CalPERS has the discretion to accept the late filing of a member's disability retirement application. However, such discretion arises only where the member makes the request within six months of learning of the error, and proves to CalPERS that the error was the result of "mistake, inadvertence, surprise, or excusable neglect." (Gov. Code §20160.)

The ALJ considered all evidence submitted at the hearing.

CalPERS submitted evidence that established that on November 12, 2009, respondent Pfau knew that he did not submit a disability retirement application when he retired for service in December, 2008, and that if he wanted to retire for disability he should file a disability retirement application as soon as possible. CalPERS did not receive a disability retirement application from respondent Pfau until November 2013. Respondent City submitted evidence that its process for reviewing a disability retirement

application for a local safety member does not begin until CalPERS notifies the respondent City that it has accepted an application for disability retirement from one of its employees. Respondent City also presented evidence that established that it received a retirement form from respondent Pfau in 2008, the request was processed as a service retirement application pursuant to respondent Pfau's request, and after respondent Pfau's retirement he did not contact respondent City to discuss changes to his service retirement or to report a mistake in his initial application. The first time respondent City was informed of respondent Pfau's desire to receive a disability retirement was when it was contacted by CalPERS through a letter dated November 13, 2013.

Respondent Pfau contended at the hearing that the first time he discovered the right to correct or change his status from service retirement to disability retirement was June, 2013, when respondent Pfau retained an attorney to prosecute his workers' compensation appeal. Respondent Pfau also argued at the hearing that he was not informed by CalPERS of the six-month requirement to correct a mistake until June 2013. Respondent Pfau also argued that he relied on representations from Darlena Kirkland, who he believed to be an employee of respondent City, when he submitted his service retirement application. He alleged that he was told by Ms. Kirkland that he needed to complete his workers' compensation case before he could file for disability retirement with CalPERS. Respondent Pfau acknowledged at the hearing that he spoke with a CalPERS employee on November 12, 2009, and that he was "surprised" when told that there was no pending disability application on file for him.

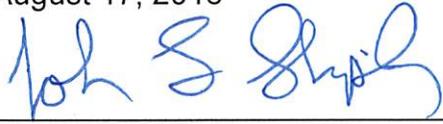
The ALJ summarily rejected respondent Pfau's allegations and contentions. The ALJ found that "the only credible conclusion to be drawn from these circumstances is that respondent Pfau first discovered the right to correct his status from service to disability retirement on November 12, 2009." The ALJ found that once respondent Pfau learned of his mistake/error (not submitting a disability retirement application), respondent Pfau only had six months to correct it under Government Code section 20160. Consequently, the ALJ found that respondent Pfau would have needed to correct the mistake within six months of November 12, 2009, when respondent Pfau was informed by CalPERS that he did not apply for disability retirement when he service retired.

The ALJ concluded that respondent Pfau'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.

Pursuant to Government Code section 11517(c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." In order to avoid ambiguity, staff recommends that the word "industrial" be inserted before the words "disability retirement" on page two of the Proposed Decision. In addition, staff recommends that the words "and uncorrectable" be inserted before the words "under Government Code section 20160" on pages two, four and nine.

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

August 17, 2016



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