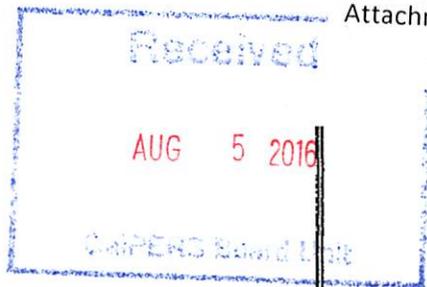


**ATTACHMENT C**  
**RESPONDENT'S ARGUMENT**



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

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In the Matter of the Application for Industrial Disability Retirement of:  
  
Daniel A. Pfau,  
  
Respondent,  
and  
City of Alhambra,  
  
Respondent.

Case No. 2014-0717  
OAH No. 2015010239

**RESPONDENT PFAU'S ARGUMENT AGAINST PROPOSED DECISION WITH REQUEST FOR BOARD TO DESIGNATE ITS DECISION AS PRECEDENT**

Respondent Daniel A. Pfau herein objects to ALJ Shrenger's Proposed Decision filed July 8, 2016, and respectfully requests the Board to reject the ALJ's proposed decision and designate its decision as precedent, as follows:

**BASIS FOR REJECTION OF THE ALJ'S DECISION**

- 1. The proposed decision contains a significant legal and/or policy determination of general application that has reoccurred herein, and is likely to reoccur in the future, that the ALJ failed to consider and/or apply the law properly.
- 2. The ALJ's proposed decision does not contain a complete analysis of the issues, nor does the decision follow applicable law.

**THE ALJ's IMPROPER APPLICATION OF G.C.§20160**

Relevant portions of G.C.§20160 state: "(a) ... the board may, in its discretion an upon any terms it deems just, correct the errors omissions of any active or retired member, ... provided that ... (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

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1 of mistake, inadvertence, surprise, or excusable neglect, ... (3) ... Failure by a  
2 member ... to make the inquiry that would be made by a reasonable person in like or  
3 similar circumstances does not constitute an "error or omission" correctable under  
4 this section. (b) Subject to subdivisions © and (d), **the board shall correct all**  
5 **actions taken as a result of errors or omissions** of ... **any contracting agency,**  
6 **any state agency or department, or this system.** ... (e) **Corrections of errors or**  
7 **omissions pursuant to this section shall be such that the status, rights, and**  
8 **obligations of all parties described in subdivisions (a) and (b) are adjusted to**  
9 **be the same that they would have been if the act that would have been taken,**  
10 **but for the error or omission was taken at the proper time. .."**

11 Here, the ALJ ignored or dismissed respondent Pfau's unrebutted testimony,  
12 supported by CalPERS own corroborating evidence, establishing the date Pfau first  
13 discovered his right to Industrial Disability Retirement (IDR) was upon advice by  
14 competent counsel on 6/8/2013, with timely notice as required under thereafter  
15 under G.C. §20160, within six months, on 10/23/2013.

16 The ALJ's reliance upon deficient Publication 35, **fails to acknowledge Pub. 35**  
17 **is devoid of any reference to the six month filing requirement,** and the ALJ's,  
18 reliance upon Customer Touch Point Reports (CTPR) **fails to acknowledge their**  
19 **notations indicate that Pfau must await the City's adjudication of his Workers'**  
20 **Compensation Appeals Board (WCAB) claim,** which supports Pfau's testimony.

21 Both the Pub. 35 and the CTPR's cooperate Pfau's unrebutted testimony which  
22 failed to put Pfau on notice of the six month time frame affecting his right to request  
23 IDR, and thereafter, to correct his mistaken belief within the six month time frame under  
24 G.C. §20160.

25 Pfau's unrebutted testimony established his mistaken beliefs also resulted from  
26 respondent City of Alhambra's (City) misrepresentation he must await a decision by the  
27 WCAB; his prior incompetent attorney's failure to inform Pfau of the G.C. §20160 six  
28 month requirement; the complexities of both CalPERS IDR and the Workers'

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1 Compensation Appeals Board (WCAB): as well as the ambiguous instructions and  
2 omissions by CalPERS representatives, recorded on CTPR's, indicating his employer  
3 would have to make the IDR determination, and none of which putting Pfau on notice of  
4 G.C. §20160's six month requirement.

5 A reasonable person under the same set of circumstances **has, and will in the**  
6 **future, make the same error until CalPERS and contracting agencies advises their**  
7 **members of G.C. §20160's six month requirement for IDR filing.** Here, the Board  
8 **"...shall correct all actions taken as a result of errors or omissions of "... any**  
9 **contracting agency, any state agency or department, or this system. ..."** just as the  
10 Board has done in the past:

#### 11 **THE ADJ'S FAILURE TO APPLY STARE DECISIS**

12 The policy behind stare decisis "is based on the assumption that certainty,  
13 predictability and stability in the law are the major objectives of the legal system; i.e.,  
14 that parties should be able to regulate their conduct and enter into relationships with  
15 reasonable assurance of the governing rules of law." (*Moradi-Shalal v. Fireman's*  
16 *Fund Ins. Companies (1988) 46 Cal.3d 287, 296.*)

17 The most recent and case on point is: ***In the Matter of the Application for***  
18 ***Earlier Effective Date of Retirement of, Luz O. Lopez, (11/12/15); OAH No.***  
19 ***2015020075, Case No. 2013-0793;*** decided Feb 18, 2016, an IDR Application filed  
20 six (6) years after employment.

21 ***The Board's holding:*** Applicant's mistakes mirror Pfau's mistaken beliefs:  
22 (1) inferring she must wait for her W.C.A.B. case to conclude (mistake of fact); (2)  
23 her lack of certainty about her disability (mistake of law), both of which were  
24 correctable under G.C. §20160, with Application deemed timely under G.C. §21252  
25 and CCP §473, reasonable person, met **"...as navigating the W.C.A.B. and**  
26 **CalPERS systems "can be confusing to a reasonable person."**

27 In this instance, Pfau's mistaken beliefs cited above are even more  
28 compelling than Lopez's. Pfau's un rebutted testimony, CalPERS Pub. 35, CalPERS

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1 advisors' Customer Touch Point Reports, and CalPERS specialist Herrera's  
2 testimony, all confirmed Pfau was never advised of the six month filing requirement.

3 **THE ADJ'S FAILURE TO APPLY ESTOPPEL**

4 Under *Cal. Const. Art. XVI, § 17(b)*: The Board members are further obligated to  
5 "discharge their duties with respect to the system **solely in the interest of, and for the**  
6 **exclusive purposes of providing benefits to, participants and their**  
7 **beneficiaries...**"

8 On 11/12/2009 (CTPR and CTPR's thereafter, CalPERS was appraised of the  
9 fact that Pfau believed respondent City had submitted an IDR application on his behalf.  
10 CalPERS acts thereafter as evidenced by CTPR's, reinforced Pfau's belief the City was  
11 in control of determination of IDR, CalPERS took no action to advise Pfau otherwise,  
12 and/or advise him of his duty to file a proper Application within six months of knowledge  
13 of right to do so.

14 Under those facts, and as city's workers' compensation administrator,  
15 Denise Kirkland's indication to Pfau that the pending WCAB claims must be decided  
16 before the IDR could be approved, with no advice provided by competent counsel until  
17 6/8/2013, Pfau's unrebutted testimony he was ignorant of the true state of facts and  
18 had a right to believe, and did believe and rely upon the misrepresentations, and  
19 omissions of CalPERS, and the City, both whom had a statutory fiduciary obligation to  
20 so advise, grossly exceeds the facts found in Lopez.

21 CalPERS benefit specialist Herrera's testimony confirmed that Pfau had never  
22 been advised by CalPERS of the six month filing requirement. As specialist Herrera  
23 also represented CalPERS *In the Matter of Lopez*, Herrera was, or should have  
24 been, fully aware of her fiduciary duty and requirement to discharge her duties with  
25 respect to the system **solely in the interest of, and for the exclusive purposes of**  
26 **providing benefits to Pfau**. Nonetheless, Herrera ignored the law, Lopez's ruling and  
27 it's implications regarding her fiduciary duties to Pfau.  
28

Case Name: Pfau, Daniel A.

OAH No. : 2015010239

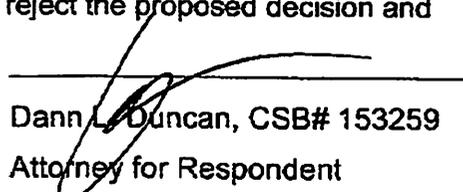


1 examine witnesses... on any matter relevant to the issues even though that  
2 matter was not covered in the direct examination; to impeach any witness  
3 *regardless of which party first called him or her to testify; and to rebut the evidence*  
4 *against him or her. ... Any relevant evidence shall be admitted if it is the sort of*  
5 *evidence on which responsible persons are accustomed to rely in the conduct of*  
6 *serious affairs, regardless of the existence of any common law or statutory rule which*  
7 *might make improper the admission of the evidence over objection in civil actions."*

8 Here, despite offers of proof, the ALJ prevented Pfau's witnesses who were  
9 present from testifying. Carole Hong, the city's finance manager, for 25 years, was  
10 responsible for workers' compensation matters and would have testified that the City  
11 routinely and consistently advised employees they must await a WCAB decision of  
12 industrial disability before they could process an IDR application. Norbert Mendoza,  
13 was prevented from testifying that the City's testifying witness, assistant city manager  
14 and human resource manager, Richard Bacio, had previously testified under oath in  
15 Mendoza's workers' compensation matter, wherein Bacio was admonished by the ALJ  
16 for having committed perjury, which impeaches Bacio's testimony.

17 The ALJ's failure to allow testimony of witnesses violates Pfau's fundamental  
18 right to a fair hearing and subjects the ALJ's findings to due process scrutiny under CA  
19 Code of Civil Pro. §1094.5.

20 **WHEREAS**, the above facts support Pfau's argument against adoption of the  
21 proposed decision; as substantial rights and responsibilities will be eviscerated unless  
22 the proposed decision is vacated; as respondents have a fiduciary duty to fully advise  
23 members of their rights and responsibilities to ensure their rights to earned benefits; **IT**  
24 **IS RESPECTFULLY REQUESTED**, the Board reject the proposed decision and  
25 designate its decision as precedent.

26   
Dann L. Duncan, CSB# 153259  
27 Attorney for Respondent  
28 Daniel A. Pfau

Case Name: Pfau, Daniel A.  
OAH No. : 2015010239



**In the Matter of Accepting the Late Application for Industrial Disability  
Retirement of: Daniel A. Pfau, Respondent, And City of Alhambra, Respondent**

**PROOF OF SERVICE**

I, Mei Q. Gu, declare, I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 136 N. Grand Ave., Ste. 318, West Covina, California 91791.

On Aug. 4, 2016, I served a copy of the within document(s):

**RESPONDENT PFAU'S ARGUMENT AGAINST ADOPTION  
OF THE PROPOSED DECISION**

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below:

CalPERS

PO Box 942701, Sacramento, CA 94229-2701

Attn: Cheree Swedensky, CalPERS Executive Office

(TO BE SERVED ELECTRONICALLY AUG. 5, 2016)

Burke, Williams & Sorensen, LLP

Attn: T. Park

444 Flower St., Ste. 2400, Los Angeles, CA 90071-2953

Attorney General of California

300 S. Spring St., Ste. 1702, Los Angeles, CA 90013

Attn: M. Hui

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on Aug. 4, 2016, at West Covina, California.

By: Mei Q. Gu

