

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Nadine West (Respondent) was employed by Respondent Irvine Unified School District (District) as a Campus Control Assistant IV. The District contracted with CalPERS to provide retirement benefits to its employees. By virtue of her employment, Respondent was a local miscellaneous member of CalPERS. The District submitted to CalPERS an application for disability retirement on Respondent's behalf. Despite requests from Staff to Respondent to provide necessary forms and information, Respondent did not cooperate and the employer generated application for disability retirement was cancelled. Over two years after the District had submitted an application for disability retirement on Respondent's behalf, Respondent submitted her own application. Staff reviewed medical reports and a written description of Respondent's usual and customary job duties. Staff determined that Respondent was substantially incapacitated from performing her usual and customary duties for the District and approved her application for disability retirement. Respondent requested that February 21, 2013, be the effective date of her disability retirement, if approved for disability retirement, as that was her last day on paid status with the District. Staff denied Respondent's request for an earlier effective retirement date. Respondent appealed Staff's determination and a hearing was held on October 25, 2016.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her 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.

The Administrative Law Judge (ALJ) received documentary evidence and the testimony of the CalPERS witness, a Staff Services Manager II. The evidence demonstrated that Respondent was injured while at work with the District. Respondent received medical care and initiated a claim for Workers' Compensation benefits. Respondent and the District engaged in multiple interactive meetings in 2012 and 2013 to discuss whether Respondent could return to full time, unrestricted work in her position. The District took the position that it could not accommodate work restrictions imposed on Respondent by her treating physicians in the Workers' Compensation action. Accordingly, on February 21, 2013, the District sent Respondent a letter advising her that: A) it could not accommodate stated work restrictions, B) she was being placed on an unpaid, inactive status, and C) because her employer believed that her condition made her eligible for disability retirement, the District was submitting an application for disability retirement, on her behalf, to CalPERS.

CalPERS received the employer generated application for disability retirement on March 11, 2013. On March 27, 2013, Staff sent Respondent a letter advising her that the District had submitted an application for disability retirement on her behalf. The March 27, 2013 letter to Respondent included several forms that Respondent was asked to complete and return, in order for the application to be processed.

Respondent testified that beginning in February 2013, and continuing through April 2013, following the final interactive accommodation meeting with the District, she had several telephone conversations with CalPERS Staff wherein she asked questions regarding disability retirement, service retirement and requested estimates for benefits. Respondent admitted that she was aware that the District had submitted an application for disability retirement on her behalf and that Staff had asked her to provide completed forms and information related to the possibility of her being eligible for disability retirement.

Respondent did not respond to Staff's initial request to provide relevant information and complete forms necessary for processing the employer generated application for disability retirement.

Having not received a response from Respondent, Staff sent a second letter to her on May 8, 2013. The letter again asked Respondent to provide the completed forms and authorizations necessary for CalPERS to process the employer generated application for disability retirement. The letter stated, in relevant part, "Whether you feel you are or are not disabled, it is very important for you to comply with our requests." The letter informed Respondent that she had 30 days to provide the requested documents. Additionally, the letter informed Respondent that failure to provide the requested documents could result in the application for disability retirement being cancelled by Staff. Significantly, the letter clearly informed Respondent of what the consequences would be if she failed to provide the requested documents and the application were to be cancelled.

"If cancelled, you would need to submit a new application for any future retirement request. Please be aware that with a new application you {sic}retirement effective date cannot be earlier than the first day of the month your application is received by CalPERS, if not currently on pay status. You could lose retroactive benefits that you may now be entitled to under the current application."

(Emphasis added.)

Respondent did not provide the requested documents within 30 days of the May 8, 2013 letter and Staff, consistent with the advice and warning that they had provided to Respondent, cancelled the employer generated application for disability retirement.

On June 29, 2015, more than two years after the District had submitted an application for disability retirement on Respondent's behalf, Respondent submitted an application for service retirement pending disability retirement. In her application, Respondent requested an effective retirement date of February 21, 2013.

On October 22, 2015, Staff approved Respondent's application for disability retirement. On the same date, Staff denied Respondent's request for an earlier effective retirement date of February 21, 2013.

The ALJ noted that, among other information provided to Respondent, Staff sent Respondent a copy of Publication 35 ("A Guide to Completing your CalPERS Disability Retirement Election Application"). Publication 35 included the statement:

"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."

Respondent testified that she did not provide the requested information and forms regarding the employer generated application for disability retirement because she wanted to explore working for the District in another position/capacity. Respondent also testified that her attorney in the workers' compensation action told her to not do anything which would jeopardize her claim, which she interpreted to mean that she should not apply for disability retirement. Respondent also said that one of her treating physicians refused to give her copies of records.

After considering all of the documentary evidence and testimony, the ALJ found that Respondent had not met her burden of proof. The ALJ concluded that Respondent had failed to demonstrate that her failure to cooperate with Staff with regard to the employer generated application for disability retirement was the result of inadvertence, mistake, surprise or excusable neglect correctable under Government Code section 20160.

"Fundamentally, the relevant facts show that [Respondent], after consultation with her workers' compensation attorney, CalPERS staff, her doctor and other individuals, voluntarily elected not to follow through on the disability retirement application because she did not believe she was permanently incapacitated; wanted to remain on the District's 39-month hire list in order to possibly obtain employment with the District in another position; and was concerned that filing for disability retirement would impact her workers' compensation case. CalPERS even advised that [Respondent] should provide the requested documents and information even if she believed her condition was not permanent and stationary. Despite these warnings, [Respondent] elected not to proceed with the application and CalPERS properly cancelled it. As such, [Respondent] failed to establish that her conscientious decision not to prosecute the application was the result of mistake, inadvertence, or excusable neglect. Rather, it was clear she elected not to proceed with the application because she did not want to retire on disability at that point in time."
(See Legal Conclusion No. 10.)

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.

February 15, 2017



RORY J. COFFEY
Senior Staff Attorney