ATTACHMENT B

STAFF’S ARGUMENT
STAFF’S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Henry Moreno (Respondent) worked for Respondent California Highway Patrol (Respondent CHP) as a Commercial Vehicle Inspection Specialist I. By virtue of his employment, Respondent was a state miscellaneous member of CalPERS. State miscellaneous members may not receive an industrial disability retirement under any circumstances, and may only receive a disability retirement should they qualify.

On May 13, 2013, Respondent submitted an application for service pending industrial disability retirement (2013 Application), requesting a retirement date of May 1, 2013. Respondent service retired effective May 1, 2013, and he has been receiving his service retirement since that date.

In his 2013 Application, Respondent listed his heart conditions as his disability, and indicated that his cardiologist, Charles Athill, M.D., had not released Respondent back to work.

Because Respondent was a state miscellaneous member, CalPERS treated Respondent’s 2013 Application as a disability retirement application, and not an application for industrial disability retirement. In a letter dated May 1, 2014, CalPERS requested additional information from Respondent regarding his 2013 Application, and the letter requested additional medical records from Respondent. The May 1, 2014 letter also explained that the 2013 Application could be cancelled if the requested information was not submitted, and that a cancellation could preclude a future application for disability retirement.

According to CalPERS’ Customer Touchpoint Notes, Respondent contacted CalPERS three times in June and July 2014, at which time Respondent was advised that service retirement benefits would be higher than disability retirement benefits. CalPERS also told Respondent that there was no tax benefit for a disability retirement.


Respondent contacted CalPERS multiple times in 2017 regarding the requirements for filing a disability retirement application. During the 2017 correspondence, Respondent obtained information and instructions from CalPERS for completing a disability retirement application.

On January 18, 2018, more than three years following Respondent’s voluntary cancellation of his disability retirement application, Respondent submitted a new disability retirement application (2018 Application).
Following receipt of the 2018 Application, CalPERS sent letters in June 2018 to Respondent and Respondent CHP that requested information explaining the time delay between Respondent’s 2013 Application and his 2018 Application.

Both Respondent and Respondent CHP replied to CalPERS’ June 2018 letters. Respondent CHP indicated in its response that it did not know why there was a delay between Respondent’s 2013 and 2018 applications. Respondent CHP also indicated that Respondent had claims for industrial injuries at the time he stopped working for Respondent CHP in 2013.

In response to CalPERS’ June 2018 letter, Respondent’s letter indicated that he has had heart related medical issues that continued to linger. In addition, Respondent indicated he thought that, following the cancellation of his 2013 Application, he could reapply for disability retirement without penalty. Respondent alleged in his appeal documents that CalPERS told him that he could reapply without penalty. However, CalPERS’ Customer Touchpoint Notes did not reflect such conversations.

By letter dated August 10, 2018, CalPERS advised Respondent of its determination that Respondent could not change from a service retirement to a disability retirement. Government Code section 21154 requires a disability retirement applicant to be a CalPERS member at the time of the application. Under Government Code section 20340, Respondent ceased CalPERS membership upon retirement on May 1, 2013. So, Respondent was precluded from applying for disability retirement in 2018 because he was no longer a CalPERS member, but was instead an annuitant.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on May 13, 2019. Respondent did not appear at the hearing. Respondent CHP did not appear at the hearing. Under Government Code section 11520, the matter proceeded as a default against both Respondent and Respondent CHP.

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.

Additionally, after the matter was set for hearing, and on two separate occasions, CalPERS provided information and instructions to Respondent so that he could request a continuance from OAH if one was required.

At the hearing, CalPERS’ staff testified in support of CalPERS’ determination. Staff testified that Government Code section 21154 only allows active CalPERS members to apply for disability retirement. Staff then explained that, under Government Code section 20340(a), Respondent ceased to be a CalPERS member when he retired for service in 2013. In order for CalPERS to consider Respondent’s 2018 disability retirement application, staff testified that Respondent needed to provide evidence that he made a correctable mistake under Government Code section 20160.
Staff testified that it reviewed the explanations for the late disability retirement application submitted by Respondent. As evidenced by Respondent’s 2013 Application, Respondent knew how to apply for disability retirement. However, Respondent never provided CalPERS with evidence explaining why he waited more than three years to submit his 2018 Application. Hence, staff explained that Respondent did not make a mistake correctable by Government Code section 20160. Staff also explained that, even if a disability retirement were granted, there would be no change to the service retirement benefit amount Respondent currently receives.

After considering all of the evidence introduced, as well as closing argument by CalPERS, the ALJ denied Respondent’s appeal. The ALJ found that Respondent ceased to be a CalPERS member at the time he retired in 2013. In finding that Respondent did not make a mistake correctable under Government Code section 20160, the ALJ considered the arguments and evidence provided by Respondent in his appeal and other correspondence. Respondent waited more than three years following the voluntary cancellation of his 2013 Application to reapply. No explanation was offered to explain the unreasonable amount of time between the two applications.

In the Proposed Decision, the ALJ concludes that there was no evidence to support that Respondent made a correctable mistake, and that the request to fix the mistake was untimely. The appeal was thus denied.

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 “industrial disability retirement” be changed to “disability retirement” on page two in the Issue paragraph, and in the first sentence on page four, in paragraph seven. Staff further recommends that “application for industrial disability” in the second line of paragraph 14 on page 15 be changed to read “application for disability retirement.”

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

August 21, 2019

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