ATTACHMENT B

STAFF'S ARGUMENT
STAFF’S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Susan L. Chase (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge’s (ALJ) Proposed Decision (PD), dated May 7, 2019. The Board considered and adopted the PD at its June 19, 2019, meeting. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent’s appeal did not seek to overturn a determination made by Staff, on the basis of competent medical evidence, that she was not substantially incapacitated from performing her usual and customary duties as a Park Ranger for the California Department of Parks and Recreation. Respondent appealed Staff’s determination that there was no legal basis upon which her application for industrial disability retirement (IDR) could be accepted, reviewed and processed. Accordingly, the basis for Respondent’s request for reconsideration (“the board did not address the related health conditions of the initial work related diagnosis of Lyme disease…”) is misplaced and does not provide a reason or justification for the Board to grant reconsideration.

Government Code section 21154 provides:

The application 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 (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. (Proposed Decision, pg. 5 & 6)

Government Code section 20340, subdivision (a), provides that a person ceases being a “member…upon retirement, except while participating in reduced worktime for partial service retirement.” (Proposed Decision, pg. 6)

Respondent ceased being a member of CalPERS on December 31, 2010, the effective date of her service retirement. According to the provisions of Government Code section 21154, Respondent could submit an application for industrial disability retirement “within four months after discontinuance of the state service of the member…”

The first of three applications for industrial disability retirement was submitted by Respondent in a timely manner. But Respondent knowingly and voluntarily withdrew that application before staff could review it and make a determination.
On March 1, 2011, Respondent submitted a Disability Retirement Election Application to CalPERS, seeking IDR with an effective date of December 31, 2010. Respondent stated as the medical basis for her disability that she suffered from symptoms, including loss of balance and peripheral neuropathy, “from Lyme Disease contracted on the job.” (Emphasis added.) She identified the date of her disability as January 14, 2008. Respondent knew, from 2008 on, that she had a potentially disabling disease or condition.

In a letter dated May 24, 2011, Respondent withdrew her IDR application. She stated in her letter that “[s]ince I have submitted the application I have slowly been getting better through treatment and physical training.” She added that “[w]hile I still have some lingering health problems, I am no longer impacted to a point that would prevent me from working again as a peace officer or in another capacity.” (Emphasis added.) In a letter dated June 3, 2011, CalPERS notified Respondent that her IDR application was cancelled.

Many years later on February 26, 2018, Respondent submitted a second IDR application dated February 21, 2018, with a requested effective retirement of December 31, 2010. Respondent claimed Lyme disease as the basis of her disability and that her disability occurred on January 14, 2008.

CalPERS cancelled Respondent’s second IDR application on June 15, 2018, because she did not submit medical records substantiating her continuing disability from December 29, 2010, the date of her second IDR application.

On July 9, 2018, Respondent submitted a third Disability Retirement Election Application, dated July 6, 2018. Respondent again claimed Lyme disease as the basis of her IDR application. She stated her disability began on January 14, 2008. Because Respondent’s third application for IDR did not meet the requirements set forth in Government Code section 21154, the only way that staff could accept and process the application was if she were able to demonstrate that her failure to submit an application earlier had been due to “mistake, inadvertence, surprise or excusable neglect as required by statute.”

Government Code section 20160 outlines circumstances when CalPERS may correct an active or retired member’s error or omission, and provides in relevant part as follows:

(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 active or 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 the discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, or surprise, or excusable neglect, as each of those terms is [sic] used in Section 473 of the Code of Civil Procedure. (Emphasis added.)

There is no evidence of “surprise” or “excusable neglect” by or/on Respondent’s behalf that would allow for a Section 20160 correction or remedy by the Board.

Respondent knew, from January 2008, that she had been diagnosed with and was experiencing symptoms associated with Lyme disease.

Respondent knew that disability retirement, or IDR, was potentially available to her. In 2010, before she service retired, Respondent spoke with staff members on two occasions and was provided with the CalPERS disability retirement publications and application. Respondent knew of another Park Ranger who had been approved by CalPERS to receive disability retirement. As the ALJ noted, “[Respondent]…knew she could apply for IDR…”

There is no evidence of Respondent making a “mistake” in failing to apply for IDR after her first application was cancelled - at her request. Respondent’s argument that she did not fully know and/or appreciate the severity of her symptoms was considered by the ALJ and rejected. As the ALJ concluded in the Proposed Decision:

[Respondent] failed to prove by a preponderance of the evidence that her cancellation of her IDR application on May 24, 2011, was due to mistake, inadvertence surprise or excusable neglect. This conclusion is reached for this reason: In 2011, [Respondent] believed she was unable to perform her job duties due to Lyme disease. Indeed, on March 1, 2011, after she service retired, she applied for IDR. Nonetheless, she cancelled this application in the hope that she could obtain part-time work with the Department, which she was not able to obtain. Because she believed she could not work in 2011, the fact that her symptoms from this condition have unfortunately worsened since that time is not a basis to find that her decision to cancel IDR application on May 24, 2011, was due to mistake, inadvertence, surprise, or excusable neglect under Section 20160. (emphasis added)

Respondent’s return to this argument as the basis for the Board to reconsider the matter should be rejected.
In addition, while the ALJ did not make findings regarding the six month limit set forth in Section 20160, this provides another reason to reject Respondent’s request for reconsideration. The facts are clear. Respondent took no action to pursue her potential right to file for IDR after her first application was cancelled until seven years had passed. Respondent would have had six months, or until January 3, 2012, to contact CalPERS and seek relief from her previous decision to cancel or withdraw her application.

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The PD that was adopted by the Board at the June 19, 2019 meeting was well reasoned and based on the credible evidence presented at hearing.

August 21, 2019

RORY J. COFFEY
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