# ATTACHMENT B

# STAFF'S ARGUMENT

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

Kevin Smith (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated May 22, 2019. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent's appeal is limited to the issue of whether he made a mistake which was the result of inadvertence, mistake, surprise or excusable neglect correctable by Government Code section 20160, which would have entitled him to retroactively change retirement status from service retirement (SR) to industrial disability retirement (IDR).

Respondent rose through the ranks while employed by Respondent City of El Segundo (Respondent City). He retired for service from his last job as Fire Chief, with 30.323 years of service, effective October 3, 2015. He is a local safety member of CalPERS.

Respondent applied for SR in May 2015. He was approved for SR effective October 3, 2015, and he has been receiving SR benefits ever since. After receiving benefits for approximately eight months, he sought to change from SR to IDR. CalPERS denied his request, because he had full knowledge of the application process and no correctable mistake was made as defined by Government Code section 20160.

At the time he submitted his SR application, Respondent had been a Fire Chief for 10 years. During those 10 years, he counseled City employees regarding retirement options, including SR and IDR. He admitted that he saw many attempts to "game" the retirement system regarding workplace injuries. He did not apply for IDR because he wanted to avoid the "stigma" associated with IDR, so he *chose not to apply for IDR*.

In July 2015, CalPERS informed Respondent in writing that he may be entitled to an IDR, if he was unable to work due to illness or injury: "To request a service pending disability retirement, you must complete a Disability Retirement Election Application." Respondent *chose not to apply for IDR*.

On October 6, 2015, Respondent met with his attorney, who told him he could pursue an SR pending IDR application. Respondent *chose not to apply for IDR.*

On June 7, 2016, Respondent requested to change from SR to IDR. CalPERS made inquiries to Respondent and Respondent City to obtain information as to why Respondent's IDR application was not timely submitted. Both Respondents responded to CalPERS' inquiries.

Respondent stated in two response letters and testified at hearing, that he chose not to apply for IDR because, “I did not intend to retire on disability. I do not like the stigma associated with it.” At the hearing, Respondent testified that his medical difficulties arose following his hip replacement surgery in April 2015. Shortly after surgery, he became aware that his recovery was not progressing well. By July 2015, he claimed that he could not tie his shoes, could not walk long distances, and had difficulty lifting. He was diagnosed with sciatica that caused extreme pain on his left side. He “lived with this pain, hoping it would go away on its own.” He also testified that he experienced side effects associated with various medications including memory loss, snoring, sweating and restlessness.

CalPERS reviewed all information, case law and statutory authority to determine if Respondent made a correctable mistake in not filing for IDR at or near the time he separated from employment. Assuming all Respondent’s claims of pain and numerous doctor visits are true (could not put on his shoes and socks in July 2015; April 2015 hip replacement surgery from which he did not recover fully as of October 2015; stiffness and pain in his back, neck and joints as of October 2015; could not put weight on his left foot as of October 2015; severe sciatica as of October 2015; severe neck and back pain as of October 2015) and despite his attorney telling him in October 2015 to file for IDR, Respondent chose to wait eight months to file his SR Pending IDR Application. He never discussed disability retirement options with Respondent City or with CalPERS. He admitted that as Fire Chief he was knowledgeable and had dealt with disability retirement issues for at least 10 years. He knew there were timing issues and deadlines associated with filing an IDR Application – he just chose not to file for IDR.

After review, CalPERS determined that Government Code section 20160 does not excuse Respondent’s late submission by reason of mistake: Respondent did not make a mistake; he intentionally chose not to file for IDR. On August 22, 2018, CalPERS notified Respondent that no correctable mistake had been made to allow a change to his retirement status and he was advised of his right to appeal this determination.

On September 5, 2018, Respondent appealed this determination and exercised his right to a hearing before an ALJ with the Office of Administrative Hearings (OAH). A hearing was held on April 24, 2019. Respondent represented himself at the hearing. Respondent City did not appear at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided him with pamphlets from OAH and from CalPERS. On October 19, 2018, CalPERS informed Respondent in writing, that his case had been assigned to a CalPERS attorney, and recommended that he retain a lawyer to represent him. He chose not to retain counsel. CalPERS answered Respondent’s questions and clarified how to obtain further information on the process.

CalPERS introduced exhibits and testimony at the hearing, which laid out the facts and timeline of CalPERS' communications to Respondent regarding his IDR application, and potential SR pending IDR application if he wished to be considered.

Respondent testified on his own behalf, confirming the events and his medical history. He admitted that he chose not to apply for IDR, despite knowing about the IDR retirement option for at least 10 years.

The ALJ found that Respondent was aware that he could apply for a SR pending IDR at least by October 2015, and likely long before that date. The ALJ also found that CalPERS fulfilled its fiduciary requirements in timely notifying Respondent of the potential availability of all types of retirements, including IDR.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent did not meet his burden of presenting documentation and other evidence establishing that he made a correctable error or omission pursuant to Government Code section 20160. First, the ALJ found that Respondent was on notice at least as of October 6, 2015 that he should apply for SR pending IDR (and likely earlier). His application was filed eight months later, which was longer than Government Code section 20160 provides for correction of a mistake ("not to exceed 6 months"). Second, the ALJ found that Respondent did not make a mistake. He "consciously chose not to exercise the election available to him." The ALJ reasoned that Respondent knew of his disability at or near the time he retired but chose not to pursue disability retirement. The ALJ found that Respondent made a "conscious choice," not a correctable mistake.

When all the evidence was considered, the ALJ denied Respondent's appeal, and affirmed CalPERS' denial of his request to change from SR to IDR.

The Board of Administration adopted the Proposed Decision at its August 21, 2019 meeting. Respondent was notified of the Board's decision on August 22, 2019.

On August 26, 2019, Respondent submitted a Petition for Reconsideration. He has given no new reasons for his Petition. He admits that beginning in 2011, he had various medical conditions which worsened over time. He admits he knew about the IDR process for at least 10 years due to his job as Fire Chief. He admits that he "considered whether to apply for [IDR] instead [of SR]" in May 2015 but chose not to apply for IDR because he "did not like the stigma associated with abuse of the system." CalPERS recommended that he retain counsel to represent him at hearing in writing on October 19, 2018. He admits that he chose not to retain counsel to represent him, but now argues that since he was not represented, "I was unable to represent my case adequately".

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the August 21, 2019, meeting was well reasoned and based on the credible evidence presented at hearing.

For all the foregoing reasons, the staff recommends that Respondent's Petition for Reconsideration be denied.

September 18, 2019.

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ELIZABETH YELLAND
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