

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Marque L. Gaines (Respondent) was employed as a Tax Program Assistant by Respondent Franchise Tax Board (Respondent FTB). By virtue of his employment, Respondent was a state miscellaneous member of CalPERS.

Pursuant to Respondent's request, CalPERS sent Respondent a copy of CalPERS' Publication 35, "A Guide to Completing Your CalPERS -Disability Retirement Election Application" (Publication 35) on July 25, 2017. In addition to providing detailed instructions for completing the disability retirement application, Publication 35 also instructs members regarding workers' compensation claims as follows: "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. Delaying your application for retirement may affect important benefits you may be entitled to receive."

Respondent applied for service pending disability retirement on August 29, 2017. In the application, Respondent requested an effective retirement date of November 22, 2017. CalPERS' staff advised Respondent to provide all documents supporting his request for disability retirement within 21 days, or the disability retirement portion of his application would be cancelled.

In addition, CalPERS requested documents supporting Respondent's application for disability retirement by letter dated September 5, 2017. The letter also informed Respondent that failure to provide the requested documents within 21 days would result in the cancellation of his disability retirement application.

CalPERS notified Respondent that the disability retirement portion of his application was cancelled by letter dated October 3, 2017.

Respondent called CalPERS to check on the status of his disability retirement application on October 11, 2017; October 13, 2017 and November 6, 2017. On each occasion, CalPERS' staff informed Respondent that his disability retirement application had been cancelled because he failed to submit the required documents.

CalPERS approved the service retirement portion of Respondent's application on November 23, 2017. Respondent has been receiving service retirement benefits from that date.

Respondent contacted CalPERS on May 4, 2018 and indicated that he wished to file another application for disability retirement. CalPERS' staff advised him to complete the entire disability retirement application and sent him another copy of Publication 35.

Respondent again contacted CalPERS on January 7, 2019, with questions about submitting a disability retirement application. That same day, CalPERS mailed another copy of Publication 35 to Respondent.

Respondent applied for disability retirement on February 5, 2019 seeking an effective retirement date of November 22, 2017.

CalPERS denied Respondent's request to change his service retirement to disability retirement by letter dated April 9, 2019. In the letter, CalPERS stated that because Respondent submitted the application after he service retired, it was construed as a request to change from service retirement to disability retirement. However, because the application was filed late, and that late filing was not caused by a correctable mistake, CalPERS could not grant Respondent's request to change his service retirement to disability retirement.

Respondent appealed this determination and requested a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on October 1, 2019. Neither Respondent nor Respondent Franchise Tax Board appeared at the hearing.

Prior to the hearing, CalPERS had 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.

After considering all of the evidence introduced, the ALJ denied Respondent's appeal. The ALJ found that CalPERS informed Respondent by letter and multiple phone calls that his disability retirement application was cancelled and that he would need to resubmit a disability retirement application. The ALJ found that Respondent was given this information as early as October 2017. The ALJ noted that CalPERS advised Respondent to resubmit a disability retirement application on May 4, 2018 – six months after he had been service retired; however, Respondent failed to do so until February 2019. The ALJ found that on multiple occasions CalPERS provided Respondent with Publication 35 which plainly instructs members not to delay applying for disability retirement.

In the Proposed Decision, the ALJ concludes that Respondent's failure to follow CalPERS' explicit instructions and numerous requests to file a disability retirement

application does not constitute mistake, inadvertence, surprise or excusable neglect correctable under Government Code section 20160.

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

December 18, 2019

Austa Wakily
Senior Attorney