

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Lillie Sample (Respondent) was employed by Respondent Vallejo City Unified School District (District) as a Custodian. By virtue of her employment, Respondent was a local miscellaneous member of CalPERS. Respondent last worked for the District on June 2, 2017. On February 21, 2018, Respondent submitted an application for service retirement. Respondent has been receiving a service retirement allowance since March 2018.

On January 29, 2019, Respondent submitted an application for disability retirement. Following review of Respondent's file and investigation of circumstances surrounding her retirement, CalPERS staff determined that CalPERS could not accept Respondent's application for disability retirement. By letter dated April 26, 2019, CalPERS advised Respondent and the District of its determination and provided appeal rights.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on September 16, 2019. Respondent Sample appeared and represented herself. Respondent District did not appear and the matter proceeded as a default pursuant to Government Code section 11520. A Proposed Decision was issued on October 16, 2019, affirming CalPERS' determination and denying the appeal.

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.

Documentary evidence and testimony from a CalPERS' staff witness demonstrated that CalPERS, on multiple occasions between February 2018 and January 2019, advised Respondent how to apply for disability retirement.

In the February 26, 2018, letter from CalPERS to Respondent, acknowledging receipt of her application for service retirement, Respondent was informed that, "You may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. To apply for a disability retirement, you must complete a Disability Retirement Election Application." This seemingly prompted Respondent to call CalPERS, as an entry in the Customer Touch Point (CTP) Notes for the date of February 28, 2018, documents that Respondent called and spoke with a Call Center employee about disability retirement. The CTP Note entry shows that Respondent was encouraged to secure an estimate of what a disability retirement allowance would be.

On March 26, 2018, Respondent went to the Walnut Creek Regional Office of CalPERS. Respondent received counseling regarding disability retirement. A CalPERS representative reviewed the necessary forms for applying for disability retirement with Respondent and provided Respondent with the CalPERS' Publication 35, "A Guide to Completing Your CalPERS Disability Retirement Election Application." Included in that publication the following can be found:

You – or someone on your behalf such as your employer – may file a **Disability Retirement Election Application** for your retirement. You should apply for disability or industrial disability retirement as soon as you believe you are unable to perform your usual job duties because of an illness or injury that is of permanent or extended duration and expected to last at least 12 consecutive months or will result in death.

(Bold in original; emphasis added.)

Respondent returned to the Walnut Creek Regional Office on May 17, 2018. A CalPERS representative instructed Respondent regarding the process for service retirement pending disability retirement. Respondent was given another Disability Retirement Election Application packet and advised to complete the application and submit it immediately so that CalPERS could process the application and make a determination of whether she was eligible for disability retirement.

The CTP Notes document that Respondent called CalPERS on August 1, 2018 and asked how to file for disability retirement. Respondent was again told to complete and submit a disability retirement election application. Two weeks later, on August 15, 2018, Respondent called again, asking about “her disability retirement.” Respondent was advised that she did not have a disability retirement, that she was receiving a service retirement allowance, and that, in order to receive a disability retirement, she would need to complete and file with CalPERS a disability retirement election application.

This Question-and-Answer conversation between Respondent and a CalPERS staff member was repeated one more time on December 5, 2018, for a total of five conversations regarding how to apply for disability retirement. Finally, on January 29, 2019, Respondent submitted an application for disability retirement. Respondent claimed a disability on the basis of an orthopedic (back) condition and stated that the disability began on June 2, 2017, as a result of an injury at work.

CalPERS sent letters to both Respondent and the District, asking questions and seeking information in order to assist in making a determination of whether a correctable mistake had been made that could explain the delay by Respondent in filing an application for disability retirement. The written answers provided by Respondent included the statement that, on or about June 2, 2017, her treating physician told her that her “working days are over.”

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found as follows:

Respondent last physically worked for the District on June 2, 2017. ... At that time, respondent held the mistaken belief she could not file for disability retirement at the same time because she had not been off work for 12 consecutive months. Respondent’s subjective beliefs aside, CalPERS never misled her in this regard. On the contrary, CalPERS informed her as soon as February 26, 2018, that she may be eligible to apply for disability retirement. Respondent was thereafter provided a copy of Publication 35 and verbally advised to file a disability retirement election application on the phone as well as

during two separate personal visits to CalPERS' Regional Office. Even if respondent's mistaken belief that she had to be off work for 12 consecutive months due to injury was reasonable, she did not file for disability retirement in June 2018, when she reached the 12-month mark. Nor did she file for disability retirement after the neurologist advised she could never return to work [6/2/17]. Rather, she did not file for disability retirement until more than 18 months after being taken off work, and nearly a year after she filed for service retirement.

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

December 18, 2019

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