ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)

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Respondent's Argument Ref # 2018-0995

FEB 27 2020

WILLIAM C. BAILEY
IN PROPRIA PERSONA

FEB 27 2020

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of Accepting the Application for Industrial Disability Retirement of WILLIAM C. BAILEY, Respondent, and CITY OF SAN FERNANDO, Respondent.	Agency Case No.: 2018-0995 OAH Case No. 2018120581 Judge Erlinda Shrenger **RESPONDENT'S ARGUMENT** **Board of Administration of CalPERS Board Meeting: March 18, 2020**

Respondent William C. Bailey submits the following Argument in opposition to the Proposed Decision of Judge Erlinda Shrenger filed on February 5, 2020 ("Proposed Decision").

INTRODUCTION

The Proposed Decision is deficient in a number of ways. It lacks any analysis of whether the facts of my case are sufficient to estop CalPERS from seeking all of the relief it is requesting. It completely fails to address a key legal argument raised at the Hearing and in my closing brief,[1] that being, whether CalPERS is entitled to retroactive relief as opposed to only prospective relief. It ignores CalPERS' duty to appropriately consider and process IDR applications submitted on behalf of local safety members, implying incorrectly that the employer's determination regarding physical incapacity is the *only* determinative factor governing CalPERS' approval or rejection of an application. It ignores the evidence of CalPERS' acknowledgment of its improper processing of my IDR application (Ex. "A") and CalPERS' demand for repayment of benefits barred from recovery by the statute of limitations.

Given these deficiencies, detailed below, the Proposed Decision should be rejected by the Board. Any decision adopted by the Board should, at a minimum, include a comprehensive analysis of: (1) whether CalPERS is estopped to correct its mistake given its failure to obtain my employment records and information concerning my employment status at the time of my application; (2) if CalPERS is entitled to correction, whether CalPERS is equitably and statutorily estopped from seeking retroactive repayment. When all the relevant facts are considered (most importantly those concerning CalPERS' role in my situation and the impact on my rights) and analyzed within the context of the Gov. Code, including §20160 in its entirety, and applicable caselaw, Respondent submits that these issues both must be answered in the affirmative.

Additionally, it is noted that the Proposed Decision includes a protective order for my police identification cards, which I submitted at the Hearing (Ex. "D"). Request is hereby made that the protective order be expanded to include my May 2, 2019 Service Retirement Application, Exhibit "H", in its entirety; and that the references to my CalPERS ID, home address, social security number and date of birth listed on Exhibits "A", "B-7", "F", "G" and "I". Prior to the Hearing, I was

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[1] That Argument is based on Government Code §20160(e)(2), which prevents the granting of retroactive relief to CalPERS where the status and rights of all the parties cannot be adjusted to the same position as if the error never occurred. §20160(e)(2) is quoted on page 21 of the Proposed Decision, but completely ignored in the Proposed Decision.

not aware that my and my family's personal information (address, dates of birth, social security numbers, CalPERS identification number, banking information and the like) could be redacted from exhibits submitted during the Hearing. Exhibit "H" is replete with this sensitive confidential information. The privacy rights afforded this information was in no way waived at the Hearing, with the Court indicating that such information would be redacted/protected.

INSUFFICIENCIES

1. The Proposed Decision fails to analyze whether the facts meet the elements of estoppel.

The issue of estoppel is summarily addressed in ¶18 of the Proposed Decision, where it is essentially asserted that CalPERS cannot be estopped as a matter of law. While it is undisputed that CalPERS must act to correct its mistakes, that fact does not render CalPERS immune from estoppel. The case law is clear that provided the five elements of estoppel are met, entities, such as CalPERS, can be estopped. (*Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 564-565.)

2. The Proposed Decision ignores the role that CalPERS played in creating this situation.

The undisputed evidence presented at the Hearing was that my injuries are real and that their existence and the impact on my physical ability to perform my job as an officer was evaluated and confirmed by the City's doctors. This undisputed evidence of my physical incapacity to perform my duties, undercuts the Court's factually baseless assertion that my settlement with the City was some type of ruse whereby the City was supporting my IDR notwithstanding a lack of physical incapacity as a substitute for the disciplinary process. (¶16).

Whether I was properly determined to be disabled by the City and whether CalPERS is required to accept the City's disability determination are not at issue here. Rather, the issue is whether CalPERS is immune from any responsibility for approving my IDR based on an incomplete application, without obtaining the required standard releases of my employment records, and without making any inquiry at all into my employment status as of when I applied.

As CalPERS is well aware, the employment status, including the status of pending disciplinary proceedings and appeals, of an applicant for IDR is crucial in evaluating whether an employee, such as myself is "eligible to apply" for IDR. What I did not know in 2014 when I

applied for my IDR is that my employment status was a critical factor in determining my eligibility for IDR. However, as we now know, CalPERS failed to do anything to determine whether I was eligible other than waiting for the City to make a determination as to physical eligibility, after which CalPERS approved my IDR without any assessment as to whether I was otherwise eligible. The key facts are as follows[2]:

- I submitted my application for IDR in person at a CalPERS office on March 21, 2014; at that time, I had a worker's compensation claim and employment disciplinary proceeding pending[3];
- CalPERS' rep Ms. Behrens, went through the application with my wife and I, instructing us which parts of the application to fill out and which to leave blank;
- I was not asked about my current employment situation at the City, nor was I presented with either of CalPERS' standard release forms for execution – one form (Ex. "15" [PERS-BSD-35 dated 11/11]) gives CalPERS full authority to access my protected health and personal records; and the other form (Ex. "E" [PERS01M0052DMC dated 3/12]) instructs my employer to, as soon as possible, send my medical and personnel information to CalPERS, using the form as a cover sheet;
- CalPERS notified me via letter dated April 8, 2014 that my application had been received and that the City had been notified of its obligation to make a determination of my physical disability and informing me of rights with respect to my service retirement in lieu of disability retirement and informing me of my obligation concerning injuries caused by others. Neither my personnel records nor my employment status is mentioned in this letter;
- After receiving the City's certification of my physical qualification for IDR, CalPERS notified me of this approval (Ex. "10" [11/17/14]) and then notified the City of CalPERS' approval of my IDR with an effective date of April 24, 2014 (Ex. "11" [12/8/14]);
- CalPERS granted that approval without obtaining copies of my employment

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[2] See pages 2-3 of my Closing Brief (Ex. "K") for detailed discussion.

[3] I had misstated on my promotional application that I had a bachelor degree when I was still one class short. (Ex. "B-7", which was admitted at the hearing is a complete set of my transcripts.)

records or otherwise inquiring from me or the City about my employment status and personnel records/history;

- CalPERS began making monthly disability payments to me despite the fact that the City apparently coded me as "terminated for cause" in CalPERS' system;
- After over two years of payments were received, in August of 2016, CalPERS claims that an internal audit alerted them to coding by the City on my file;
- After CalPERS first attempted to acquire my personnel records directly from the City - who they informed that they were looking into whether I was ineligible for an IDR, due to a termination for cause under *Haywood* - CalPERS sent me a letter. That letter however did not mention that the City was now auditing whether I was ineligible for an IDR because of my employment status at the time I applied, but merely asked me to execute one of the releases, which CalPERS requires as part of the IDR application process, but failed to even request from me when I applied. (Ex. "A" [10/12/16])[4];
- After reviewing my records, CalPERS issued its August 15, 2018 letter revoking my IDR (Ex. "5"); the letter did not acknowledge the mistake that CalPERS made in approving my IDR without first obtaining the necessary releases or reviewing my personnel records;
- The subsequent collection notices from CalPERS to recover in excess of $230,000 similarly did not disclose that CalPERS was seeking to obtain not only the recovery of the last three years of payments, but also those barred by the three-year statute of limitations;[5]
- I cannot be restored to the position that I would have been in had CalPERS not made the mistake in approving my IDR; my settlement with the City included the compromise of my worker compensation claim for an insignificant amount and a waiver of my right to lifetime medical for myself and my wife; a prompt denial of my application would have allowed me to immediately seek to set aside and/or rescind the entire settlement agreement because the

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[4] Exhibit "A" was not included in the copy of my CalPERS file produced by CalPERS, nor did CalPERS provide a copy to the Court during its Case. (See discussion of Exs. "A" & "12" in Ex. "K", p.10.)

[5] Contrary to ¶ 24 of the Proposed Decision, at no point prior to the Hearing did CalPERS concede that recovery of payments made more than 3-year prior to revocation was barred by Gov. Code §20164. Moreover, the August 15 revocation letter made no reference to recouping payment from me.

settlement was premised on my receipt of IDR. (Ex. "C".) Although my disability would have prevented me from returning to work unless and until it was determined that I was no longer disabled, I would have been able to pursue my worker compensation claim and maintain lifetime medical. Moreover, I have been forced to trigger a service retirement and make elections related thereto due to the very large amount that the CalPERS seeks to recoup.

All of these facts are important not only in determining whether the 5 elements of estoppel have been met to bar CalPERS from any relief in this proceeding, but also are directly relevant to whether CalPERS is estopped from obtaining retroactive relief, issues which the Proposed Decision simply fails to address. CalPERS would have known that I was ineligible to apply for my IDR well before the City approved my physical eligibility, if it had done anything to obtain information on my employment status and not simply approved my IDR with essentially an empty file. Then, CalPERS did nothing for years despite the fact that its own system included the information that I had been coded as "terminated for cause" by my employer. CalPERS thus knew or ought to have known that it was making payments to me, a recipient who they would have determined to be ineligible, and that I was relying on those payments. (elements 1,2.) The evidence was undisputed that I was ignorant of any ineligibility and relied upon CalPERS' approval to my extreme detriment. (elements 3,4.) While arguments can be made as to element 5, whether the injustice suffered by me is sufficient to justify any effect on the public interest, CalPERS' complete and unexplained (and steps to cover-up) abdication of its duty, and the severe detriment to me in reliance on their approval, satisfies this last element. (*Krolikowski at* 24 Cal.App.5th 564-566.) Moreover, even if the Board were to disagree with this analysis with respect to estopping CalPERS from obtaining a correction, the analysis provides ample support for a non-retroactive ruling in this case as expressly provided for in the Government Code.

3. <u>The Proposed Decision fails to apply Government Code §20160(e).</u>

While ¶ 29 acknowledges my argument on retroactivity and the Proposed Decision quotes the entirety of Government Code §20160(e), the Court failed to actually apply this section, which provides, in pertinent part:

(e) Corrections of errors or omissions pursuant to this section shall be such that

the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

...

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

The underlined portions of the §20160(e) are precisely why any recovery must be limited to prospective recovery. It is not possible, over 5 years later, that the status, rights, and obligations of all of the parties (CalPERS, me & the City) can be adjusted to be the same that they would have been if CalPERS had not approved my IDR. The effect of revoking my IDR now and allowing for retroactive recovery is fundamentally different than would have been denial of my IDR in 2014. Because the City and I settled based upon the belief that my physical disability entitled me to IDR, CalPERS' rejection of my IDR application would have constituted grounds to set aside the Settlement Agreement and reopen the disciplinary proceeding, a proceeding which the City could have simply terminated on its own or which could have concluded in my favor, in either of which case *I would have been eligible for IDR because I would have been otherwise eligible to return to work.*

CONCLUSION

For all the foregoing reasons, I respectfully request that the Board reject the Proposed Decision and issue a decision denying CalPERS' requested correction. Alternatively, should the Board adopt a decision granting CalPERS' request for correction, that CalPERS' correction only be implemented prospectively from the date of the Board's action. Request is further made that any decision include a protective order preventing public disclosure of: Exhibits "D" & "H", in their entirety; and my CalPERS ID, home address, social security number and date of birth as listed on Exhibits "A", "B-7", "F", "G" and "I".

02-26-2020

WILLIAM C. BAILEY