

ATTACHMENT A

RESPONDENT'S PETITION FOR RECONSIDERATION

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To:	Matthew G. Jacobs	From:	William C. Bailey
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Re:	Petition for Reconsideration	cc:	Cheree Swedensky

Urgent For Review Please Comment Please Reply Please Recycle

Comments:

OAH No. 2018120581

CalPERS Ref No. 2018-0995

I am requesting that the attached Respondent's Petition for Reconsideration be included in the Board of Administration of the California Public Employees' Retirement System agenda for it April 21, 2020 meeting.

Respondent's Petition for Reconsideration OAH No. 2018120581

The Proposed Decision grants CalPERS relief from its "mistake" pursuant to Government Code §20160; however the decision is fatally flawed, as it fails to apply all of the provisions of §20160. The decision grants CalPERS both prospective and retroactive relief. Subdivision (e) of §20160, which requires an evaluation as to whether retroactive relief should be allowed under the circumstances, is simply ignored in the decision. Similarly, it has been ignored by CalPERS' counsel in all of its briefs and arguments. No legal basis has been provided for this fatal omission and none exists. The most basic rules of statutory construction require that a statute be interpreted and applied in its entirety. (Code Civ. Pro. §§ 1858-1859.) Reconsideration should be granted so that this issue can be addressed.

§20160(e) provides:

(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:

- (1) That the correction cannot be performed in a retroactive manner.
- (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.
- (3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

I have repeatedly stressed that the issue of whether CalPERS is entitled to retroactive relief under §20160 is a separate issue from whether CalPERS is entitled to any relief to correct its mistake. At the Hearing, I specifically cited to §20160(e) and presented both documentary evidence and testimony that my rights cannot be adjusted to the same as they would have been had CalPERS error and omission not occurred.

"I cannot be put back into the same situation as stated in Government Code Section 20160(e)(2), where my rights cannot be adjusted to – I cannot be adjusted to the same they would have been if the error or omission had not occurred." (Transcript 90:5-9.)

CalPERS did not respond to this argument at the Hearing. I reiterated this position in detail in my Closing Brief. (Brief 1:26-2:1; 13:26-15:14.) While CalPERS' Closing Brief refers to Subdivisions (a), (b) and (d) of §20160, Subdivision (e) is again not addressed.

Despite the fact that ¶ 29 of the Proposed Decision acknowledges my arguments that, under the circumstances here, Subdivision (e) bars retroactive relief, nowhere in the decision is the issue of the propriety of retroactive relief addressed and analyzed, as is required by Subdivision (e). No legal authority is cited for this omission, which is contrary to the rules of statutory interpretation. Those rules require the application of the entire statute. (Code Civ. Proc. §§ 1858-1859.)

In my Respondent's Argument to the Board, I again pointed out that the Proposed Decision was deficient due to its failure to address the application of the entirety of §20160.

"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.*" (Argument 6:8-18.)

The Staff's Argument to adopt the Proposed Decision does not address the omission of the decision to address the application of §20601(e), instead focusing on the decision's outright rejection of my estoppel argument. That argument sought to demonstrate that CalPERS was prevented from any relief whatsoever pursuant to the doctrine of estoppel. My arguments based on §20601(e), are and always has been separately asserted as a basis to deny retroactive recovery. My §20601(e) arguments have simply never been addressed. Accordingly, the Proposed Decision should be rejected by the Board.

For all the above reasons, I urge the Board to reconsider its adopting of the Proposed Decision.

Dated: March 30, 2020



William C. Bailey