

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

On March 18, 2020, the Board of Administration adopted the Administrative Law Judge's (ALJ) Proposed Decision dated February 4, 2020, as its own decision. Respondent William C. Bailey (Respondent) petitions the Board of Administration to reconsider its decision. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent was employed by Respondent City of San Fernando (Respondent City) as a Police Sergeant. By virtue of his employment, Respondent was a local safety member of CalPERS.

On March 21, 2014, Respondent signed an application for industrial disability retirement (IDR Application) which was received by CalPERS on the same date. Respondent claimed disability on the basis of orthopedic (back, knee) conditions.

At the time CalPERS received Respondent's IDR Application, CalPERS was not aware that on March 18, 2014, three days prior to submitting his IDR Application, Respondent was served by Respondent City with a Notice of Intent to Terminate his employment. Respondent City's termination action was based on Respondent misrepresenting his educational background on an application he submitted on September 30, 2013 seeking to promote to Sergeant (2013 Application). Respondent Bailey, in part because of the educational background he provided in the 2013 Application, was actually promoted to Sergeant.

On April 24, 2014, Respondent City, following a pre-disciplinary Skelly hearing, determined that Respondent's employment should be terminated, effective immediately. Respondent appealed his termination, which ultimately resulted in the parties (Respondent and Respondent City) entering into a settlement agreement (Settlement Agreement). Pursuant to the terms of the Settlement Agreement, Respondent City agreed to certify Respondent's IDR Application. In exchange, Respondent agreed to withdraw his appeal of his termination, and never again seek or maintain employment with Respondent City.

In August 2016, CalPERS conducted an internal audit to determine if individuals receiving disability or industrial disability benefits had actually been separated from their prior employment because of termination. The audit disclosed that Respondent had potentially been terminated from his position with Respondent City. CalPERS immediately sought information from Respondent and Respondent City. Nearly one year later, on July 6, 2017, Respondent City provided CalPERS with documents establishing that Respondent had been terminated from his position with Respondent City for cause, and that his termination ultimately resulted in Respondent and Respondent City entering into the Settlement Agreement.

Based on these facts, CalPERS determined that Respondent, at the time he submitted the IDR Application, was ineligible for industrial disability retirement pursuant to *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); and *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (*Vandergoot*) dated February 19, 2013, and made precedential by the CalPERS Board of Administration on October 16, 2013.

The *Haywood* court found that when an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination of the employment relationship renders the employee ineligible for disability retirement. The ineligibility arises from the fact that the discharge is a complete severance of the employer-employee relationship. A disability retirement is only a “temporary separation” from public service, and a complete severance would create a legal anomaly – a “temporary separation” that can never be reversed. Therefore, the courts have found disability retirement and a “discharge for cause” to be legally incompatible.

The *Smith* court explained that to be preemptive of an otherwise valid claim, the right to a disability retirement must have matured before the employee was terminated. To be mature, there must have been an unconditional right to immediate payment at the time of termination unless, under principles of equity, the claim was delayed through no fault of the terminated employee or there was undisputed evidence of qualification for a disability retirement.

In *Vandergoot*, the Board agreed that “a necessary requisite for disability retirement is the potential reinstatement of the employment relationship” with the employer if it is ultimately determined by CalPERS that the employee is no longer disabled. The Board held that an employee’s resignation was tantamount to a dismissal when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and agreed to waive all rights to return to his former employer.

CalPERS determined that it had been a mistake to accept and approve Respondent’s IDR Application. CalPERS determined that Respondent, as a result of his termination and the Settlement Agreement forever severing his employment relationship with Respondent City, was ineligible to receive industrial disability retirement benefits. CalPERS determined that, pursuant to Government Code section 20160, it was obligated to correct its mistake and cancel Respondent’s IDR Application, thus resulting in a cancellation of his industrial disability retirement benefits. CalPERS also determined that it was obligated to recover the industrial disability benefits that Respondent received for which he was not entitled.

Respondent appealed this determination and exercised his right to a hearing before an ALJ with the Office of Administrative Hearings. A hearing was held on November 7, 2019. Respondent represented himself at the hearing. Alex Y. Wong, Esq. represented Respondent City of San Fernando 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 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.

At hearing, CalPERS presented evidence establishing Respondent had been terminated from his position with Respondent City, had appealed his termination, and had entered into the Settlement Agreement in which he agreed to withdraw his appeal and never apply for or accept employment with Respondent City. In exchange, Respondent City agreed to certify Respondent was disabled in connection with the IDR Application he had submitted to CalPERS.

CalPERS also presented evidence that at the time it initially accepted Respondent's IDR Application, it was not aware of the fact Respondent's employment had been terminated for cause. CalPERS also submitted evidence with respect to the manner in which CalPERS discovered the fact Respondent had potentially been terminated, and the efforts CalPERS took to obtain evidence regarding the termination of Respondent's employment. In addition, CalPERS presented evidence of the amount of industrial disability benefits that Respondent had received, for which CalPERS argued he was ineligible to receive pursuant to the *Haywood* line of cases.

Respondent testified on his own behalf. Respondent did not dispute the fact his job was terminated, or that he settled the appeal of his termination. Instead, Respondent argued that he submitted the IDR Application while he was pursuing a workers' compensation claim, as well as appealing his termination. Respondent testified that a medical examination discovered that he was disabled, which led to the Settlement Agreement that resolved his IDR Application, workers' compensation claim, and employment termination appeal.

Respondent argued that CalPERS should not be able to retroactively correct the acceptance and approval of his IDR Application since CalPERS should have realized he had been terminated when he submitted the IDR Application. Respondent argued that retroactively cancelling his IDR Application now is not fair, since it puts him in a position that is fundamentally different than if his IDR Application had been cancelled when it was received and approved.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. At the hearing, the parties agreed that the issue on appeal is whether CalPERS is entitled, under Government Code section 20160, to correct its mistake in approving Respondent's IDR Application. The ALJ determined that CalPERS, as the party seeking to invoke Government Code section 20160, initially has the burden of presenting documentation or other evidence establishing the right to correction. The ALJ found that CalPERS met its burden.

The ALJ determined that CalPERS reasonably relied on Respondent City's representation that Respondent was substantially incapacitated from performing his job duties when CalPERS initially approved the IDR Application. The ALJ found that CalPERS did not discover that Respondent's employment had been terminated for cause until two years after the IDR Application had been approved. Furthermore, the ALJ found that it appears Respondent City, through certifying that Respondent was substantially incapacitated after terminating his employment, was substituting the certification of Respondent's disability for the disciplinary process.

The ALJ rejected Respondent's argument that CalPERS should be estopped from retroactively cancelling Respondent's IDR Application. The ALJ found that estoppel is not available when it would require CalPERS to act in excess of its statutory authority. The ALJ found that providing Respondent with industrial disability benefits, which he is not allowed under the law, would require CalPERS to act in excess of its authority. The ALJ also rejected Respondent's argument that approval of the IDR Application was CalPERS' fault.

In the Proposed Decision, the ALJ concludes that CalPERS was entitled to correct its mistake in initially approving Respondent's IDR Application. In addition, the ALJ concludes that CalPERS, pursuant to Government Code section 20164, was entitled to collect any industrial disability retirement payments made to Respondent on or after August 15, 2015, or three years prior to the date CalPERS sent its determination letter to Respondent.<sup>1</sup>

The Board of Administration adopted the Proposed Decision at its March 18, 2020 meeting.

On March 30, 2020, Respondent submitted a Petition for Reconsideration. The Petition argues the Proposed Decision is fatally flawed since it did not apply all of the provisions of Government Code section 20160. In particular, the Petition argues that Proposed Decision failed to consider and address Government Code section 20160 subdivision (e).

Respondent cites to Government Code section 20160 subsection (e)(2) which provides the Board can correct a mistake in a retroactive manner if the status, rights and obligations can be adjusted to be the same as if the error or omission had not occurred. Respondent argues that this section cannot be satisfied because he cannot be put into the same place he would have been if CalPERS had not made its mistake. Consequently, Respondent argues that CalPERS should not be able to retroactively collect industrial disability retirement benefits made to him.

Respondent's argument, and thus his Petition, fails for two reasons.

---

<sup>1</sup> CalPERS allowed Respondent to service retire retroactive to the date he turned 50 years old. Pursuant to Respondent's request, CalPERS has applied all of the service retirement benefits he was eligible to receive to the overpayment amount. This has greatly reduced the overpayment amount that CalPERS is seeking to collect from Respondent.

First, CalPERS took actions to ensure that Respondent is put in the same position he would have been had the mistake not been made. Specifically, as the Proposed Decision indicates, CalPERS allowed Respondent to apply for regular service retirement retroactive to the date he turned 50 years old. This is the earliest date that Respondent was eligible to receive retirement benefits, which is all that he is entitled to receive based on his employment being terminated for cause.

Second, Respondent conflates the actions he took regarding the termination of his employment and the actions CalPERS took regarding his IDR Application. Respondent argues he would not have entered the Settlement Agreement with Respondent City if by doing so he would have known that it rendered him ineligible to receive industrial disability retirement benefits. Essentially, Respondent argues that had he known the law when he entered the Settlement Agreement, he would have taken a different action in defending against his termination, and he would have prevailed in having the termination decision overturned. All of this is purely speculation. There is no evidence that CalPERS provided erroneous information regarding the effect his termination would have on his eligibility to receive industrial disability retirement benefits. In addition, there is no evidence that his termination would have resulted in a different result had he decided to appeal that decision. Respondent was represented by an attorney when he entered the Settlement Agreement, and Respondent should not be able to alter those terms simply because he no longer believes the Settlement Agreement best serves his interest.

By arguing that Government Code section 20160(e) prevents CalPERS from retroactively seeking the recovery of benefits to which he was not eligible, Respondent is basically arguing that he should be put in a better position than other similarly situated CalPERS members by virtue of the Settlement Agreement he entered with Respondent City. As the Proposed Decision provides, neither Respondent nor Respondent City informed CalPERS of the true nature of the Settlement Agreement. Specifically, CalPERS was not informed that Respondent's employment was terminated, and that Respondent City substituted industrial disability retirement for the disciplinary process. This violates Government Code section 21156(a)(2).

Ultimately, Respondent is arguing that based on this Settlement Agreement he should be entitled to receive and retain nearly four years of industrial disability retirement benefits to which he was not lawfully eligible to receive. Not only does Government Code section 20160(e) not support this argument or outcome, it is strictly prohibited. Government Code section 20160(a)(3) specifically provides that a correction should not provide the party seeking the correction with a status, right or obligation not otherwise available. However, that is exactly what Respondent is seeking. Respondent is seeking to have a status or right- retaining industrial disability retirement benefits which he is not eligible to receive- not otherwise available. For this reason, the ALJ correctly determined that Respondent is not entitled to retain industrial disability retirement benefits that he was not eligible to receive, subject to the limitations contained in Government Code section 20164.

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 March 18, 2020, meeting was well reasoned and based on the credible evidence presented at hearing.

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

April 22, 2020

---

JOHN SHIPLEY  
Senior Attorney