

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED**

Regina T. Schueneman (Respondent) was employed as a Field Office Representative by Respondent Department of Motor Vehicles (Respondent DMV). By virtue of her employment, Respondent was a state miscellaneous member of CalPERS subject to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for retirement.

On June 3, 2019, Respondent submitted her application for service pending disability retirement on the basis of "exposure to mold, chronic sinusitis, fractured vertebrae and ribs." In her application, Respondent requested an effective retirement date of September 8, 2015.

CalPERS received and reviewed the application, and CalPERS informed Respondent that it was approving her disability retirement based on her Pulmonological (lung) condition by letter dated September 24, 2019. Respondent has been receiving a disability retirement since September 24, 2019.

After a review of the reports, the information in Respondent's file, and after considering Government Code section 20160 and other applicable precedents, CalPERS determined that no correctable mistake had been made to allow CalPERS to change Respondent's statutory retirement date of June 1, 2019, to an earlier retirement date. CalPERS notified Respondent and Respondent DMV of its determination and their rights to appeal by letter dated September 24, 2019.

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 June 29, 2020. Respondent represented herself at the hearing. Respondent DMV did not appear at the hearing.

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.

CalPERS' staff testified at the hearing about CalPERS records and review of the applicable code sections governing effective retirement dates. Government Code section 21252(a) is applicable and in relevant part states:

A member's written application for retirement, if submitted to the board within nine months after the date the member discontinued his or her state service, and, in the case of retirement for disability, if the member was physically or mentally incapacitated to perform his or her duties from the date the member discontinued state service to the time the written

application for retirement was submitted to the board, shall be deemed to have been submitted on the last day for which salary was payable. The effective date of a written application for retirement submitted to the board more than nine months after the member's discontinuance of state service shall be the first day of the month in which the member's application is received at an office of the board by an employee of this system designated by the board.

Staff also testified about Government Code section 20160, subdivision (a), which provides for the correction of errors or omissions made by a member as a result of a mistake, inadvertence, surprise, or excusable neglect as follows:

Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

Respondent had the burden to present sufficient evidence to establish that she is entitled to an earlier effective retirement date due to her commission of an error or omission that resulted from her mistake, inadvertence, surprise, or excusable neglect, as those terms are used in Section 473 of the Code of Civil Procedure. Respondent also had the burden to present sufficient evidence that any correction of her error or omission would not provide her with a status, right, or obligation she would not have, but for that error or omission.

Respondent left state service on September 8, 2015, but her application in June 2019 was more than nine months after she left state service. So, as testified by Staff at hearing, Respondent's effective date of retirement under Government Code section 21252 was June 1, 2019.

Staff then explained that CalPERS reviewed Respondent's CalPERS file for evidence of a mistake correctable by Government Code section 20160, as a correctable mistake

could allow Respondent to change her effective retirement date. The documents and communications from Respondent's CalPERS account were introduced into evidence and showed that CalPERS repeatedly communicated with Respondent about disability retirement beginning in 2014. Those documents and communications include:

1. A January 31, 2014 correspondence from CalPERS to Respondent, that included a copy of Publication 35 (PUB 35). PUB 35 is a booklet that instructs CalPERS members on how to apply for disability retirement. PUB 35 instructs members to apply for disability retirement as soon as they believe they are unable to perform job duties because of an illness or injury. PUB 35 also tells members not to wait for the resolution of any workers' compensation claims prior to submitting a disability retirement application. PUB-35 also includes a copy of the disability retirement application that members may complete and submit;
2. a September 9, 2015 correspondence from CalPERS to Respondent that included a second copy of PUB 35. CalPERS sent a copy of Publication 43 (PUB 43) to Respondent in the same mailing. PUB 43 includes information regarding the effective retirement date for members;
3. a January 8, 2016 correspondence from CalPERS to Respondent that included a third copy of PUB 35;
4. an August 1, 2016 correspondence from CalPERS to Respondent that included a fourth copy of PUB 35;
5. a November 14, 2016 correspondence from CalPERS to Respondent that included a fifth copy of PUB 35;
6. an April 4, 2017 letter from CalPERS to Respondent that explained member eligibility for disability retirement and service retirement; and
7. an October 4, 2017 correspondence from CalPERS to Respondent containing a blank disability retirement application, which Respondent did not return to CalPERS.

CalPERS first received Respondent's disability retirement application on June 6, 2019. CalPERS sent Respondent a questionnaire for her completion on July 18, 2015. The questionnaire asked Respondent to explain why there was an almost four-year delay between her separation from Respondent DMV and her disability retirement application.

Respondent completed the questionnaire and responded that she did not apply for disability retirement sooner because she thought she had to wait for her workers' compensation case to resolve before she could apply.

CalPERS also sent a questionnaire to Respondent DMV. Respondent DMV responded to the questionnaire, explaining that it did not counsel Respondent about disability retirement.

In determining whether a correctable mistake occurred, Staff properly analyzed the matter under Government Code section 20160. Although CalPERS repeatedly advised Respondent about disability retirement from 2014 through 2017, Respondent did not

submit her disability retirement application until June 2019. CalPERS determined that Respondent's failure to further inquire about her rights and responsibilities regarding disability retirement was not reasonable. Hence, Staff concluded there was no correctable mistake and therefore CalPERS was unable to provide the earlier effective date sought by Respondent.

After considering all of the documentary evidence and testimony of witnesses, the ALJ found that Respondent failed to demonstrate that her failure to file her application timely was a mistake correctable by Government Code section 20160. Accordingly, the ALJ found that Respondent's effective date of retirement of June 1, 2019, was correctly determined by CalPERS. The ALJ concluded that Respondent's appeal should be denied.

Government Code section 11517 (c)(2)(C) authorizes the Board to "make technical or other minor changes in the proposed decision." The Proposed Decision should be modified by changing "Accusation" to "Statement of Issues" in paragraph five on page four of the Proposed Decision. In addition, staff recommends that a portion of the definition of disability from Government Code section 20026 in paragraph two on page 15 be changed from "mean disability of permanent or extended and uncertain duration, as determined by the board" to "mean disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board..."

For all the above reasons, Staff argues that the Proposed Decision, as modified, be adopted by the Board.

September 16, 2020

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Senior Attorney