

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Respondent John Medcalf (Respondent) was employed by Respondent Department of California Highway Patrol (CHP) as a State Traffic Officer. By virtue of his employment, Respondent was a state safety member of CalPERS.

In December 2016, Respondent suffered an on-the-job injury and began receiving medical treatment. After his injury, Respondent contacted CalPERS on various occasions seeking information and advice concerning the Industrial Disability Retirement (IDR) process. He spoke with various CalPERS representatives and CalPERS mailed him a copy of PUB-35, *A Guide to Completing your CalPERS Disability Retirement Election Application*.

On May 8, 2018, Respondent contacted CalPERS with additional questions about the Service Retirement (SR) Pending IDR application process. The CalPERS representative advised Respondent that his SR would begin and be paid during the period of time he waited for determination on his IDR application; that if he did not submit all required documents within the time frame he could resubmit his IDR application; but did not provide a time frame for resubmission of his IDR application.

### **2018 SR Pending IDR Application**

On June 4, 2018, Respondent submitted his application for SR pending IDR. Respondent claimed disability on the basis of an orthopedic (back, left leg) condition. Respondent service retired on May 25, 2018, and he has been receiving his SR benefit since then.

On June 6, 2018, CalPERS mailed Respondent a letter advising him that his IDR application was incomplete and provided him 21 days within which to submit the missing documentation. Respondent timely submitted some of the required documentation but failed to submit the required Worker's Compensation Carrier Request and Physician's Report on Disability.

On June 19, 2018, CalPERS called Respondent and advised him that the missing forms were still not received. CalPERS advised him that if the missing forms were not submitted by July 4, 2018, his IDR application would be canceled.

On July 5, 2018, CalPERS mailed a letter to Respondent notifying him that his IDR application was canceled due to omission of required information. The letter advised him that if he wished to re-apply for IDR at a later date, it would be necessary for him to complete a new application.

### **2019 IDR Application**

On August 5, 2019, Respondent submitted a second IDR application, accompanied by all required documentation. Because the first IDR application had been canceled, CalPERS considered the 2019 IDR application to be a new application.

On September 10, 2019, CalPERS sent a late application remedy questionnaire to determine why he had submitted his IDR application after he had already service retired.

On November 26, 2019, CalPERS mailed Respondent a letter notifying him that CalPERS had reviewed his 2019 application and responses to the questionnaire and was denying his request to change from service to disability retirement.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on July 13, 2021. Respondent represented himself at the hearing. Respondent CHP did not appear 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 the hearing, Respondent testified on his own behalf. Respondent testified that his application should not be construed as a request to change from SR to IDR, because he never intended to apply solely for SR. He applied for SR pending IDR at the outset, so he would receive a monthly allowance while CalPERS determined his eligibility to receive an IDR. He was unaware that his SR may have an impact on his ability to apply for and receive an IDR. Respondent further testified that he submitted all the required documents over which he had control within the 21-day deadline. Finally, Respondent testified that he was told by CalPERS' representatives that if his IDR application was canceled, he could merely apply on a later date. He was never informed of the six-month reapplication deadline.

A CalPERS analyst testified on CalPERS' behalf at the hearing. The analyst testified that CalPERS deemed Respondent's 2019 Application to be a request to change his SR to IDR because Respondent was already on SR and his 2018 IDR application had been canceled. Thus, the 2019 IDR application was a new application. CalPERS determined that it could not accept the 2019 application because Respondent was no longer a CalPERS member (Gov. Code section 20340). The analyst acknowledged its members can rely on information from CalPERS' representatives and publications, and further acknowledged that PUB-35 did not provide any firm deadlines for resubmission of a cancelled disability retirement application. CalPERS considers Respondent's failure to submit the required documentation to support his 2018 application as the "mistake" which starts the 6-month correction period under Government Code section 20160.

After considering the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent's appeal. The ALJ found that CalPERS' characterization of Respondent's error was "imprecise" and "fail[ed] to recognize the complexity of his mistake." The ALJ opined that Respondent's mistake was allowing his 2018 IDR application to be cancelled without requesting an extension of time.

With regard to when Respondent discovered his right to make a correction, the ALJ disagreed with CalPERS' position that the 2018 cancellation letter (or any other correspondence) informed Respondent of his right to correct his mistake. The ALJ reasoned:

The July 5, 2018 letter provided Respondent no means to discover the right to correct his mistake. The July 2018 letter does not specifically explain Respondent's mistake, his right to correct it, how to correct it, and the time frame within which to correct it. . . . The earliest Respondent was notified of any ability to correct a mistake was via CalPERS's [sic] September 10, 2019 letter which briefly mentioned "[a]n exception can be made" for excusable inadvertence, oversight, or mistake of fact or law." However, the September 2019 letter again fails to fully explain Respondent's mistake and the impact of cancellation on Respondent's ability to resubmit his IDR application (i.e., that his prior SR and resulting non-membership in CalPERS rendered him ineligible to apply in 2019 for IDR). . . . Arguably, Respondent's earliest discovery of his right to correct his mistake was through the November 2019 letter citing Government Code section 21160 [sic]. However, even that letter did not fully explain the impact of cancellation on Respondent's ability to reapply nor did it point to any time frame within which Respondent should have sought to reapply. The full explanation of Respondent's error and the course to correct that error was first set forth in the Statement of Issues.

The ALJ concluded that CalPERS should accept and consider Respondent's 2019 IDR Application to determine if Respondent was disabled when he applied.

Under the unique and individual circumstances of this appeal, CalPERS does not oppose adoption of this Proposed Decision, as modified below.

Government Code section 11517 (c)(2)(C) authorizes the Board to "make technical or other minor changes in the proposed decision." The last sentence beginning on Page 21 states, "Arguably, Respondent's earliest discovery of his right to correct his mistake was through the November 2019 letter citing Government Code section 21160." The November 2019 letter to Respondent cited Government Code section 20160, not 21160. Staff recommends the Board correct this Government Code section to 20160.

September 15, 2021

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