

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Leilani J. Scott (Respondent) was employed by Respondent California Department of Corrections and Rehabilitation (CDCR) as a Correctional Counselor I. By virtue of her employment, Respondent was a state safety member of CalPERS. Respondent submitted an application for service retirement on March 14, 2016, and requested an effective retirement date of June 12, 2016. She has been receiving her service retirement benefits since July 5, 2016.

By letter dated March 17, 2016, CalPERS informed Respondent that she may be entitled to a disability retirement, if she was unable to work due to illness or injury: "To request a service pending disability retirement, you must complete a Disability Retirement Election Application."

By letter dated May 6, 2016, CalPERS provided Respondent with a copy of Publication 35, "A Guide to Completing Your CalPERS Disability Retirement Election Application Publication" (PUB 35). The PUB 35 informed Respondent of the option to apply for service pending disability retirement, advised Respondent to apply for disability or industrial disability retirement as soon as she believes she is unable to perform her usual job duties because of an illness or injury, and that she should not wait until her condition is "permanent and stationary" under the workers' compensation requirements to submit her application. PUB 35 cautions: "Delaying your application for retirement may affect important benefits you may be entitled to receive."

On May 19, 2016, CalPERS received Respondent's request for a disability retirement estimate. By letter dated June 17, 2016, CalPERS provided Respondent her estimate. Respondent did not apply for disability retirement at that time.

Three years later, on June 17, 2019, Respondent contacted CalPERS and inquired about changing her retirement status and benefits from service to industrial disability retirement. On September 19, 2019 and September 26, 2019, CalPERS received several pages of Respondent's incomplete industrial disability retirement application (first application). On September 23 and September 30, 2019, CalPERS returned her submitted application because it was missing several pages and information.

On October 14, 2019, CalPERS received Respondent's industrial disability retirement application (second application). By letter dated March 26, 2020, CalPERS cancelled her second application due to Respondent's failure to timely provide all requested medical records.

On April 28, 2020, CalPERS received another application from Respondent for industrial disability retirement labeled "Amended 4.14.20" (third application).

CalPERS made inquiries to Respondent and CDCR to obtain information as to why Respondent's third application was not timely submitted. Both Respondent and CDCR responded to CalPERS' inquiries. After reviewing Respondent's file, the responses received, and after considering Government Code section 20160 and other applicable precedents, CalPERS determined that Respondent's industrial disability retirement application was filed late, and no correctable mistake had been made which would allow CalPERS to change her service retirement to industrial disability retirement.

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 August 3, 2021. Respondent represented herself at the hearing. CDCR did not appear at the hearing. The ALJ found that the matter could proceed as a default against CDCR, pursuant to Government Code section 11520, subdivision (a).

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.

At hearing, CalPERS introduced the testimony of a CalPERS' staff and exhibits, which laid out the facts and timeline of CalPERS' many communications to Respondent regarding disability retirement, service pending disability retirement application, and how to file an application if she wished to be considered. CalPERS staff also testified about the information contained in the PUB 35 and how a member or retiree could contact CalPERS for further information or clarification.

Respondent testified on her own behalf. Respondent testified that at the time she applied for service retirement, she had orthopedic conditions but did not believe she was disabled or qualified for industrial disability retirement because her physicians opined that she could return to work. She claimed that her workers' compensation attorney advised her that she could apply for industrial disability retirement later and to wait until they resolved her workers' compensation case before filing an industrial disability retirement application. Respondent testified that at a retirement workshop, CalPERS informed her that she could file for service retirement first and apply for industrial disability retirement later. Respondent also testified that she experienced symptoms related to her heart condition six months after she service retired; was diagnosed with a heart condition and started receiving treatment for her heart condition in July 2017; and believes she is disabled due to her heart condition. Respondent admitted that she received the PUB 35 from CalPERS and found it complicated and confusing, but did not seek out information, clarification, or assistance from CalPERS because she was stressed.

Respondent submitted medical records from her treating physicians to support her appeal, which were admitted as administrative hearsay. Hearsay evidence may be used

for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent had the burden of proof to present sufficient evidence to establish that she is entitled to relief under Government Code section 20160, but did not meet her burden. First, Respondent failed to establish she made a correctable mistake pursuant to Government Code section 20160. CalPERS provided Respondent with information, instructions, and documentation to apply for industrial disability retirement prior to her service retirement in June 2016, but Respondent waited more than three years to submit her first industrial disability retirement application. Second, the ALJ found that the PUB 35 specifically instructed Respondent not to delay her industrial disability retirement application based on the pendency of her workers' compensation matter, despite alleged advice given to her by her workers' compensation attorney. The ALJ found that at a minimum, a reasonable person would have inquired to obtain greater clarification from CalPERS when faced with a perceived inconsistency between PUB 35 and her attorney's advice. Third, the ALJ found Respondent's testimony regarding alleged advice given to her at a retirement workshop vague, lacked context, and unsubstantiated. The ALJ reasoned that CalPERS staff may have referred to the option of filing for service pending industrial disability retirement and the PUB 35 outlines the deadlines to apply for industrial disability retirement. Finally, the ALJ found that Respondent failed to exercise due diligence upon discovery of her heart condition. She was diagnosed with her heart condition in July 2017, but waited more than two years before filing her first industrial disability retirement application.

When all the evidence was considered, the ALJ denied Respondent's appeal and affirmed CalPERS' determination that Respondent's late industrial disability retirement application could not be accepted pursuant to Government Code section 20160.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

November 17, 2021

Helen L. Louie
Staff Attorney