

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Dwayne J. May (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated May 5, 2023. For reasons discussed below, staff argues the Board should deny the Petition and uphold its decision.

Respondent was employed as a Police Lieutenant with the City of Riverside (Respondent City). By virtue of his employment, Respondent was a local safety member of CalPERS. On March 11, 2020, Respondent applied for Service Retirement (SR).

On April 15, 2020, Respondent contacted CalPERS to inquire about applying for Disability Retirement (DR) benefits. In response to Respondent's inquiry, CalPERS mailed Respondent a publication entitled "*A Guide to Completing Your CalPERS Disability Retirement Election Application*," (PUB 35), which Respondent acknowledges receiving. PUB 35 sets forth the eligibility requirements for disability retirement, the deadlines to apply, blank copies of necessary forms, and detailed instructions.

On June 1, 2020, Respondent's SR application was approved, and CalPERS sent him a *First Payment Acknowledgement Letter* informing him of his monthly retirement amount, effective retirement date, and beneficiary/survivor information. Respondent retired from service with an effective retirement date of May 29, 2020. CalPERS advised Respondent, "If you want to change your retirement date or cancel your retirement application, you must make the request within 30 days of the issuance of your first retirement check, or your choice becomes irrevocable."

On June 5, 2020, Respondent called CalPERS to request assistance with completing a DR application. CalPERS staff counseled Respondent and explained what documents were required to make a complete DR package, and also advised him of the timeframe to submit the required documents.

On June 22, 2020, CalPERS received Respondent's SR pending DR application. Because Respondent was already receiving SR benefits, CalPERS processed a SR vs. DR comparison to see if he would receive additional benefits if his DR application was approved. CalPERS concluded that given Respondent's age and years of service at retirement, there would be no difference between SR and DR benefits. As such, the DR would provide no additional monetary or health vesting benefit.

On July 1, 2020, CalPERS sent Respondent a letter informing him that DR would not be additionally beneficial to him, and that he would continue to receive his SR benefits. The letter also advised Respondent that if he still wished to continue to pursue DR, he needed to contact CalPERS within 30 days.

On July 16, 2021, Respondent contacted CalPERS to discuss his DR application. He indicated that when he applied for DR, he meant to apply for Industrial DR (IDR) but checked the wrong box on the application by mistake. On July 20, 2021, CalPERS

contacted Respondent to advise that he would have to submit a new IDR application along with all the required documentation included in the PUB 35. On August 13, 2021, Respondent called CalPERS to request help with his IDR application. CalPERS staff walked Respondent through the forms, explained what documents were required, and provided the processing timeframes.

On September 20, 2021, CalPERS received Respondent's IDR application. By letter dated September 28, 2021, CalPERS informed Respondent that, in general, members cannot change their retirement status after they retire or refund their contributions (Gov. Code § 20340). After reviewing the facts and information received, CalPERS determined that (a) Respondent's member status with CalPERS ceased on May 29, 2020, (Gov. Code § 20340); (b) Respondent's IDR application was not timely submitted (Gov. Code § 21154); and (c) Respondent did not meet the criteria under Government Code section 20160 that allows for the correction of a mistake. Consequently, CalPERS determined that it could not accept Respondent's late application for IDR.

On June 29, 2022, Respondent and Respondent City were notified of CalPERS' determination and advised of their appeal rights. On June 30, 2022, Respondent appealed this determination and exercised his right to a hearing before an ALJ with the Office of Administrative Hearings (OAH). A remote hearing was held on April 11, 2023.

At the hearing, CalPERS presented evidence demonstrating that on multiple occasions, Respondent was provided with information, instructions, and documentation to timely file for SR, DR, and IDR. Respondent was aware he had the option to apply for DR or IDR as early as April 2020.

Respondent testified that he did not know the difference between DR and IDR when he submitted his application. Shortly after retiring, Respondent and his wife went on a cross-country vacation and did not return home until late October 2020. Due to his vacation, by the time Respondent received the July 1, 2020, CalPERS letter informing him that his DR application was being denied because DR would not be of any additional benefit to him, the 30-day window had already passed. Respondent testified that he waited so long to file his IDR application because he was waiting to receive medical documentation in support of his disability. Respondent contends that he meant to apply for IDR when he submitted his DR application before going on vacation in 2020, and as such, his IDR application should be considered timely.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that CalPERS appropriately determined that Respondent's late application for IDR could not be accepted pursuant to Government Code section 20160, and ultimately found that Respondent failed to meet his burden of proof. The ALJ concluded that it was not CalPERS' responsibility to ensure that Respondent checked the correct box on his application, particularly when the information at his disposal clearly explained the differences between DR and IDR.

At its June 20, 2023, meeting, the Board adopted the Proposed Decision, as modified, as its own Decision. Respondent now petitions the Board to reconsider its decision,

raising the same arguments that were considered and rejected by the ALJ. 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 June 20, 2023, meeting was well reasoned and based on the credible evidence presented at hearing.

For all the above reasons, staff argues that the Board should deny Respondent's Petition for Reconsideration.

July 19, 2023

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NHUNG DAO  
Attorney