

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Richard Gastello (Respondent) was a Supervising Correctional Cook for Respondent N.A. Chaderjian Youth Correctional Facility, California Department of Corrections and Rehabilitation (Respondent CDCR). Respondent applied for service pending industrial disability retirement on December 4, 2017. Respondent retired for service effective December 30, 2017.

On January 16, 2018, February 7, 2018, and February 27, 2018, CalPERS sent Respondent letters requesting additional medical information for his industrial disability retirement application. The letters notified Respondent that the Physician's Report on Disability form received by CalPERS indicated that he did not meet CalPERS' criteria for disability retirement; specifically, that the form stated the duration of Respondent's disability would be less than 12 months. The letters provided Respondent an opportunity to submit either an updated or new Physician's Report on Disability form and provided him with deadlines to submit the requested information. Respondent did not respond to the letters, and the industrial disability retirement portion of his application was subsequently cancelled on March 20, 2018, because CalPERS received insufficient information to continue processing his case.

Almost 31 months later, in October 2020, CalPERS received Respondent's second service pending industrial disability retirement application. The application was rejected because it was neither notarized nor signed by Respondent.

On November 9, 2020, CalPERS received Respondent's third service pending industrial disability retirement application. Because Respondent submitted this application after he service retired, it was construed as a request to change from service retirement to industrial disability retirement. CalPERS requested information from Respondent concerning his request to change from service to industrial disability retirement. After a review of the documents and information, and after considering Government Code section 20160 and other applicable precedents, CalPERS determined that the application was filed late, and no correctable mistake had been made which would allow CalPERS to change Respondent's service retirement to an industrial 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 June 1, 2022. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing. The ALJ found that the matter could proceed as a default against Respondent CDCR, pursuant to Government Code section 11520.

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, CalPERS presented evidence, including Respondent's Customer Touch Point Report demonstrating that after CalPERS cancelled Respondent's 2017 application in March 2018, the next time he communicated with CalPERS by phone was on October 5, 2020; and that CalPERS has no record of receiving an application from Respondent in 2018.

Respondent testified on his own behalf. He testified that he submitted a new application for service pending industrial disability retirement in 2018, after his 2017 application was cancelled; but did not submit that application into evidence at hearing nor did he look for it prior to the hearing, despite testifying that it was in his paperwork at home. Respondent testified he submitted three total disability retirement applications to CalPERS. Respondent testified that he called CalPERS between March 2018 and October 2020; but did not recall the specific dates. He admitted that a CalPERS representative told him he could re-apply and admitted that he delayed reapplying after his 2017 application was cancelled because he "lost hope and gave up." Respondent also blamed his doctors' failure to cooperate. Respondent argued that CalPERS did not timely advise him of his right to reapply

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 did not meet his burden of proving that his 31-month delay in reapplying for industrial disability retirement was an error or omission attributable to mistake, inadvertence, surprise, or excusable neglect. The ALJ found:

Losing hope and giving up do not constitute mistake, inadvertence, surprise, or excusable neglect. Similarly, [R]espondent's doctors' alleged failure to cooperate is not attributable to mistake, inadvertence, surprise, or excusable neglect. Finally, [R]espondent claimed his delay was attributable to CalPERS not timely informing him of his rights. However, the evidence does not support that conclusion.

The ALJ found that CalPERS' evidence was credible and that Respondent's testimony that he called CalPERS between March 2018 and October 2020 but could not recall any specifics, was "biased by self-interest and less credible than CalPERS' evidence to the contrary." Additionally, Respondent "acknowledged that when he did communicate with CalPERS after his 2017 application was cancelled, he was told he could reapply." The ALJ found Respondent's testimony that he submitted an application in 2018 was not credible. "CalPERS has no record of receiving any such application, [R]espondent did

not provide a copy of it, and [R]espondent stated in his correspondence with CalPERS and at hearing that he applied only three times.” The ALJ further found “to the extent [R]espondent argued his delayed reapplication was the result of his own failure to timely communicate with CalPERS, any such failure would not justify relief.” The ALJ concluded CalPERS cannot accept Respondent’s untimely application.

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

September 21, 2022

Helen L. Louie
Attorney