

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Philip F. Ketterle (Respondent) was employed as a Correctional Officer by Respondent California Men's Colony, California Department of Corrections and Rehabilitation (Respondent CDCR). By virtue of his employment, Respondent was a state safety member of CalPERS.

On February 29, 2012, Respondent submitted an application for service retirement (SR) with an effective retirement date of May 1, 2012. He subsequently asked for his retirement date to be changed to November 23, 2012. On April 12, 2012, CalPERS acknowledged receipt of his SR application, and advised Respondent, "[y]ou may be entitled to receive disability retirement if you are unable to work because of an illness or injury. To request a service pending disability retirement, you must complete a Disability Retirement Election Application."

On August 23, 2012, Respondent was diagnosed with arterial fibrillation and low blood pressure. He was told not to return to work. The next day, Respondent informed CalPERS that he intended to file an industrial disability retirement (IDR) application. In response to his inquiry, staff mailed an IDR application to Respondent. Respondent again contacted CalPERS on November 20, 2012, explaining that he had suffered a cardiac issue at work and was wondering if he would receive a more generous benefit if he applied for IDR. CalPERS sent him a copy of "*A Guide to Completing Your CalPERS Disability Retirement Application*" (PUB-35). PUB-35 sets forth the eligibility requirements for disability retirement, the deadlines to apply, blank copies of necessary forms, and detailed instructions. PUB-35 specifies that medical information can be submitted by the member's treating physician. In response to Respondent's subsequent inquiries, CalPERS mailed him additional copies of PUB-35 on June 12, 2015, November 15, 2018, March 25, 2019, and May 21, 2021.

On November 15, 2018, Respondent called to inform CalPERS that CDCR had approved his workers' compensation settlement and that he wanted to change his retirement status to IDR. Respondent contacted CalPERS at least three times in 2019, twice in 2020, and six times in 2021, all inquiring about changing his SR to IDR. He did not submit an IDR application until July 9, 2021.

On July 22, 2021, CalPERS sent Respondent and Respondent CDCR letters inquiring about Respondent's request to change from service to disability retirement. On August 20, 2021, Respondent CDCR responded to CalPERS' inquiry, stating that there were no records on Respondent, as records are only kept for five years. On July 29, 2021, Respondent responded to CalPERS' inquiry, stating that he believed he could not apply for IDR until his workers' compensation claim was completed. After a review, CalPERS determined he did not make a correctable mistake and canceled his IDR application.

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 August 29, 2022. Respondent represented himself at the hearing. Respondent CDCR 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, CalPERS presented evidence regarding Respondent's late application, and whether he made a correctable mistake. CalPERS' evidence demonstrated that Respondent had full knowledge of the IDR application process because he received information about IDR on at least sixteen separate occasions between 2012 to 2021. CalPERS also presented evidence establishing Respondent completed at least two retirement counseling sessions with CalPERS staff, that CalPERS provided Respondent with five copies of PUB-35, that CalPERS answered numerous phone call inquiries, and that CalPERS advised Respondent in writing not to wait to apply for disability if he felt he was disabled.

Respondent testified on his own behalf. Respondent testified that he was unaware of any requirement for him to file his IDR application by a certain date, and CalPERS failed to inform him of such a date. He further claimed he believed he could wait until after his workers' compensation claim was resolved before filing an IDR application. Respondent claimed that COVID-19 further delayed his filing. Respondent called two former colleagues, Santos Martinez and Edward Yett, to testify on his behalf. Mr. Martinez, a facility captain, testified he never received training about informing his employees on filing for IDR. Mr. Yett was a lieutenant when Respondent experienced his cardiac event in August 2012, and assisted Respondent in completing his workers' compensation claim form.

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 not demonstrated any unusual circumstances that would allow him to change his retirement status nearly nine years after he retired for service. Respondent's misconceptions and resulting inaction were neither reasonable nor justified. The evidence demonstrated Respondent was aware of his right to file for IDR before he retired for service, and he did not inquire about the effect, if any, of his workers' compensation claim on his application. His IDR application was late, and he failed to prove his failure to file a timely application was the result of a correctable mistake. Further, Respondent waited more than two years after his workers' compensation claim was resolved to file his IDR application. Thus, the ALJ found that CalPERS was correct in denying Respondent's IDR application.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to “make technical or other minor changes in the proposed decision.” In order to avoid ambiguity, staff recommends correcting two dates: replace “November 18, 2018” with the correct date of “November 14, 2018” on the second line of paragraph 14, page 6, of the Proposed Decision; and the “January 1, 2020” inquiry date with the correct date of “January 2, 2020” on the first line of paragraph 16, page 7, of the Proposed Decision.

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

November 16, 2022

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Senior Attorney