

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Donald White (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated July 25, 2022. For reasons discussed below, staff argues the Board should deny the Petition and uphold its decision.

Respondent was employed as a Correctional Officer by Sierra Conservation Center, California Department of Corrections and Rehabilitation (Respondent CDCR). By virtue of his employment, Respondent was a state safety member of CalPERS.

On September 27, 2012, Respondent submitted his first application for industrial disability retirement (IDR), which he subsequently withdrew. On October 29, 2019, Respondent submitted an application for service retirement (SR) with an effective retirement date of November 20, 2019. The same day, CalPERS acknowledged receipt of his SR application, and advised Respondent, "[y]ou may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. To apply for a disability retirement, you must complete a Disability Retirement Election Application." On December 16, 2019, CalPERS advised Respondent that his SR application was processed. CalPERS advised Respondent, "[i]f 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."

In response to an inquiry from Respondent on October 12, 2020, CalPERS sent him a copy of "*A Guide to Completing Your CalPERS Disability Retirement Application*" (PUB-35) and instructed him that if he wanted to change from SR to IDR "he will need to include a statement as to why he did not apply for IDR at the time he applied" for retirement. 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. On April 26, 2021, Respondent submitted a second IDR application, requesting to change his retirement status from service to disability retirement. In general, a member cannot change his retirement status after he retires, unless the late application was a result of mistake, inadvertence, surprise or excusable neglect (Gov. Code § 20160). CalPERS determined Respondent did not make a correctable mistake and canceled his late IDR application.

A hearing on Respondent's appeal was held on June 29, 2022. The resulting Proposed Decision was adopted by the CalPERS Board of Administration on September 21, 2022. Respondent submitted a Petition for Reconsideration (Petition) on October 18, 2022. Respondent argues the same issues already presented at the hearing, which were previously denied by the ALJ in the Proposed Decision.

In his Petition, Respondent admits that he made a choice to apply for service retirement, that he felt he had plenty of time to change his application to IDR, and claims he was misinformed by CalPERS staff. The ALJ addressed and dismissed all of these arguments at the hearing holding that:

White faults CalPERS staff for providing him information that he found confusing and inconsistent. However, the Touch Point records do not support White's recollections and the staff members had no motive to be untruthful in their contemporaneously recorded notes. White's memories of the conversations were vague, without context, and unsubstantiated by any documentation. The only instance where White's recollection aligns with the Touch Point records is on the April 5, 2021, record which states CalPERS staff member Kevin Harris told White that "the farthest he can go back is [nine] months[.]" Yet White could not have relied on this conversation in failing to submit his IDR application 16 months earlier. Additionally, the statements White asserts that CalPERS staff made directly contradict the PUB 35. At a minimum, faced with such a perceived inconsistency, a reasonable person would have made an inquiry to obtain greater clarification from CalPERS, rather than assume he would be granted an exception. (Proposed Decision Page 16.)

The ALJ ultimately concluded White failed to demonstrate that he timely addressed his misconceptions about the IDR application. Thus, CalPERS appropriately determined his late application could not be accepted under Government Code section 20160.

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 September 21, 2022, meeting was well reasoned and based on the credible evidence presented at hearing.

For all the foregoing reasons, Staff recommends that the Petition for Reconsideration should be denied.

November 16, 2022

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