

ATTACHMENT C

RESPONDENT'S ARGUMENT

CalPERS Board Members

I was in the PERS system as a sworn police officer for 32 years. I have been injured on several occasions, but I always went to work. That was the way I was raised. I had a career that I thoroughly enjoyed and even postponed my retirement. I finally made the decision and retired on May 29, 2020. It was a challenging time. There was a lot of uncertainty and fear because of the COVID 19 pandemic. I was still working when everything was shut down. PERS offices were closed for face-to-face visits during the last several months of my career. Our civilian support staff was required to work from home including, our Workman's Comp staffer that helps with claims and retirements. Completing all the City's paperwork for my retirement, the Worker's Comp claim, and PERS retirement application was laborious. As a result, I made a mistake on my PERS retirement paperwork that I was not made aware of until July 2021. This mistake has denied me a benefit that other retirees with my injury or similar are receiving. The benefit is strictly federal tax savings and there is no cost to PERS.

My low back injury that I have struggled with for several years took a turn for the worst on March 9, 2020, and I filed a Worker's Comp claim. My job was administrative at the time, so I was still able to perform my duties while I was going through the medical evaluation of my low back pain. An Xray was taken during my initial medical exam. It revealed decreased spacing between the discs of my lumbar and sciatica spine. Future medical evaluations showed moderate degenerative disc disease to L4-L5 and L5-S1. Because of this injury all types of movements, bending, kneeling, twisting, and positions, such as, sitting, laying down, and standing for extended periods of time affect the nerves and that causes muscle spasms that affects normal living. There have been times when the spasms lasted two to three weeks. Random things can cause a shooting pain in my low back, such as: coming to a flat-footed stop after walking, getting out of bed too quickly, or if I reach for something and turn slightly. I generally have to be very deliberate when moving and never too quickly. Due to my physical limitations and skill set re-entering the workforce would be extremely difficult. The QME doctor has determined I'm disabled. My employer has settled my claim and is covering future medical expenses for my injury. PERS has acknowledged that I have an injury sustained as a result of my employment as a sworn police officer. My injury is permanent, the doctors stated it could progress, and it will affect me for the rest of my life. The issue and the reason that I'm not receiving a federal tax benefit for safety employees injured on the job is, I mistakenly checked the wrong box on my application.

Over the last few months of my career, I had to close out all the administrative paperwork that I was working on, go to chiropractor care (3 times per week) for my low back injury, and see the City's contracted doctor for the Worker's Comp claim. Additionally, my primary residence was going through renovations that had to be completed before the sale of our house could conclude in mid-June 2020. The sale of our home meant my wife and I needed to pack 30-years of belongings in order to vacate it. With so much going on I called PERS for assistance with completing my disability application.

The PERS regional offices were closed during the COVID pandemic so calling a representative was my only option. I explained my situation each time to the representative. That included, I was going through a medical evaluation on my low back. The doctors had not made a determination as to what caused my injury or its severity. The final diagnosis of my injury was not until June 2021. The injury could have been sustained during an on-duty rear-end collision in 2008, it could have been repetitive movements while wearing duty gear for 32-years, a combination of both, or an unknown cause. During each conversation with PERS representatives I was told to write those vague details into the section that described my injury. They did not explain the significance of the two checkboxes on page one of the application (Disability Retirement and Industrial Disability Retirement) or the definiteness, nor did I understand it. As the manual defines the two boxes it was unclear based upon my current condition which box was correct for my injury. Was my injury job related or not, I did not know, the doctors did not have an opinion at that time. During my conversations with PERS representatives they consistently referred to my application as disability retirement, not industrial disability retirement. I'm sure that is where the mistake originated. That verbiage is consistent with me checking disability retirement instead of industrial disability on my application in addition to not knowing what caused my injury or it's severity. I mailed my application in without making a copy of it. I did not know that I may need it in the future. Therefore, I did not have a record to refer to when I received a letter from PERS in October 2020 stating, there was no benefit to me for a disability retirement. The letter did state a tax benefit was only for safety personnel injured on-duty. I met that requirement at the conclusion of the medical evaluations in June 2021 but at the time of the letter there wasn't a doctor's opinion that my injury was due to my profession. So, I concluded that I needed proof that my injury was job related to be eligible for the tax benefit. My train of thought corresponded with my only experience of this process and that was with the Worker's Comp claim. In that case, Worker's Comp denied my claim until further evidence was gained through medical evaluations. This seemed to be the case with PERS too. It was logical. I did not have any evidence or a medical opinion stating that I had a disability as a result of my employment. I did not know that the issue was with a checkbox on my application. Also, I did not know that when the facts came in that I was injured as a result of my employment that my status couldn't be changed to industrial disability. This delayed my discovery of the mistake made on the application. I would not learn of that mistake until July 2021, when I spoke to another PERS representative.

When I submitted my application for disability retirement, I was informed that the process would take several months after a completed package was reviewed by PERS. A complete application package included: medical records and a doctor's report stating that I was disabled to the point that I could not perform the duties of a police officer. I did not have those details. My first appointment with a QME doctor, Donald Kim, MD, wasn't until June 12, 2020, that was after I retired. At that initial appointment Dr. Kim said he would request an MRI as part of his evaluation. After the appointment I was not given any paperwork declaring I was disabled, or that my injury was a result of my job. Therefore, I did not have the paperwork that PERS required for a complete package. My wife and I

left California and traveled across the country as a retirement send off. I was not expecting a letter from PERS about my application since I still had to complete an MRI, and more information was needed for a complete application package. On July 20, 2020, I completed an MRI while I was in South Carolina. The results of the MRI were mailed to my employer and a copy would be sent to Dr. Kim for his review. Several months passed and in December of 2020 I was informed by my employer that I would have to attend another exam with Dr. Kim to go over the MRI. The follow-up appointment was scheduled for February 12, 2021. The medical evaluation process was continuing. No determination had been made regarding my injury, its severity, and if it was job related. I still did not have any information to complete a disability package for PERS to review.

In 2021 COVID closures were still in effect and causing delays for what used to be normal timeframes. I received a call from my employer on an unknown date and they told me that my follow-up appointment with Dr. Kim had been canceled; he had a conflict with his schedule. On February 10, 2021, I was informed that my follow-up appointment was rescheduled for May 7, 2021. I met with Dr. Kim, on the scheduled date and time and he conducted a follow-up examination. I was not given any paperwork from Dr. Kim stating that I was disabled, that my injury was caused as a result of my employment as a police officer, or the extent of my injury. After that exam I did not have the documentation for a complete disability retirement package as required by PERS.

In the middle of June 2021, I received a letter from my employer stating that I have a job-related permanent disability and the doctor's report indicates that I will need future medical care. The medical report that was needed to complete my disability retirement package was received by my employer. I did not have a copy of the report, but my employer did. As I understood the process PERS, and my employer would correspond to complete the disability retirement package. At this time, I was not aware that a mistake of the wrong checkbox on my application had stopped the process. There was no reason to suspect something was wrong; I sought assistance from PERS to complete my application. Therefore, I did not expect any issues with the paperwork going forward. It was in July 2021, when I talked to a PERS representative to find out what was happening with my disability retirement, that I learned there was a mistake on my application. That representative explained that the checkbox on my application should have been for industrial disability. Even though I did not have any medical opinion or evidence that my injury was job related that representative said I should have marked my application that my injury was job related. He was the first representative out of many to state I should have checked industrial injury, and the PERS phone record notes confirm this. The representative told me that he would see if they could change that mistake on my application and process it as an industrial disability retirement. In less than a week, July 20, 2021, I was notified by PERS that I would have to resubmit an IDR application.

It took me two months to obtain all the required documentation for a complete industrial disability package. That package included, signed doctor's reports, detailed job description to show the requirements and abilities needed to be a police officer, and

signed documents from my employer and Worker's Comp personnel. After I obtained all the documents, I packaged them and sent it to PERS. PERS received the complete package on September 20, 2021. From the date I learned of the mistake made on my disability application to the time that PERS received a complete industrial disability application it was 64 days.

Trying to fix a mistake on my application has been a long frustrating process. The initial Remedy review asked me several questions that I had to answer based off memory. I did not have any notes or documents to refer to. However, when you read my answers, they are consistent throughout each step of this process. In preparation for the Administrative Hearing, PERS provided me all the documents that they had for my case. This helped me recall more specific details of the whole process and shined some light on the mistake made. Since I had never participated in in such a formality before I focused on the mistakes made during the Remedy review and failed to adequately address the reasons that would allow the mistake made on my application to be corrected under GC 20160.

Government Code Section 20160 (a) gives the Board the ability to correct the errors made by a retiree if I meet the requirements of subsections (1) (2) and (3).

Government Code Section 20160 (a) (1), states, that I had to request a correction within six months (180 days) of discovery of the mistake. I discovered the mistake on July 16, 2021. I was informed that I would have to resubmit my application on July 20, 2021. PERS received my complete industrial disability package on September 20, 2021. I made my request for correction in 64 days, far less than required by this statute.


Government Code Section 20160 (a) (2), the mistake made on my disability application was due to a lack of knowledge about the process. Even after consulting PERS representatives for assistance with filing my disability application a mistake was still made. At the time of filing, I was an injured employee, there was no medical opinion or evidence that my injury was job related. Completing an application claiming my injury was job related without proof would be fraudulent. I was not aware of the finality of selecting a checkbox on my application for disability retirement compared to industrial disability retirement. It seemed logical that if the facts presented themselves at the conclusion of the medical evaluation that my injury was a result of work that it could be processed as such. The medical evaluation determining that my injury was job related concluded in June of 2021. This was the first time that there was proof that my injury was job related. Section 473 (a) (1) of the Code of Civil Procedure provides the authority to correct a mistake in the name of a party, or a mistake in any other respect upon any terms as may be proper and just. PERS required that I file another application for industrial disability after I discovered there was a mistake on my disability application. PERS then denied my application because it was deemed late. Under Section 473 of the Code of Civil Procedure PERS Board members can correct my mistake for excusable neglect and extend the timeframe for filing. This would be appropriate since the mistake was discover

in July 2021 when my injury was established as job related. My complete application was received by PERS in September 2021, well within the six-month timeframe to file.

Government Code Section 20160 (a) (3), if the correction is made, I will receive a benefit that others with my same or similar job-related injury are receiving. That benefit is strictly federal tax savings and there is no cost to PERS.

The pandemic complicated the application process by prohibiting face-to-face contact. If I would have been able to meet with individuals at PERS and my employer that are experienced in this procedure, I believe the mistake made on my application would have been avoided. I'm asking the Board, that has the authority to correct mistakes that they consider all the irregularities in my case that include: I sought assistance from PERS representatives to complete my application, I was going through the medical process to determine if my injury was job related, and to state that it was at the time of my application was not factual, PERS required the doctor's reports to complete my file that I did not have, and Worker's comp initially denied my claim and finally accepted it in June 2021, about 16 months later, these are all reasons that I made a mistake on my disability application and checked the wrong box. With these facts you have the basis to correct the mistake on my disability application and I would receive the benefit that other disabled safety employees are receiving.

Respectfully,

A handwritten signature in black ink, appearing to read "Dwayne May". The signature is stylized with a large initial "D" and a long horizontal stroke.

Dwayne May