

ATTACHMENT B

Staff Argument

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Timothy Meno (Respondent) was employed as a Bus Servicer by Golden Gate Bridge Highway and Transportation District (Respondent District). By virtue of his employment, Respondent was a local miscellaneous member of CalPERS subject to Government Code section 21150. Respondent's last day on Respondent District's payroll was August 23, 2020.

The issue in this case is whether CalPERS should grant Respondent an earlier effective retirement date based on the mistake statute (Gov. Code, § 20160).

Respondent injured his head and neck on the job in March 2020. He was treated at a hospital that day, and subsequently received treatment through workers' compensation, including surgery. Respondent never returned to work.

On February 26, 2021, Respondent District reported that Respondent had been off payroll for six months, and he was determined to be permanently separated from employment with Respondent District. CalPERS sent Respondent an "Options at Separation" letter, which identified retirement as one option to consider. The letter advised Respondent to "submit your retirement application within nine months of separating from employment to receive the earliest retirement date" and that by "submitting your retirement application more than nine months after separation from employment, your retirement date can be no earlier than the first of the month in which your application is received." The letter also directed Respondent to the CalPERS website to review the publications and forms available.

On May 20, 2021, Respondent requested a one-on-one appointment with CalPERS. Prior to his appointment, CalPERS mailed him a copy of CalPERS' Publication 35, "*A Guide to Completing Your CalPERS Disability Retirement Election Application*" (PUB 35), which details the timelines, due dates and forms required to file for disability retirement (DR). PUB 35 advises members to apply "as soon as you believe you are unable to perform your usual job duties because of an illness or injury that is of permanent or extended duration and expected to last at least 12 months." PUB 35 advises, "if you have a workers' compensation claim, you should not wait until your condition is 'permanent and stationary' under workers' compensation requirements to submit your application. Delaying your application for retirement may affect important benefits you may be entitled to receive." PUB 35 gives specific directions for filling out the application: "the effective date of your retirement can be no earlier than the day following your last day on payroll, as long as your application is **received by CalPERS within nine months** of that date. If not, the retirement date can be no earlier than the first of the month in which CalPERS receives your application" (emphasis in original). On May 25, 2021, a CalPERS representative called Respondent for the scheduled one-on-one appointment. The representative explained how to complete the DR application and how to submit a request for estimates for service retirement (SR) and DR.

Respondent requested and received an SR application on August 26, 2021. Respondent requested information regarding DR on October 8, 2021. Another PUB 35 was mailed to him, and the CalPERS representative provided general information about the DR application process.

On November 30, 2021, Respondent submitted an SR application, with a requested date of retirement of November 30, 2021.

Respondent called CalPERS on May 10, 2022, requesting information regarding DR. The CalPERS representative provided him information about what documents were required to support his DR application. Respondent submitted a DR application on May 25, 2022, with a claimed last day on payroll of March 30, 2021. He requested a retirement date of April 1, 2021.

On June 21, 2022, CalPERS notified Respondent that his DR application was rejected because it lacked the required signatures, and because he marked "Industrial Disability" rather than "Disability" retirement as the type of application. Respondent was directed to complete and sign a new application, and to submit his application as soon as possible.

CalPERS provided Respondent in-person guidance on how to submit his DR application on June 30, 2022. He submitted a complete DR application the same day. He requested April 1, 2021, as his retirement date.

On August 22, 2022, CalPERS notified Respondent that his SR application had been processed, with an effective retirement date of November 30, 2021; that a retroactive payment would be issued to him on September 6, 2022; and that he would begin receiving regular monthly SR payments beginning October 1, 2022.

Also on August 22, 2022, CalPERS wrote to Respondent and Respondent District requesting information relevant to his request for an earlier effective retirement date. Respondent responded to CalPERS' request, but Respondent District did not. CalPERS notified Respondent that his DR application was approved on November 22, 2022, that his status would be changed from SR to DR, and that his benefits would be adjusted retroactive to his retirement date of November 30, 2021.

By separate letter on November 22, 2022, CalPERS notified Respondent that his request for an earlier effective retirement date of April 1, 2021, was denied. On December 6, 2022, Respondent appealed the denial of his request for an earlier effective retirement date and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). The hearing was held on September 5, 2023. Respondent represented himself at the hearing. Respondent District 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, answered Respondent's questions and clarified how to obtain further information on the process.

At the hearing, CalPERS presented evidence demonstrating that Respondent was informed numerous times about deadlines for submitting his DR application and the consequences of not meeting those deadlines. Further, CalPERS provided him with DR and SR estimates and letters, and several copies of PUB 35, which specifically informed him that he should apply for disability retirement as soon as he believed he was unable to perform his usual job duties and that he would need to apply for retirement within nine months of separating from employment if he wanted to obtain a retirement date effective on the date following his last day on payroll. CalPERS concluded that Respondent had not submitted his application within nine months of his last day on payroll which is required for him to be entitled to a retirement date earlier than the first of the month in which the application was submitted.

Respondent testified that he was injured on the job and opened a workers' compensation case and that Respondent District refused to communicate with him. Respondent explained that he did not understand his employment status, sought clarity from Respondent District, without success, and that he was frustrated that this did not happen. He found the process of applying for DR difficult and confusing. He called CalPERS, visited the Regional Office for instruction, and watched a video on YouTube for guidance, but "something was always wrong" when he tried to apply. He requested April 1, 2021, as his retirement date because that is when he stopped receiving benefits from workers' compensation.

After considering all of the documentary evidence and the testimony of witnesses, the ALJ found that Respondent's failure to submit a retirement application within nine months of his last day on payroll was not a correctible mistake. Respondent knew, at least by February 2021 (and possibly earlier), that he had been separated from employment, and he was informed about his options upon retirement. Respondent contacted CalPERS in May 2021, received information about the process of applying for both SR and DR, and was warned that delaying his application could adversely affect the benefits he was entitled to receive. Respondent did not submit any retirement application until he applied for SR in November 2021. His SR was granted in August 2022, with an effective date of November 30, 2021. Respondent's complete DR application was submitted in June 2022, and it was approved in November 2022. Respondent's SR was converted to DR, retroactive to the November 30, 2021 date of retirement.

The ALJ found that Respondent testified credibly about his frustrations in dealing with his employer and the difficulties he had understanding and completing the DR application. Nevertheless, the ALJ found that Respondent did not make the inquiry that would be made by a reasonable person in like or similar circumstances, and his delay in applying for DR was not reasonable. Accordingly, the ALJ found that Respondent did not meet his burden of establishing that he was entitled to correct his mistake. The ALJ concluded that Respondent's appeal should be denied.

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

November 15, 2023

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