ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent was employed by Department of Forestry and Fire Protection (CalFIRE). By virtue of his employment, Respondent was a state safety member of CalPERS. In 2002, Respondent was injured during a training exercise. As a result of the injury to his right knee, on July 3, 2003, Respondent submitted an application for Industrial Disability Retirement (IDR).

On January 7, 2004, Respondent separated from employment with CalFIRE. At that time, his application for Industrial Disability Retirement was still being processed by Staff.

On January 8, 2004, Respondent started working for the County of Riverside (County) as an emergency medical services specialist (EMS). The County contracted with CalPERS to provide retirement benefits to its employees. By virtue of taking the EMS position, Respondent became a local miscellaneous member of CalPERS. The County did not contract with CalPERS to provide health care coverage to its employees.

Also, Respondent's full-time employment with the County meant that he was receiving compensation and earning service credit, which was being reported to CalPERS by the County.

On November 23, 2004, CalPERS staff informed Respondent that his application for Industrial Disability Retirement had been approved. The notice letter included the following:

> Since you separated employment from your safety position as a Firefighter II with [CalFIRE] on January 7, 2004, and are being approved for [IDR] from this position, you will need to cease employment immediately from your miscellaneous position with the County of Riverside. The County of Riverside will need to separate you from employment before CalPERS can begin processing your [IDR].

In a second, separate letter from CalPERS' staff to Respondent on November 23, 2004, CalPERS staff provided Respondent with information/fact sheets regarding A) temporary employment as a retired annuitant (960 hour limit), B) reemployment without reinstatement with a CalPERS-covered employer, C) general reinstatement from Industrial Disability Retirement, and D) reinstatement from an Industrial Disability Retirement into a miscellaneous-classified position. In relevant part, Respondent was advised as follows:

> Reemployment and reinstatement require prior approval from CalPERS. The enclosed fact sheets list the documents which must be submitted to CalPERS to request this approval. Retroactive

approval for employment or reinstatement cannot be granted; the earliest effective date that can be approved is the date all of the required documents are received at CalPERS.

The ALJ noted:

> The reemployment fact sheet advised that a member approved for IDR may be reemployed in a non-safety position without reinstatement from IDR but stated in bold lettering that CalPERS's approval was needed before beginning this type of employment and that during the reemployment under Section 21228, 'no CalPERS retirement contributions are made by the member or the employer, and the member does not earn service credit.' The fact sheet further advised that, 'Section 21228 carries an earnings limitation with the new job. If the total of the retiree's pension and earnings from the new job exceeds the earnings limit, then the pension portion of the retirement allowance is reduced dollar-for-dollar to achieve the earnings limit. (See Factual Finding No. 13. (Emphasis added.)

On December 13, 2004, Respondent advised the County that A) he was resigning from the EMS position, and B) he intended to apply for reinstatement to the same position. By separating from active service with the County, this allowed CalPERS to continue processing his application for Industrial Disability Retirement.

On December 14, 2004, CalPERS' staff placed Respondent on Industrial Disability Retirement.

On December 21, 2004, CalPERS' staff sent Respondent a letter informing him that in order to be eligible for continued health care coverage through CalPERS, Respondent's retirement date needed to be no later than 120-days from the date of his separation from employment. This was the beginning of the series of events that culminated in Respondent receiving an overpayment of benefits. Because the County did not provide health care coverage, and because Respondent's retirement date (12/14/04) was more than 120-days from Respondent's date of separation from service with CalFIRE (January 7, 2004), Respondent was not eligible for health care coverage through CalPERS.

Respondent began communicating with CalPERS' staff in an effort to somehow secure health care coverage for himself and his family. Respondent had telephone conversations with CalPERS' staff and wrote letters. In a June 23, 2005 letter to CalPERS, Respondent wrote, "This is a formal request for CalPERS to change my retirement date and to restore my health benefits." Respondent also submitted an appeal regarding the loss of health care coverage and requested an administrative hearing.

CalPERS' staff worked with the County in an effort to create an internal remedy and was successful in meeting both of Respondent's requests. On January 19, 2006, Donna Lum, then Chief of the Benefit Services Division, wrote to Respondent and advised:

> I am happy to report that the adjustment to change your effective date of [IDR] to January, 8, 2004, the day following your last day on the [CalFIRE] payroll has been completed and will be reflected in your February 1, 2006, benefit payment. Riverside County is reversing all payroll reported to us for the period January 8, 2004, through December 13, 2004. This time period will be considered as time you worked as a retired annuitant under Government Code section 21228.
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> . . . .
> The problem has now been rectified and your eligibility for State-sponsored health benefits has been restored." (Emphasis added.)

Changing Respondent's effective retirement date had consequences. First, it allowed Respondent to secure health care coverage. Second, it created an overpayment of benefits to Respondent. For almost a full year (1/8/04 to 12/13/04), Respondent had received compensation for his EMS position with the County. As noted above, with the change of Respondent's effective retirement date to January 8, 2004, Respondent would be entitled to receive a retroactive Industrial Disability Retirement benefit for the same time period for which he received compensation from the County. However, Respondent was not entitled to receive both a full Industrial Disability Retirement benefit and full compensation from the County. That is why, in crafting the solution that restored his health care coverage, Respondent was told that the money paid to him by the County would be treated as approved earnings under Government Code section 21228, which meant an earnings limit would have to be factored in.

Stepping back in the sequence of events, on December 13, 2004 (the same date that Respondent resigned from his EMS position with the County), consistent with his stated intent to apply for reinstatement to the EMS position, Respondent submitted to CalPERS a completed Request for Reemployment, pursuant to Government Code section 21228, seeking employment with the County as an EMS. In a January 19, 2005 letter, CalPERS staff advised Respondent that A) he could work as an EMS for the County, and B) his employment would be subject to the section 21228 earnings limits. So, on a going-forward basis, Respondent was approved to work as an EMS for the County and receive an Industrial Disability benefit, with the understanding that if his earnings exceeded a calculated earnings limit, then his Industrial Disability Retirement benefits would be reduced.

On January 20, 2006 (the day after the 1/19/06 letter from Staff to Respondent noted above), Respondent contacted CalPERS. A summary of the telephone conversation was documented in the Customer Touch Point, or CTP system. The note indicated that Respondent wanted to be reimbursed for retroactive Industrial Disability Retirement benefits. In response, CalPERS' staff again advised Respondent that, because of the

section 21228 earnings limit, he was not entitled to the full amount. The note reflects that Respondent was informed that there would be an overpayment of benefits and that Respondent stated "that's reasonable" and that he would "set some money aside for that purpose and reimburse [CalPERS] when we notify him."

In the same January 20, 2006, telephone conversation, CalPERS' Staff informed Respondent that, because of the way or timing that warrants are issued, the February 1, 2006, warrant (see reference in January 19, 2006 letter) would include the full amount of the retroactive Industrial Disability Retirement allowance for the period of 1/8/04 to 12/13/04. The February 1, 2006 retirement warrant sent to Respondent was in the amount of $21,471.54, of which $19,651.32 represented the retroactive Industrial Disability Retirement allowance, which resulted in an overpayment to Respondent stated, at the time, to be $17,181.92.

At the hearing, after an exhaustive review of the file, the CalPERS staff witness in a thorough analysis, demonstrated that the overpayment to Respondent amounts to $13,580.85.

There was a separate overpayment to Respondent. Respondent's file was the subject of an audit. In a March 10, 2008 letter, CalPERS' staff informed Respondent that the audit had disclosed that Respondent's income from the EMS position exceeded the earnings limit amount, creating an overpayment of $8,844.03 for the period from January 19, 2005 through October 31, 2005. The letter contained a worksheet showing the calculations that supported the claimed overpayment. Respondent was given three options for repayment of the overpaid benefits. Respondent elected to have $200 per month withheld from his Industrial Disability warrant. Respondent has repaid the $8,844.03.

Respondent did not agree with the claimed $8,844.03 overpayment and appealed this determination. Prior to the hearing, CalPERS staff 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' staff answered Respondent's questions and clarified how to obtain further information on the process.

As a result, of the same audit of Respondent's file, on June 12, 2008, CalPERS' staff sent Respondent a letter informing him that his receipt of the February 1, 2006 warrant, resulted in an overpayment of $17,181.92. Acknowledging that Respondent had already appealed the $8,844.03 claimed overpayment and requested an administrative hearing, CalPERS' staff advised Respondent that he could add an appeal of the claimed $17,181.92 overpayment, which Respondent did.

After considering all of the documentary evidence and testimony, the ALJ found as follows:

Ms. Gelardi [Staff witness] testified that CalPERS originally calculated the overpayments to [Respondent] as being $8,844.03 and $17,181.92. [Respondent] repaid some of the overpayment. Prior to hearing, she reviewed all the records and re-evaluated the overpayment calculations to factor in CalFIRE adjustments in pay and other deductions owed to [Respondent]. Based upon those her new calculations, CalPERS now contends that the overpayment owed by [Respondent] is $13,580.85. Ms. Gelardi provided demonstrative and supporting documentation illustrating the new calculation and explained in detail at hearing how that figure was derived. Her testimony was credible and supported by the evidence. (See Factual Finding No. 66.)

The ALJ's legal conclusion, in relevant part, was as follows:

[Respondent] cannot have it both ways: He cannot have his retirement date backdated so that he can receive health benefits but then argue he should not have to reimburse CalPERS the overpayments that resulted when his retirement date was backdated to accommodate the problem he created when he sought re-employment before his IDR was approved. The entire issue arose because of [Respondent's] inability or unwillingness to wait until his IDR was approved and his seeking employment with a CalPERS-contracted agency that did not provide health insurance. Any fault in this matter lies with [Respondent]. CalPERS acted in his best interests when it backdated his employment so that he could maintain his health insurance. The evidence established that CalPERS repeatedly advised [Respondent] of the applicable law, especially the laws regarding overpayment and excess earnings, and it was through no fault of CalPERS that he was overpaid. [Respondent's] argument that he was not aware of the errors is belied by the documents CalPERS sent him clearly informing him of his rights and obligations." (See Legal Conclusions No. 10.)

Government Code section 20164 reads, in relevant part, as follows:

(b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:

(1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.

....

(e) The board shall determine the applicability of the period

of limitations in any case, and its determination with respect
to the running of any period of limitation shall be conclusive
and binding for purposes of correcting the error or omission.

The ALJ concluded that Respondent's appeal should be granted because CalPERS is
prohibited from collecting the overpayment because of the expiration of a statute of
limitation. The Proposed Decision is supported by the law and the facts. Staff argues
that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the
risks of adopting the Proposed Decision are minimal. The Proposed Decision grants
the Respondent's appeal. Accordingly, there would be no reason for Respondent
Decou to file a Writ Petition in Superior Court seeking to overturn the Decision of the
Board.

December 21, 2016

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RORY J. COFFEY
Senior Staff Attorney