



**BEFORE THE BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

In the Matter of the Application for  
Disability Retirement of

**THERESA V. HASAN,**

and

**DEPARTMENT OF CORRECTIONS  
(PAROLE & COMMUNITY SERVICES  
DIVISION, REGION II),**

Respondent.

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CASE NO. **2704**

OAH NO. **N-1999100099**

**PROPOSED DECISION**

This matter was heard before Jonathan Lew, Administrative Law Judge, State of California, Office of Administrative Hearings on November 12 and 16, and December 21, 1999, in Oakland and Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by Fernando De Leon, Staff Counsel.

Theresa V. Hasan was present and represented by James Dal Bon, Esq., 3089 Emerson Street, Palo Alto, California 94306.

The case was submitted on December 21, 1999.

**FACTUAL FINDINGS**

1. Petitioner James E. Burton, Chief Executive Officer of CalPERS made and filed the Statement of Issues in his official capacity as such, and not otherwise.

2. Theresa Hasan (respondent) was employed by the Department of Corrections, Parole and Community Services Division, Region II. At the time she filed her application for retirement she was employed as a Parole Agent I. By virtue of her employment respondent is a member of CalPERS subject to Government Code section 21151.<sup>1</sup>

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<sup>1</sup> Government Code section 21151(a) provides in pertinent part: "Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service."

3. On October 10, 1997, respondent signed an application for disability retirement, which was received by CalPERS on November 3, 1997. In filing the application, disability was claimed on the basis of an orthopedic condition (neck, back and upper extremity).

4. CalPERS obtained or received medical reports concerning respondent's orthopedic condition from medical professionals. After review of these reports the Chief Executive Officer determined that respondent was not permanently disabled or incapacitated from performance of her duties as a Parole Agent I at the time the application for disability retirement was filed. The Chief Executive Officer's determination was limited to his review of medical records pertaining to respondent's orthopedic condition.

5. Respondent was notified of the Chief Executive Officer's determination and was advised of her appeal rights by letter dated April 26, 1999.

6. Respondent filed an appeal on April 26, 1999, and through her counsel on May 5, 1999, requested a hearing. The appeal was accepted as timely. This appeal is limited to the issue of whether respondent is permanently disabled or incapacitated from performance of her duties as a Parole Agent I on the basis of an orthopedic (neck, back and upper extremity) condition. If such disability is found to exist, any dispute as to whether the disability is industrial or non-industrial is to be resolved pursuant to Government Code section 21166.

#### Job Duties

7. A Parole Agent I has responsibility for supervision of parolees assigned and this includes anti-narcotic testing, monitoring behavior, employment assistance, referrals, counseling and other services. The agent performs field supervision in the home or place of employment, and develops relationships with family and friends to augment knowledge of individual parolees and their behavior patterns. Travel in the caseload area is required. The Parole Agent I provides written reports to the paroling authorities regarding violation of parole condition, discharge review and other matters; maintains case records, record of supervision, case progress reports and other necessary documents.

Twenty percent of duties are dedicated to investigation. This requires the Parole Agent I to investigate alleged parole violations by obtaining police and other reports and interviewing parties involved, evaluating such information and recommending appropriate sanctions. They must also investigate proposed release or transfer plans and other matters for the paroling authorities as needed. A Parole Agent I has peace officer status. They are responsible for apprehending parolees who have violated the conditions of parole. The California State Personnel Board job description specifies that the agent "conducts investigations when parole violation or criminal behavior is alleged which includes interviewing, surveillance, and search and seizure; apprehends and arrests parolees/releasees who are suspected of involvement in criminal activities or violation of parole."

8. The Parole and Community Services Division requires that all parole agents regularly attend and complete a course on defensive tactics. Agents are instructed in techniques relating to proper stance and recovery of position, gun retention, escapes, control holds, takedowns, handcuffing and searching techniques. Defensive tactics lecture notes explain that such training is needed because agents may on rare occasions have to defend themselves by utilizing physical self defense in the event of unexpected assault, while making an arrest or while making a home call.

9. Respondent observes that at any given time parole agents are assigned approximately sixty parolees with extensive criminal backgrounds (murder, robbery, assault). Parole agents must have face-to-face contact with each parolee every sixty days. Agents must conduct surprise home visits, alone, within ten days after release from prison, and every ninety days thereafter. Home visits must be conducted every thirty days for high control/service parolees. Urine samples must be obtained from each parolee every sixty days. Agents must physically search for parolees, alone, who are not reporting or who have recently committed a crime to apprehend them. Respondent believes that most parolees perceive parole agents as a threat, and as wanting to send them back to prison. During her tenure as a parole agent she estimates that a hundred of her parolees were returned to prison for murder, and that eighty percent of her assigned parolees were returned to prison for serious and violent crimes.

Particularly difficult physical tasks for respondent include shooting range drills because she experiences numbness in her hand and arm after firing twenty rounds. She also avers that she is unable to participate in defensive tactics training every ninety days because of her injuries. Other physical tasks expected of parole agents include lifting of parolee's property during residence searches; bending, reaching, twisting, balancing the parolee and holding her back during a clothed body search; twisting and turning of her head during searches and driving; and physical upper body strength and mobility to subdue, apprehend and arrest parolees.

### Medical Evaluations

10. Respondent was evaluated on February 15, 1999 by orthopedic surgeon Vatche Cabayan, M.D. She had been involved in a car accident on June 14, 1995. When seen by Dr. Cabayan she described burning and constant pain with activities along her cervical spine and left trapezius. She had limited motion of the shoulder and neck, with stiffness in her neck and left shoulder. She had intermittent headaches and described difficulty working overhead for very long, and felt limited in the amount of time she could sit, stand or walk. She also described difficulty lifting over twenty pounds. Dr. Cabayan reviewed medical records made available to him and conducted a physical examination. He noted that a MRI in the past has shown disc disease at C5-C6 and assessed her as having cervical sprain with disc disease, and no radiculopathy. However, he opined that she is not incapacitated from performing her usual duties or the essential duties of a parole agent. He wrote:

In my opinion, based on review of the job duties the patient is able to do the activities on the job as a Parole Agent I. I would agree that she should avoid defense tactics, which involve rolling on her shoulder and doing a full roll on the floor.

Such restrictions are recommended prophylactically. He acknowledges that he does not know with precision the mechanics of tumbling and rolling that are practiced in defense tactics so he could not comment if she was precluded from performing these maneuvers because of her disability. He describes a loss of twenty-five percent strength, and recommended that she be precluded from lifting, pulling and pushing in excess of seventy-five percent of her normal capacity. He did not preclude her from driving or from handcuffing a parolee. In reaching his conclusions he did not consider an activity that is required four times a year (defensive tactics) to be an essential job duty. He felt that if she had to forcibly subdue a parolee, such would be a rare occurrence and that he understood that others would typically be available to assist her. He felt she could engage in very forceful pushing and pulling if others were present, and that she could do so safely within fifty to seventy-five percent of her capacity. He opines that she would have no difficulty making arrests when others were present, and he understood that such was typically the case.

11. Respondent was also evaluated by orthopedic surgeon Henry L. Edington, M.D. This was on October 8, 1996. At that time she reported having recurrent headaches, and recurrent bouts of pain about the right side of the neck, as well as about the right shoulder blade. She also reported some numbness and tingling in the right arm and hand. Dr. Edington diagnosed her with contusion and sprain of the left nondominant upper extremity and cervicothoracic sprain superimposed upon discogenic disorder of the cervical spine at C5. Objective findings included some tenderness in the paracervical musculature, as well as about the right upper extremity, some loss of range of motion of the neck and MRI revealing a disc protrusion at C5. Dr. Edington opined that she had disability to the neck, upper extremities and upper torso precluding heavy lifting. However he concluded that she "can perform her work activity and does not require consideration of vocational rehabilitation from an orthopedic point of view."

Dr. Edington wrote a supplemental report on August 27, 1997. He had been presented with additional records and information including materials relating to defensive tactics training. Regarding the defensive tactics described, he opined that respondent could not perform such activities. From his reading of her job description he felt that she could not maintain control of a weapon, engage in combat with individuals resisting arrest or defend herself against an assault. Because he viewed her job as one where incidents are likely to occur where she or others would be placed in harm's way, and because she does not have the physical prowess to subdue a combative individual and might easily be overcome, he believes that she is substantially incapacitated from performing the work of a parole agent.

Dr. Edington had no information on the frequency or likelihood that she would be placed in harm's way, and he was not familiar with the specific maneuvers included as part of defensive tactics training. It was enough for him to include the ability to defend oneself and to engage in defensive tactics as part of a parole agent's usual and customary job duties.

## Discussion

12. Respondent was supervised by Jodie Black, a Parole Agent III unit supervisor. According to Ms. Black arrests out of the Richmond office where respondent was assigned averaged one to two per week. Most of the arrests are made in the office. Parolees are usually compliant during office arrests and a number of parole agents are present as back up during the arrests. Field arrests are normally planned. Additional parole agents are called in and local law enforcement usually makes the arrests. Yet the manner and location of the arrest is left to the discretion of the individual parole agent and supervisor, taking into account each situation. In the Richmond office, Ms. Black believes that they might encounter resistance to arrest maybe once every six months. She cannot remember the last time that a parole agent needed to forcibly effectuate an arrest. When cuffing a parolee, two other agents typically assist, and there are others nearby to observe and to act as support. Ms. Black has worked as a parole agent for fourteen years. She has never been physically assaulted as a parole agent, has never had to chase a parolee and essentially believes that the job is safe because they have procedures in place and the tools to make it so. She acknowledges the importance of, and supports the need for defensive tactics training.

13. Jeffrey Lawson worked fourteen months as a Parole Agent I, all in the Richmond unit. He was responsible for up to one hundred parolees in the community, with fifteen considered to be high control. He recalls making five arrests per week, and up to four on a single day. He characterizes the job as being quite dangerous. Agents must meet with parolees convicted of violent felonies in their own homes, arriving unannounced. There may be a drug deal going down or other illegal activity, and a parolee recognizes the agent as one who is empowered to take away his freedom. The Richmond area is considered particularly dangerous. Agents must carry weapons for the protection of self and others. Mr. Lawson views defensive tactics as needful in certain circumstances faced by parole agents – maintaining gun control, getting out of a choke hold or situations where a parolee places his hands on an agent.

14. The office policy is that field arrests are preplanned, and that local law enforcement is used to make field arrests. Arrests are not to be made at all costs by agents. Home searches are also typically planned in advance and are not done by a parole agent acting alone.

15. The aim of the defensive tactics course is to refresh and practice defensive tactics training and skills. Running and falling is not required. There is one move where one starts down on the ground and then rolls to one knee, but no one is knocked down. Mark Stockton is a Department training coordinator. In the field he has only used the basic wrist lock and standard handcuff maneuvers

taught in the defensive tactics course. He confirms Department policy that arrests are not to be made alone, and that they are not to be done if it is unsafe to do so. The majority of parolees are compliant. When resistance is encountered, it is usually done with the object to flee, not to fight the parole agent. The Department prefers the least force option. He avers that for some parole agents the only time they use defensive tactics is in the course of training, and he does not believe that defensive tactics are a usual and customary part of their job duties.

16. After respondent was injured she tried to participate in defensive tactics courses, but did not participate from September 1996 to November 1997. She found certain moves caused pressure in her neck area and gave her a migraine. She cannot go against an assailant's strength to perform maneuvers. On average she estimates that she completed three arrests per week. She suggests that in two-thirds of these arrests she would encounter resistance from parolees refusing to put their hands behind their backs. She believes that today she cannot effectively place a person under custody because of her loss of upper body strength. Respondent also believes that she could not defend herself if needed.

17. Respondent was terminated from employment on November 7, 1997. She denies that such disciplinary action prompted her application for CalPERS disability retirement benefits, pointing out that in September 1997 the Department of Corrections, Parole and Community Services Division had advised her of her right then to apply for disability retirement.<sup>2</sup> When she applied for disability retirement she was aware that matters underlying her eventual termination were being investigated.

It was not established that the investigation leading up to disciplinary action against respondent was a significant motivation in her making application for disability retirement.

#### LEGAL CONCLUSIONS

1. To find "incapacity for the performance of duty" within the meaning of Government Code section 20026 there must be "disability of permanent or extended and uncertain duration" as determined by the PERS Board of Administration on the basis of competent medical evidence. The courts have interpreted section 20026, formerly Government Code section 21022, to mean "the *substantial* inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.)

The applicant in *Mansperger* was a game warden with peace officer status.

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<sup>2</sup> By letter dated September 18, 1997, respondent was advised that the Department had received Dr. Edington's medical report indicating that she was precluded from defensive tactics. The Department characterized defensive tactics as being "usual and customary occurrences for the performance of job duties as a Parole Agent I."

His duties included patrolling specified areas to prevent violations and to apprehend violators; issuing warnings and serving citations; serving warrants and making arrests. He suffered injury to his right arm while arresting a suspect. There was evidence to the effect that he could shoot a gun, drive a car, swim, row a boat (but with some difficulty), pick up a bucket of clams, pilot a boat and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry the prisoner away. The court noted that “although the need for physical arrests do occur in petitioner’s job, they are not a common occurrence for a fish and game warden.” (*Id.* at p. 877.) Similarly the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding that the applicant was not incapacitated for the performance of his duties the *Mansperger* court noted that the activities he was unable to perform were not common occurrences and that he could otherwise “substantially carry out the normal duties of a fish and game warden.” (*Id.* at p. 876.)

2. *Mansperger* is controlling in this case. Applicant must present competent medical evidence that she is substantially unable to perform her usual duties as a parole agent. She has not done so.

3. Dr. Cabayan determined that she could not engage in lifting, pulling and pushing in excess of seventy-five percent of her capacity. He felt that she could engage in forceful pushing and pulling if others were present, and that she could do so within fifty to seventy-five percent of her capacity. Significantly, he felt that she would have no difficulty making an arrest when others were present. And that she could handcuff a parolee. Were it necessary to forcibly subdue a parolee, she could do so if others were present to help. Dr. Edington initially opined that she could perform her work activity and that she did not need vocational rehabilitation from an orthopedic standpoint. Because she lacked the physical prowess to subdue an attacker, and because he felt she should not engage in defensive tactics training, Dr. Edington determined that she was substantially incapacitated from performing the work of a parole agent. His determination does not account for how arrests are normally handled.

4. It is true that parole agents participate in far more arrests than the fish and game warden in *Mansperger*. Estimates range from supervisor Jodie Black’s estimate of one to two per week, to parole agent Jeffrey Lawson’s experience of doing up to four arrests in a single day. But the manner in which arrests are made is qualitatively very different for parole agents than for individual peace officers acting alone. In only extremely rare instances would an agent make an arrest alone. Arrests are usually performed in the office. The arrests are planned. Five parole agents are typically present, sometimes more. Three are directly engaged in the actual arrest and handcuffing. The other agents are there as backup. Under these circumstances respondent, as Dr. Cabayan points out, would have no difficulty making an arrest. Field arrests are less common, but they are still planned. Additional agents are called and local law enforcement is usually relied upon to make the actual arrest. An arrest by a parole agent working alone would be a remote occurrence.



5. Respondent points out that parole agents operate in the field alone, and under conditions placing them in harm's way should they happen upon a parolee engaged in illegal activity. She believes she is obligated to place a violator into immediate custody, and that to do anything different would jeopardize the safety of the community she is duty bound to protect. She believes that she has no alternative but to arrest a parolee under those circumstances, and suggests that any parole agent who allows a parolee to escape – especially if the parolee subsequently commits a crime – would pay the consequences for such failure. Department policy is to the contrary. Arrests are not to be made at any cost and parole agents are expected to exercise sound discretion in making such decisions. Department training coordinator Mark Stockton avers that Department policy is never to make arrests alone, and that you are required to have a minimum of two agents or law enforcement officers present.

6. Unit supervisor Jodie Black has fourteen years service with the Department. She notes that only very rarely do parole agents have to forcibly effectuate arrests, and she cannot remember the last time it happened. She has never herself been physically assaulted as a parole agent. Only once has she encountered a parolee who resisted arrest by being loud and physical. To the extent that they monitor the work of parolees in the community, she believes that the measure taken and procedures in place allow for parole agents to perform their work in relative safety.

Respondent describes but one occasion when she was physically assaulted as a parole agent. The parolee knew she would be going into custody because of a positive drug test. When respondent attempted to grab her hands, the parolee got upset, struck respondent in the face and then ran away. She was chased and eventually subdued by respondent and two other officers.

7. By reason of the above, it was not established that respondent is substantially unable to effectuate arrests as they are typically performed. For respondent to be in a situation where she would have to forcibly effectuate an arrest alone would be a remote occurrence. Even then she would have discretion to call for assistance prior to attempting any arrest. Such circumstances simply do not fall within the normal duties of a parole agent.

8. Both Dr. Edington and Dr. Cabayan recommend that respondent not engage in certain defensive tactics maneuvers, for example those that involve rolling on her shoulder or doing a full floor roll. Respondent's supervisor would not have refused any request by respondent for reasonable accommodation in restricting her participation in the course. Though most people physically participate in defensive tactics training, passive observation was also permitted. By reason of the matters set forth in Finding 15, the use of defensive tactics are not a usual and customary part of a parole agent's normal job duties. For some agents the only time defensive tactics are used is during the course of training.

To the extent that physicians recommend limitations on her participation in defensive tactics training, such are considered prophylactic restrictions, especially given the doctors' limited knowledge of what specific body mechanics

were required by the various maneuvers. Prophylactic restrictions that are imposed only because of a risk of future injury are insufficient to support a finding of disability. The disability must be presently existing and not prospective in nature. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

9. Competent medical evidence was not offered to establish that respondent's neck, back and upper extremity conditions would prevent her from performing the normal duties of a Parole Agent I. She is substantially able to perform her usual duties in that position.

ORDER

The application of Theresa V. Hasan for disability retirement is denied.

DATED: January 18, 2000

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JONATHAN LEW  
Administrative Law Judge  
Office of Administrative Hearings