

ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)

RLS RAINS LUCIA STERN ST. PHALLE & SILVER, PC

MAY 19 2021

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Date: May 19, 2021

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Attn: Cheree Swedensky, Assistant to the Board CalPERS Executive Office	(916-795-3972)

From: Richard A. Levine, Esq.

Re: Respondent Finn O. McClafferty's Argument; In the Matter of the Appeal of the Cancellation of the Industrial Disability Retirement Benefits and Change to Service Retirement: Respondents Finn O. McClafferty; Richard B. Ceja Brian Weir; Marion Weir and Respondent City of Beverly Hills Ref. No. 2020-0325

Number of Pages, Including Cover: 7

Message:

Letter to also follow Certified Mail.

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May 18, 2021

Via U.S. Mail and Fax (916) 795-3972

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

**Re: Respondent Finn O. McClafferty's Argument; In the Matter of the Appeal of the Cancellation of the Industrial Disability Retirement Benefits and Change to Service Retirement; Respondents Finn O. McClafferty; Richard B. Ceja Brian Weir; Marion Weir and Respondent City of Beverly Hills
Ref. No. 2020-0325**

Dear Board of Administration:

May this serve as the written argument on behalf of Respondent Finn O. McClafferty in the above-entitled matter for the Board of Administration to reject the Proposed Decision dated April 28, 2021.

Finn O. McClafferty, employed as a Police Officer (and later Police Detective) with the City of Beverly Hills Police Department for 17 years, appeals from Proposed Decision of the Administrative Law Judge that he was ineligible for an Industrial Disability Retirement which had otherwise been duly approved by the City of Beverly Hills in July 2015. The Proposed Decision reached such a conclusion despite its Factual Findings that McClafferty sustained an injury on June 19, 2014 during the course of his duties resulting in disabling injury to his right knee which necessitated his placement on total temporary industrial disability from June 24, 2014 until his date of industrial disability retirement. (Proposed Decision Factual Findings 33-34,36,38)

The undisputed evidence in this case established that McClafferty, during the course of his duties as a Police Detective on June 19, 2014, slipped and fell while walking to a courthouse to file cases and sustained knee derangement to his right knee. Following regular progress examinations and reports in 2014-2015 by McClafferty's treating orthopedic physician Dr. Tibone, a Permanent and Stationary Report was issued in March 2015 which concluded that McClafferty "has chronic quad tendinitis. This prevents him from running, kneeling, squatting, and doing his police work". (Administrative Record "AR", Exh. BBB) With respect to the issue of work restrictions, Dr. Tibone stated "He cannot do police work. He cannot do his squatting and kneeling and climbing."

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Throughout McClafferty's orthopedic care, it was undisputed by the City that he sustained the knee injury in the course and scope of employment resulting in his temporary total disability from performance of his duties within the meaning of Labor Code Section 4850. As a consequence of Dr. Tibone's March 2015 medical determination that McClafferty could not resume police work, McClafferty applied to CalPERS for an industrial disability retirement.

On July 24, 2015, Shelly Ovrom Assistant Director of Administrative Services/Human Resources for the City of Beverly Hills, pursuant to the authority delegated to her by the City Manager, and after review of the relevant medical evidence, approved the Determination of Disability of McClafferty. (AR Exh.16) Such certification of McClafferty's industrial disability retirement was based upon competent medical opinion and records that he was unable to perform the duties of his position due to industrial injury.

The Proposed Decision recommending that McClafferty's industrial disability be cancelled was solely based upon the conclusion that the City did not have authority to approve McClafferty' application for an industrial disability retirement after the City entered into a settlement agreement with McClafferty by operation of Government Code Section 21156, PERL and Haywood case and its progeny (Statement of Issues "SOI" Exh. 1 page 19)

As thoroughly demonstrated in this Brief, irrespective of the existence of the Settlement Agreement between the City and McClafferty, the City was duly vested, and properly exercised, its legal authority to process and approve McClafferty application for an IDR. The City's certification of such IDR was based upon competent medical opinion and records that McClafferty was unable to perform the duties of his position due his undisputed industrial injury and satisfied all applicable requirements of certification of Government Code Sections 21151, 21154 and 21156.

Moreover, McClafferty's eligibility for a disability retirement was not "a substitute for the disciplinary process" within the meaning of Government Code Section 21156 where McClafferty was never terminated from employment, never submitted a resignation, nor served any notices by the City imposing or implementing any disciplinary or involuntary separation. Since there was no termination of McClafferty nor resignation of employment by him, there was no severance of the employment relationship which would justify the application of CalPERS' cited cases of *Haywood* or *Vandergoot* cases as the basis of the cancellation of McClafferty's retirement.

Even assuming *arguendo*, that the terms of the Settlement Agreement were construed to be "tantamount to a dismissal" and with no right of McClafferty to reemployment with the City during his disability retirement, pursuant to applicable case law his industrial disability retirement cannot be defeated where there is undisputed evidence in the record that McClafferty was fully eligible for his disability retirement.

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It Was Undisputed That McClafferty Sustained An Industrial Injury Which Was The Basis For His Industrial Disability Retirement

On June 19, 2014 McClafferty sustained an injury to his right knee in the course of his duties as a Police Detective for the Beverly Hills Police Department, when he slipped on gasoline or oil on the roadway while walking from a parking lot to the Airport Courthouse to file cases on behalf of the Beverly Hills Police Department Narcotics Division causing him to lose his balance and hyperextend his right knee. (Reporter's Transcript "RT" Vol III McClafferty p.13:21-p.14:6; Exh W) McClafferty timely and properly reported his injury to his employer (RT Vol III McClafferty p.15-16; Exh.W) and was referred by the City to a physician specializing in occupational medicine whose diagnosis of McClafferty's injury included internal derangement of the right knee of which he was prescribed medication and physical therapy. (Proposed Decision, Factual Finding No. 34;RT Vol III McClafferty p.17-20; Exhs X,Y)

By August 2014, respondent McClafferty began treatment with orthopedic surgeon James E. Tibone. Over several months he was given conservative treatment for pain to his right knee, including an MRI, ultrasound, a brace, physical therapy, and blood plasma injection. (Proposed Decision, Factual Finding No. 37; Exs. TT, SS & QQ.)

On March 18, 2015, Dr. Tibone issued a workers' compensation Permanent and Stationary Report (P&S report). (Ex. BBB.) Dr. Tibone concluded McClafferty had chronic quadriceps tendinitis which prevented him from running, kneeling, squatting, and doing police work. Dr. Tibone found those impairments meant respondent McClafferty could no longer perform police work and he should retire from service. Proposed Decision, Factual Finding No. 38; Ex.BBB.)

On May 29, 2015, respondent McClafferty submitted his IDR application.
On June 4, 2015, PERS requested the City determine whether respondent McClafferty was substantially incapacitated.(Proposed Decision, Factual Finding No. 45)

On July 24, 2015, Shelly Ovrom, Assistant Director of Administrative Services/Human Resources for the City of Beverly Hills, pursuant to the authority delegated to her by the City Manager, and after review of the relevant medical evidence, approved the Determination of Disability of McClafferty based on her finding that McClafferty was a.) incapacitated within the meaning of the Public Employees' Retirement Law from performance of his duties in the position of Police Officer and; b) based on her determination that such incapacitation was the result of an injury arising out of and in the course of his employment as a local safety member of CalPERS. (Exh.16)

Consequently, the City's certification of McClafferty's industrial disability retirement was based upon competent medical opinion and records that he was unable to perform the duties of his position due to industrial injury. The City thus satisfied the requirements for an IDR and

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complied with the applicable process of certification as then required under applicable Government Code Sections 21151, 21154 and 21156 and any related CalPERS Regulations.

McClafferty's Eligibility For A Disability Retirement Was Not "A Substitute For The Disciplinary Process" Under Government Code Section 21156 Nor Haywood

In this case CalPERS cancelled McClafferty's industrial disability retirement on grounds that such retirement was a "substitute for the disciplinary process." (Proposed Decision, page 3). However, the administrative record in this case does not establish by a preponderance of evidence that McClafferty's industrial disability retirement was a "substitute for the disciplinary process".

In October 2014, McClafferty was first notified by the City that he was to be interviewed as part of a personnel investigation (such notification was 4 months after his June 2014 knee injury and workers compensation claim for such injury). (Proposed Decision, Factual Findings No. 40, 34; RT Vol III McClafferty p.48:14-24) McClafferty agreed to be interview. (RT Vol III McClafferty p.48:17-21)

Thereafter, the City served McClafferty a Notice of Intent to Take Disciplinary Action dated November 14, 2014. (Proposed Decision, Factual Finding No.23; Exh 9) On November 17, 2014, McClafferty's legal representative requested a pre-disciplinary "*Skelly* hearing" with the Police Chief Dave Snowden which is an opportunity for an employee to present information that may impact a final decision regarding the proposed disciplinary action. (Proposed Decision, Factual Finding No. 44; Exh. 10 at Bate-stamp page 89; Vol I Ovrom p.76:2-12), however such a *Skelly* hearing was never convened. (Proposed Decision, Factual Finding No. 44; RT Vol III McClafferty p.54:8-20)

Not only was a *Skelly* hearing never convened on the Notice of Intent to Take Disciplinary Action (RT Vol III McClafferty p.54:8-20), but neither was there any evidence as to any deadline imposed by the City for the convening of such hearing, nor any evidence that the City was attempting to schedule such hearing. (Proposed Decision, Factual Finding No. 54; RT Vol III McClafferty p.54:21-24) Significantly, there was never any decision reached by the City or Police Department as to the allegations of misconduct or proposed penalty sought in the Notice of Intent. (Proposed Decision, Factual Finding No. 54; RT Vol III McClafferty p.54:25-p.55:4) There were no sustained findings by the City against McClafferty, nor was McClafferty ever served any disciplinary action with regard to the allegations in the Notice of Intent. (RT Vol III McClafferty p.55:5-15) Nor was there any Notice of Disciplinary Action issued respecting the above investigation. (Proposed Decision, Factual Finding No. 54; RT Vol III McClafferty p. 77:11-13)

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The Proposed Decision Improperly Relied On Findings Regarding Suspicious Events and Rejected Undisputed Relevant Evidence

In this case, CalPERS bears the burden of proof, as required by Government Code section 20160, subdivision (d). The standard of proof in this matter is the preponderance of the evidence. (*McCoy*, supra, 183 Cai.App.3d at p. 1044,1051.) That standard of proof is met when a party's evidence has more convincing force than that opposed to it. (*People ex ref. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cai.App.4th 1549, 1567.) (Proposed Decision p.31-32)

Rather than determining this matter based upon a preponderance of convincing and credible evidence required of CalPERS, the Proposed Decision rejected undisputed testimony and evidence and relied on "suspicious events". This record includes unimpeached and credible evidence establishing that the Director of Administrative Services/Human Resources for the City, after review of the relevant medical evidence approved the Determination of Disability of McClafferty based on her finding that McClafferty was incapacitated within the meaning of the Public Employees' Retirement Law from performance of his duties in the position of Police Officer (Exh.16). However, despite such credible evidence, the ALJ found that "the City's certifications [of Respondent employees in this case] are suspicious given all were granted after the respective Settlement Agreements" (Proposed Decision, Legal Conclusions No. 21C)

Likewise, notwithstanding abundant and uncontradicted medical and business records introduced in this case confirming the bone fide and extensive injuries to McClafferty arising from the June 2014 injuries---the ALJ found that it was "suspicious respondent McClafferty served 16 years for the City without incident, only to injure himself by slipping on a gasoline spill just a few months before being formally interviewed by the City for alleged misconduct occurring many months before." (Proposed Decision Legal Findings No. 24B)

Even Assuming *Arguendo*, That The Terms Of Settlement Agreement Were Tantamount To Dismissal With No Right To Reemployment During His Disability Retirement, McClafferty's Right To A Disability Retirement Is Deemed Matured And Cannot Be Forfeited

Even if an employee's right to a disability retirement was immature, where there exist "undisputed evidence" such that a favorable decision on his claim would have been a foregone conclusion, "a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause." (*Smith v. City of Napa* (2004) 120 Cal App 4th 194 at p.206-207; *Martinez v. PERS* (2019) 33 Cal.App. 5th 1156 at p.1167; Emphasis Added)

In the present case, not only did the date of McClafferty's disabling injury antedate McClafferty's knowledge of the City's personnel investigation, issuance of Notice of Intent to Take Disciplinary Action and presentment of the Settlement Agreement, but the undisputed medical opinion in this case that confirmed that McClafferty could not perform the essential duties of his position and thus "cannot do police work" (Exh. BBB Dr. Tibone's Permanent and

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Stationary Report dated 3/18/15; RT Vol I Ovrom p.170:11-p.171:4; Vol III McClafferty p.13:8-17). Even the Recital in the Settlement Agreement stated that "The *City has received and reviewed the medical evidence and believes that it demonstrates that Employee is qualified for IDR*" (Exh. 14, Recital "C" at Bate-stamp p. 103; Emphasis Added)

Lastly, the assertion by the Proposed Decision that there existed evidence of McClafferty's medical ineligibility for an IDR based upon the *initial* denial by the City's workers compensation administrator regarding McClafferty's eligibility for permanent disability *workers compensation benefits* cannot satisfy CalPERS' burden of proof by preponderance of evidence that McClafferty did not have a *matured right to a disability retirement*. Specifically, in accordance to the appeal procedure delineated by the City's workers compensation (Athens Administrator) in its *initial* determination letter dated April 6, 2015 that in the event of any disagreement by McClafferty, his attorney should contact the Claims Adjuster, McClafferty proceeded to contact his attorney to address the denial by Athens Administrator. (RT McClafferty Vol III p. 107-108) Thereafter, on July 6, 2015, Athens Administrator sent McClafferty a "Notice Regarding Permanent Disability Benefits Start" (Exh.15). The inference in the Proposed Decision that it was the Settlement Agreement which caused the change of such initial determination by the City's workers compensation administrator is contrary to the explicit terms of the Settlement Agreement which stated that *workers compensation claims will be handled entirely independent of the Agreement and will have no impact on the Agreement:*

"Employee also has filed and has pending a workers compensation claim or claims. Employer and Employee are working to resolve those claims independently of this Agreement Those claims are being handled entirely independent of this Agreement. The Parties intend that resolution of or failure to resolve the workers compensation matter will have no impact on this Agreement. (Recital D, Settlement Agreement, Exh. 14 p.103)

Conclusion

Based upon the administrative record and applicable law, Respondent Finn McClafferty respectfully submits that the Proposed Decision be rejected and that the cancellation of his industrial disability retirement by CalPERS be reversed, effective on the cancellation date, and that CalPERS reimburse McClafferty for all monetary losses incurred as the result of CalPERS' improper cancellation of his industrial disability retirement.

RAINS LUCIA STERN ST. PHALLE & SILVER, PC

/s/ Richard A. Levine

Richard A. Levine Esq.
Attorneys for Respondent,
Finn O. McClafferty

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Total Number of Pages (including Cover Letter): 7

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In the Matter of the Appeal of the Cancellation of
Industrial Disability Retirement Benefits and Change
to Service Retirement of Finn O. McClafferty;
Richard B. Ceja; Brian Weir; and Marion E. Weir
RE: Respondents and City of Beverly Hills Respondent

Ref. No. 2020-0325

Dear Ms. Swedensky,

JUN - 6 2021

Attached please find Respondent's Argument against Proposed Decision for the upcoming June 16, 2021 Board Meeting.

Thank you.

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JUN - 3 2021

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JUN - 3 2021

7 Attorneys for Respondents, Richard B. Ceja and Brian Weir

8 BOARD OF ADMINISTRATION

9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

10 IN THE MATTER OF THE APPEAL OF THE
11 CANCELLATION OF INDUSTRIAL DISABILITY)
12 RETIREMENT BENEFITS OF:)

AGENCY CASE NO. 2020-0325

) OAH NO. 2020090244

13 FINN O. MCCLAFFERTY; RICHARD B.)
14 CEJA; BRIAN WEIR; MARION WEIR)

15 and CITY OF BEVERLY HILLS,)

RESPONDENT'S ARGUMENT AGAINST

16 Respondents)

Proposed Decision

17 AND)

18 CALPERS;)

Hearing Dates: December 21, 2020,
December 22, 2020, and December 23, 2020

19 Complainant.)

Location: Los Angeles (Videoconference)
Time: 9:00 A.M.

Administrative Law Judge: Eric Sawyer

20 INTRODUCTION

21 Respondents Brian Weir and Richard Ceja were employed by the City of Beverly Hills
22 Police Department (BHPD) as Police Officers. Weir began his employment on April 1, 1996. He
23 suffered numerous work-related injuries over the years, the most serious being a November 19,
24 1997 car accident resulting in injury and impairment to the neck and back; a February 13, 2001
25 injury to the knee suffered while jumping from a brick wall; an August 7, 2012 injury to the neck,
26 back, and head when Weir fell off a truck. There were also injuries dated November 5, 2013, to the
27 back and neck resulting from a car accident as well as a June 29, 2015 motor vehicle accident
28

1 causing neck and back injury. The most impactful incident occurred on April 26, 2016 when Weir
2 injured his back following a foot pursuit which required jumping over multiple fences.

3 These injuries were accepted by the City and required lengthy treatment, all provided by the
4 City. Weir last physically worked for the City on April 29, 2016. He went off work due to
5 musculoskeletal back pain which prevented him from performing his job duties.

6 Richard Ceja also suffered various accepted injuries while employed with BHPD. Again,
7 all injuries were accepted by the City, and treatment was provided.

8 Ceja joined the Beverly Hills Police Department in 1993. He suffered the following work
9 injuries, all accepted by the City. February 11, 2010 injury to left knee. October 10, 2010 injury to
10 right foot. November 18, 2011 injury to circulatory and nervous system. September 1, 1993-
11 December 20, 2011 continuous trauma injury to feet and spine as well as to circulatory system and
12 nervous system. It is the musculoskeletal injuries which prevent Ceja from substantially performing
13 his job duties.

14 On June 24, 2011, an internal investigation was commenced regarding whether or not Ceja
15 should be disciplined for inappropriate behavior. Ceja was placed on light duty on October 26, 2011
16 by Dr. Darvish. He was never returned to full duty. On November 6, 2011, he was placed on
17 administrative leave. On April 26, 2011 there was an attempt to terminate Respondent Ceja, but
18 following an appeal, Ceja was reinstated with an order that he be made whole. The reinstatement
19 was dated November 24, 2014. Ceja was certified for IDR on September 18, 2015.

20 Both Weir and Ceja were evaluated by neutral doctors as opposed to CalPERS IME's who
21 are actually selected by PERS alone. The doctors who evaluated Ceja and Weir were truly neutral
22 and agreed to by both parties on a workers' compensation case. The common notion that workers'
23 compensation Agreed Medical Examiners (AME) are somehow less reliable is without merit. Yet,
24 that is what the ALJ seems to imply.

25 ISSUES

26 There was only one issue at play in this case. It is correctly presented in CalPERS exhibits
27 (Ex. 1, pg. 19). It states:

28 ///

1 This appeal is limited to the issue of whether Respondent City had authority to
2 process and approve respondent members applications for IDR after entering
3 into settlement agreements with them, or whether respondent Members'
4 eligibility for disability was precluded by operation of section 21156, the
5 PERL and Haywood and its progeny.

6 It is important to note the specific narrow scope of the issue as the Proposed Decision seems
7 to attempt to conjure up an additional issue regarding the medical conditions and work restrictions.
8 That was not an issue to be addressed or examined by the ALJ. The examination of the Haywood v
9 American River Fire Protection District (1988) 67 Cal. App.4th 1292 case and any applicability it
10 has on our case was the sole issue in front of the ALJ. The ALJ overstepped his authority and it is
11 that to which Respondents Weir and Ceja object.

12 THE ROLE OF THE ALJ

13 The Courts have long held that it is not the ALJ's duty to reach a medical conclusion. They
14 are to evaluate and weigh the medical evidence to determine which medical opinion is most
15 persuasive. Respectfully, it appears that this ALJ has crossed the line. A medical opinion is required
16 when a medical issue is involved since the opinion of a layman on a medical issue will not be
17 reliable. Peter Kiewit Sons (1965) 234 Cal.App.2d 831, 838. But in our case, the Statement of
18 Issues clearly notes that only the issue of Haywood was to be considered by the ALJ. Instead,
19 however, the ALJ resuscitated a dead medical issue and propelled himself into an issue that does
20 not exist. In so doing he has made a medical determination that is not within his purview. In short,
21 there were two mistakes. First, the issue of medical disability is not at play in this case. Secondly,
22 even if it were, the ALJ cannot substitute his Decision for that of a medical specialist.

23 The ALJ has taken great stock in noting that per Smith, 120 Cal.App.4th at page 208,
24 workers' compensation rulings are not binding on the issue of eligibility for disability retirement.
25 The key word is "binding." Although a workers' compensation decision, ruling or report may not
26 be binding, it still is evidence to be considered by a judge. The judge must then weigh the evidence.
27 Here, there seems to be a notion that the workers' compensation medical reports are of lesser
28 quality and are somehow suspect, which is just invalid. There were two neutral AMEs used on the
workers' compensation. Dr. Sabbag was the AME on the Weir case and Dr. Roth was the AME

1 utilized on the Ceja case. Both are respected independent-minded doctors. They are also the only
2 neutral doctors who appear in this case.

3 The Proposed Decision seems to make light of the medical conditions present in both the
4 Weir and Ceja cases. For example, the ALJ states, "Respondent Weir's disabling condition is a bad
5 back which is far less serious than the loss of a limb example noted by the Smith court." (Proposed
6 Decision, pg. 46.) This cannot be the basis for a Decision. It is quite certain that the Board realizes
7 that very few valid IDR claims involving amputated limbs. There is a large continuum of medical
8 maladies which warrant the granting of a disability retirement. There also must be cognizance given
9 to the fact that the work of a police officer is considered to be arduous work. In Weir's case, he has
10 been diagnosed with cervical disc herniation in the neck; left cervical C6 mass; lumbar
11 spondylolisthesis with "severe" spinal stenosis. It is improper to describe it as a mild condition or
12 dismiss it as indicative of a "bad back." (Ex. A, pg. 24.). AME Sabbag concluded Weir could no
13 longer perform the arduous duties of a police officer.

14 Likewise with Ceja who has suffered various admitted injuries resulting in a limitation to
15 "light duty" from as far back as 2011. He was given work restrictions by AME Roth which prevent
16 him for continuing to work as a police officer.

17 **THERE IS NO EVIDENCE OF RESPONDENTS WORKING TOGETHER WITH THE**
18 **CITY IN AN EFFORT TO CIRCUMVENT RETIREMENT RULES**

19 There seems to be a belief that somehow the Respondents were trying to circumvent some
20 of the rules in order to obtain an IDR. Nothing indicates that was the case. Both Weir and Ceja
21 suffered legitimate, and accepted, work injuries. Both attended AME evaluations to determine
22 levels of disability and ability, or inability, to substantially perform their job duties. They were sent
23 to different AMEs. The dates of injury are different. The Respondents were responding to the City's
24 procedure while taking advice from their attorneys. CalPERS wanted the Respondents to be re-
25 evaluated by the doctors and they were. No IDRs were granted until after the doctors issued their
26 reports.

27 Per Haywood and its progeny, the ALJ has looked at the chronology of events in order to
28 determine whether the IDRs were granted only to avoid the disciplinary process.

1 CITY PROPERLY AWARDED IDR TO RESPONDENTS

2 The Proposed Decision supports CalPERS cancelling of the IDRs on the grounds that the
3 City was providing the IDRs in lieu of disciplinary action. That is not the case. Both Weir and Ceja
4 suffered accepted injuries and were deemed incapacitated by neutral AMEs. That is the sole reason
5 they were granted IDRs.

6 In Ceja's case, he had already been injured and was in fact on light duty as far back as 2011.
7 He never returned to full duty. (RT Vol 3, pg. 149, lines 11-21.) He applied for IDR April 12,
8 2015. He was terminated April 6, 2012. The termination was appealed. The Hearing Officer
9 overturned the termination and reinstated Ceja on November 24, 2014. (Ex. 41.) Ceja filed a civil
10 complaint alleging retaliation. The civil case was settled 9/11/15 (Ex. 44). As part of the settlement,
11 it was agreed that if and when a doctor deemed Ceja incapacitated, he would be granted an IDR and
12 the Respondent would resign. He did not resign on the date that the settlement was signed, despite
13 the ALJ's assertion that the settlement was tantamount to a resignation on that date.

14 If Ceja was on light duty as far back as 2011, and that disability status never changed, then
15 the only conclusion which can be reached is that he had been incapable of performing his job duties
16 for years prior to the IDR. The light duty was only a temporary position. Ceja was never offered a
17 permanent job within his work restrictions. He was not permanently accommodated. (RT Vol 3, pg.
18 149, lines 16-21.)

19 The ALJ relies on Smith (supra) and finds that there is a right to a disability retirement
20 despite termination, or as here, an alleged separation, if there was a matured right to an IDR prior to
21 the separation. The ALJ ruled that neither Weir nor Ceja had such a mature right. We disagree.
22 Clearly, Ceja has a chronology showing incapacity from 2011 forward. Such chronic incapacity is
23 evidence of the mature right. He was entitled to file for, and receive, his IDR.

24 Respondent Weir has a case that has travelled a mysterious path. Weir had never been
25 terminated. Other than an investigation, he has no major blemish on his record.

26 CalPERS argues that Government Code Section 21156 prevents Respondent Weir (and
27 Ceja) from filing an application for IDR. Specifically, they argue that disability retirements were
28 provided to resolve personnel disputes and/or pending lawsuits in violation of Government Code

1 Section 21156. That is clearly not the case. Weir filed for IDR May 13, 2016. Weir had filed a civil
2 suit for retaliation due to a pending investigation. The civil suit settled on May 12, 2016.
3 Respondent agreed to resign if and when medical reporting found him permanently incapacitated.
4 Neutral AME, Dr. Sabbag, found him permanently incapacitated in his September 16, 2016 report
5 (Ex. A) and again in his follow-up report (Per CalPERS request) on July 22, 2019 (Ex. B). If the
6 doctor had not found Weir incapacitated, he would not have received the IDR. The settlement
7 points out that the resignation did not take place on the date the settlement was signed. It would
8 take place if a doctor deemed Respondent to be disabled. The IDR application was filed May 13,
9 2016. It was approved by the City on November 2, 2016. CalPERS certified the IDR on November
10 3, 2016.

11 Weir was never terminated. He followed a legal path in filing the civil lawsuit which
12 settled. He had numerous severe injuries resulting in significant pathology as indicated by MRI.
13 This resulted in work restrictions that could not be accommodated. The evidence of permanent
14 incapacity was evident prior to the formal date of resignation. Therefore, the City had every right to
15 grant the IDR. Medical evidence supported the IDR.

16 In both Weir and Ceja, CalPERS must keep in mind the language in Smith (supra):

17 Conceivably, there may be facts under which a court, applying principles of
18 equity, will deem an employee's right to a disability retirement to be matured
and thus survive a dismissal for cause.

19 (Smith, supra, pgs. 205-207.)

20 CONCLUSION

21 Respondents Weir and Ceja request that the Proposed Decision be rejected and that the
22 cancellation of the Industrial Disability Retirements be reversed and that the Respondents be
23 reimbursed for all losses.

24
25 Date: May 27, 2021

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Danny Polhamus

DANNY POLHAMUS, (Signed Electronically)
Attorney for Brian Weir & Richard Ceja