

ATTACHMENT C

RESPONDENT'S ARGUMENT

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9 **BOARD OF ADMINISTRATION**
10 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
11

12 *In re the Appeal of:*

13 JASON J. BEMOWSKI,

14 Respondent,

15 and

16
17 CITY OF CHINO,

18 Respondent.
19

AGENCY CASE NO. 2020-0160

OAH NO. 2020070063

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I.

INTRODUCTION

In the proposed decision, the ALJ makes the following critical finding:

There was also no evidence that respondent was so disabled that his eligibility for IDR would have been a foregone conclusion. Respondent purportedly suffers from left shoulder instability, right shoulder rotator tendinitis, and low back pain, injuries which are nowhere near the severity of the “loss of limb” example set forth by the Court of Appeal in Smith. (Smith, supra, 120 Cal.App.4th at p. 207.) Therefore, respondent is ineligible to apply for IDR because he has no right to reinstatement and no exception under Haywood and Smith applies.

However, this finding is contrary to the evidence that due to a severe shoulder injury Bemowski “cannot do his job the way he is now. I anticipate he will need to find a new job and is a Qualified Injured Worker.” Therefore the Board should reject the proposed decision because the medical evidence supports the conclusion that Bemowski was entitled to an IDR based on his severe shoulder injury.

II.

DISCUSSION

A. Bemowski Is Entitled to an IDR Based on His Injury.

The most critical date in this case is the date of the report from Arrowhead Orthopedics wherein Roney Ghazal M.D. states:

Patient can complete on the open labor market with the following work restrictions:
No lifting more than 25 pounds, no repetitive bending or stooping, and no work above shoulder level. He is also restricted from physical altercations with combative people due to his left shoulder instability. He cannot do his job the way he is now. I anticipate he will need to find a new job and is a Qualified Injured Worker.”

As stated in *Vandergoot*, “respondent has not presented unequivocal medical evidence of such nature that approval of his application for disability retirement was a “foregone conclusion.” The ALJ finds that Bemowski’s shoulder injury is not of such a nature that it would be a foregone conclusion that he would be approved for an IDR. However, there is no evidence in the record to

1 dispute Dr. Ghazal’s findings that Bemowski could no longer do his job due to injuries he sustained
2 at work.

3 In fact, the parties have had two separate evidentiary hearings and zero evidence has been
4 proffered that CalPERS would dispute Bemowski’s injury qualifies him for an IDR. In the instant
5 case, Bemowski has presented evidence that he filed for an IDR while on administrative leave, five
6 months before he was even notified of the City’s intent to dismiss him for cause; that he was still
7 being paid his salary; and that he was still making his CalPERS contributions. There can be no
8 dispute that as of June 12, 2019, Bemowski was unable to carry out the duties of a peace officer due
9 to shoulder injuries he suffered at work. Thus, Bemowski’s eligibility for an IDR was a foregone
10 conclusion.

11 **B. The Present Case Is Analogous to *Willens*.**

12 In *Willens*, the California Supreme Court held that a Judge who had criminal bribery
13 charges pending and was on a paid suspension was entitled to his disability retirement. In so
14 holding, the Supreme Court stated that any other outcome “would ignore the fundamental precept
15 that an accused is presumed innocent until proven guilty.” *Willens v Commission on Judicial*
16 *Qualifications* (1973) 10 Cal. 3d 451, 456. Here, Respondent was on paid leave making his
17 CalPERS contributions when he applied for an IDR. Furthermore, it was determined by an
18 orthopedist that Respondent suffered permanent injuries while on the job and could no longer
19 carry out his duties as a peace officer. To disallow Respondent a disability retirement would
20 completely contradict the opinion of the California Supreme Court in *Willens* and the ALJ
21 correctly analogized the facts of the present case to that of *Willens*. Moreover, the *Smith* case on
22 which CalPERS relies so heavily cites to *Willens* and presents an exception that is precisely the
23 fact pattern in the present case: “Thus, if a plaintiff were able to prove that the right to a disability
24 retirement matured before the date of the event giving cause to dismiss, the dismissal cannot
25 preempt the right to receive a disability pension for the duration of the disability.” *Smith v. City*
26 *of Napa* (2004) 120 Cal.App.4th 194 at p. 206.

