

ATTACHMENT A
THE PROPOSED DECISION

FACTUAL FINDINGS

Procedural Background

1. Mary Lynn Fisher, Chief of the Benefits Services Division of CalPERS, filed the Statement of Issues while acting in her official capacity.
2. At the time she filed her application for disability retirement, Respondent Resendez was employed as a Special Agent Supervisor with Respondent DOJ. By virtue of her employment, Respondent Resendez is a member of CalPERS subject to the provisions of Government Code section 21151.
3. On December 24, 2008, Respondent Resendez signed, and subsequently filed, an application for industrial disability retirement (application) based on a neurological (cervical spine) condition. CalPERS approved Respondent Resendez's application, and she retired for industrial disability effective July 2, 2009.
4. By application in September of 2009, Respondent Resendez requested reinstatement to her previous position as a Special Agent Supervisor at Respondent DOJ.
5. CalPERS obtained medical reports concerning Respondent Resendez's neurological (cervical spine) condition. After review of the medical reports, CalPERS determined that Respondent was no longer substantially incapacitated for the performance of her usual duties as a Special Agent Supervisor and that Respondent Resendez was eligible for reinstatement.
6. In a letter dated February 25, 2010, CalPERS sent Respondent Resendez a letter stating:

A careful review of the medical examination reports and other information indicates that you are currently capable of performing the job duties of Special Agent Supervisor with the [DOJ]. Your request for reinstatement from industrial disability retirement is approved.

[CalPERS] can only reinstate an annuitant to active membership in the Retirement System; we cannot order your return to the job. Actual re-entry into employment must be arranged between you and the [DOJ]. . . . As soon as possible, the [DOJ] should notify our Disability Retirement Section regarding your actual reemployment date to minimize the possibility of an overpayment of retirement benefits. To complete the reinstatement action, the [DOJ] must also submit a membership document verifying your entry into compensated employment.

According to Government Code Section 21193, an employee of the state . . . has mandatory reinstatement rights to her former or like position, and her retirement allowance is to be discontinued when (1) CalPERS has determined that she is no longer substantially incapacitated and (2) the employer has offered the job. Your disability retirement will be stopped on the effective date of your job offer.

(Exhibit 4.)

7(a). In a letter dated February 25, 2010, CalPERS notified Respondent DOJ of the following:

Angelita Resendez has been approved for reinstatement. The member cannot be brought into active employment and membership until CalPERS has been notified of the hire date. Please contact CalPERS with this information.

(Exhibit 5.)

7(b). The letter also advised Respondent DOJ of its right to appeal the determination.

8. In a letter to Respondent Resendez, dated March 4, 2010, Respondent DOJ advised her of the following:

The [DOJ] has received a copy of the February 25, 2010 letter from [CalPERS] approving your request for reinstatement from industrial disability retirement.

This letter constitutes a conditional offer of reinstatement to the position of Special Agent Supervisor, California [DOJ]. As a condition of your reinstatement to a DOJ peace officer position, the DOJ must ensure that you continue to meet the minimum standards mandated by the Commission on Peace Officers Standards and Training (POST) regulations (CCR Title 11, Division 9 Chapter 5, Sections 9054(a) and 9055(a)) and Government Code section 1031. As such, you will be required to be evaluated by a licensed physician to determine if you are free from any physical, mental or emotional condition that might adversely affect your ability to exercise peace officer powers. In addition, in accordance with CCR Title 11 Division 9, Chapter 5, Section 9053(1)(A)(1), and your consent, the department will conduct an updated background investigation covering the period of time from your date of your retirement to the current date. A reinstatement date cannot be established until these processes have been successfully completed.

[¶] . . . [¶]

Once the background investigation is completed, you will be provided with the applicable forms and instructions for completing the medical and psychological evaluations.

The department will make every effort to complete the above processes as expeditiously as possible. And, be advised that the department will file an appeal of the CalPERS decision, which endures that your name remains on the CalPERS disability retirement roll until this matter is resolved. A reinstatement date will be established upon completion of the above processes and finality of the appeal of the CalPERS decision.

(Exhibit 6.)

9. In a letter dated March 8, 2010, Respondent DOJ timely appealed the determination and requested a hearing. The letter stated: "DOJ is challenging CalPERS' determination that [Respondent] Resendez is not incapacitated for duty in the position of Special Agent Supervisor." (Exhibit 7.)

10. The issue on appeal is whether Respondent Resendez is still incapacitated for performance of the usual job duties of a Special Agent Supervisor. (See Gov. Code, § 21192.)

History of Disability

11. Just prior to her disability retirement in July 2009, Respondent Resendez worked for the California DOJ as a Special Agent Supervisor. Before joining the DOJ in October 1994, she worked for the Department of Motor Vehicles (DMV) as a special investigator and for the Department of Insurance (DI) as a criminal investigator. Both the DMV and DI positions were peace officer positions. When she was hired by the DOJ, she passed full physical and psychological examinations. She was promoted to Special Agent Supervisor in May 2001.

12. As a Special Agent, her day-to-day duties included handling criminal investigations and collecting evidence (e.g. going out into the field to interview witnesses, surveillance of suspects), serving search warrants and arrest warrants, writing reports of her investigations, submitting cases to the District Attorney for review, and testifying in court if necessary. When she became a Special Agent Supervisor, she retained the duties of a Special Agent but took on the added duties which came with managing a team of sworn and non-sworn personnel (including employee discipline).

13. Respondent has an outstanding reputation at DOJ for being a hardworking and dedicated employee, and received several awards for her outstanding service, including several Special Agent of the Year awards.

14. While working at DOJ, Respondent Resendez was involved in four on-duty automobile accidents in which she suffered neck and back injuries.

15. In 1995, while in the field conducting surveillance, the tire on Respondent Resendez's work-issued vehicle blew out while she was traveling on the freeway at 55 to 60 miles per hour. Her vehicle hit a guard rail and she hit her head on the steering wheel. She was able to change the tire on the vehicle and complete her shift. The following day, she began to experience headaches, and she went to urgent care. However, she believed she was "fine," sought no further treatment and took no time off of work.

16. Later in 1995, Respondent Resendez was involved in another motor vehicle accident while on duty and following a suspect on the freeway. Her vehicle was pushed into another vehicle, but she did not believe she was injured. She did not take time off work or seek treatment.

17. In 1996, Respondent Resendez was again involved in a motor vehicle accident while on duty. A vehicle in front of her on the freeway stopped abruptly and she braked, but rolled forward and hit the other vehicle. She again felt fine and completed her shift. She took no time off from work and did not seek treatment at that time.

18. In approximately 1999 or 2000, Respondent Resendez began to experience physical symptoms which included neck and shoulder pain while she was running and numbness and tingling in her fingers. She sought chiropractic treatment and was referred to a neurologist, who began providing treatment.

19. In May 2001, she underwent an anterior cervical discectomy and fusion at the C5-C6 level and took approximately three months off work.

20. Later, in 2006, Respondent Resendez was involved in another on-duty accident, when her vehicle was rear-ended. About a week later, she began to feel pain in her lower back and on the right side of her leg. Although she did not immediately take time off for her injuries, she eventually sought treatment for the pain and took time off from work beginning April 2006. She had a second cervical spine surgery (anterior cervical discectomy, plating and fusion at the C4-C5 level) in December 2007.

21. On June 9, 2008, Agreed Medical Evaluator, Edwin Haronian, M.D., issued a report indicating that Respondent would not be able to return to her work duties.

22(a). On September 5, 2008, the DOJ sent Respondent Resendez a letter indicating that it was in receipt of Dr. Haronian's June 9, 2008 report. There were several options

outlined for Respondent Resendez in the September 5, 2008 letter. These included returning to work, temporary leave and separation from State Service.

22(b). Regarding the possibility of disability retirement, the letter stated:

If you are unable to return to work due to your health condition, you may apply for industrial disability retirement with CalPERS. Disability retirement is considered a temporary separation from state service. Health benefits are available through CalPERS while you are on retirement status. If, after you are approved for disability retirement and, at a later date, it is determined that you are able to return to work as a Special Agent Supervisor, you will have mandatory rights to reinstatement to Special Agent Supervisor. (Exhibit N.)

22(c). Respondent Resendez was given until September 26, 2008, to respond to the letter or the DOJ would select an option for her, which could include demotion, filing an application for disability retirement on her behalf and medical termination.

22(d). Respondent Resendez timely responded to the letter.

23. Some time in September 2008, Respondent obtained a report from her primary physician, J. Patrick Johnson, M.D., releasing her to return to full duty on September 26, 2008.

24. Respondent returned to work between September 26 and September 30, 2008. However, she experienced an increase of her symptoms, including lower back symptoms which were exacerbated by wearing her gun belt. In mid-November 2008, Dr. Johnson ordered that she be taken off work.

25(a). On November 13, 2008, the DOJ sent Respondent Resendez a letter acknowledging Respondent Resendez increase in symptoms and the fact that she had been taken off work by Dr. Johnson. The letter outlined several options available to her, which included returning to work, temporary leave and separation from State Service. (Exhibit O.)

25(b). Regarding the possibility of disability retirement, the letter stated:

If you are unable to return to work due to your health condition, you may apply for industrial disability retirement with CalPERS. Disability retirement is considered a temporary separation from state service. Health benefits are available through CalPERS while you are on retirement status. If, after you are approved for disability retirement and, at a later date, it is determined that you are able to return to work as a Special Agent Supervisor, you will have mandatory rights to reinstatement to Special Agent Supervisor. (Exhibit O.)

25(c). Respondent Resendez was given until December 5, 2008, to respond to the letter or the DOJ would select an option for her, which could include demotion, filing an application for disability retirement on her behalf and medical termination.

25(d). Respondent Resendez timely responded to the letter.

26. Although Respondent did not want to retire, after discussing the issue with Artie Cooper, the person who signed Respondent DOJ's September and November 2008 letters (Exhibits N and O), Respondent Resendez decided that applying for industrial disability retirement was the best course of action for her in case she was unable to return to work. From her conversations with Cooper, Respondent Resendez understood that, if she applied for disability retirement, she could withdraw the application at any time, and that it could take up to three years for CalPERS act on her application. She believed that, following her submission of an application for disability retirement, she would have time to heal, withdraw her application and return to work.

27. In late December 2008, Respondent Resendez submitted an application for industrial disability retirement based on her neck and back injuries. She did not claim any psychological or emotional disabilities.

28. Respondent Resendez continued receiving treatment for her injuries, and by approximately March 2009, Respondent Resendez had begun "feeling better." She had contacted Respondent DOJ to apply for a position as Special Agent in Charge, and had taken and passed the three-hour examination in May 2009.

29. On June 24, 2009, CalPERS notified Respondent Resendez that her application had been approved, and she was retired, effective July 2, 2009.

30. When Respondent Resendez received notice that CalPERS had approved her application, she was "shocked." She had not intended to retire, but was planning on withdrawing her application and returning to work. She immediately contacted CalPERS to find out how to "reverse" the decision. She was instructed to apply for reinstatement, and she requested the application materials.

31(a). On September 18, 2009, CalPERS received Respondent Resendez's application for reinstatement to her previous position as a Special Agent Supervisor at Respondent DOJ.

31(b). Respondent Resendez also sent CalPERS an October 27, 2009 letter from Cedars-Sinai Medical Center Institute for Spinal Disorders, signed by Jodi R. Ladge, Physician Assistant to neurosurgeon, Dr. Johnson. The letter stated the following:

[Respondent Resendez] is currently under our care. She was last evaluated in our office on September 21, 2009.

Her job description and the physical requirements for the position of Special Agent Supervisor for the California Department of Justice have been reviewed. In regards to her cervical spine condition, she has been released to return to her job duties without restrictions or limitations.

(Exhibit 9.)

32. Respondent Resendez was later notified by CalPERS that she would undergo an independent medical examination by Theodore Georgis, Jr., M.D.

33. In the interim, following her retirement, Respondent Resendez continued to receive treatment for her injuries. She also explored non-aggressive therapies to build her strength. She worked with a personal trainer three times per week for a year, and at the same time, she developed her own regimen for building strength, including yoga, use of exercise bands, and home implementation of modalities she learned in physical therapy. A former avid runner, she resumed running two to three times per week. She tested herself to see if she was physically capable of performing her job duties, including putting on her gun belt, running and jumping a six-foot wall while wearing it.

Usual Duties

34. At the administrative hearing, Respondent DOJ has asserted that Respondent Resendez's usual job duties include the requirements set forth in Government Code section 1031. Respondent Resendez and CalPERS assert that the requirements in Government Code section 1031 are not part of her usual job duties. As set forth in Factual Findings 35 and Legal Conclusion 7, while Government Code section 1031, subdivision (f), is incorporated into Respondent Resendez's job description and forms a part of her usual duties as a peace officer, that section's specific requirements are not at issue in this case.

35(a). Respondent signed and initialed on September 30, 2008, a document entitled "State of California [DOJ] Essential Duties of Peace Officer Classifications, Special Agent Series," for "Special Agent Supervisor Classification" (Essential Duties Statement). (Exhibit 12.)

35(b). The Essential Duties Statement contained the following prefatory statements:

Penal Code Section 830.1 states that . . . special agents, and investigators designated by the Attorney General are peace officers. . .

Government Code Section 1031(f) states that "Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standards. (1) be found to be free from any physical, emotional, or mental condition which might adversely affect the exercise of the powers of a peace officer. Physical condition shall be evaluated by a licensed physician and surgeon. Emotional and

mental condition shall be evaluated by a licensed physician and surgeon or by a licensed psychologist who has a doctoral degree in psychology and at least five years of post graduate experience in the diagnosis and treatment of emotional and mental disorders.

The essential functions of a peace officer within the [DOJ] are listed below.

Special Agents employed by the [DOJ] must perform the following essential functions on or off duty and they are commissioned peace officers 24 hours a day.

(Exhibit 12.)

35(c). According to Respondent's Essential Duties Statement, the list of essential functions of a Special Agent Supervisor included the following:

C. Mobility and Flexibility

1. Operation of a vehicle under stressful conditions (e.g. pursuit, surveillance, emergencies) . . .
2. Physical methods of arrest . . .
[] . . . []
Description: Must be able to physically take down a suspect, which may be violent, on drugs, or mentally disturbed . . .
3. Reaching: In front[,] To side[,] Behind[,] Below
[] . . . []
4. Use of arms, hands and fingers
 - 1 Handle and/or operate a weapon
[] . . . []
 2. Use of specialized equipment
Frequency: On and off throughout the entire day. Computer work will vary from 30 minutes and can be up to 8 hours
[] . . . []
 - 3 Frequent writing

Frequency: Up to eight hours a day (majority of a shift)

[9] . . . [9]

4. Operate office equipment

Frequency: Up to 4 to 8 hours a day

[9] . . . [9]

5. Operate vehicle or other equipment

Frequency: Up to ten hours per day

[9] . . . [9]

D. Strength

1. Use of body to forcibly enter a building or structure

[9] . . . [9]

3. Performance of duties while wearing special clothing and/or equipment (e.g. gun, handcuffs, etc.)

Frequency: Off an on throughout the entire day

Description: Holster with weapon, handcuffs, bullet proof vests . . .

[9] . . . [9]

4. Use of hands, feet and/or entire body in self defense

[9] . . . [9]

5. Lifting and Carrying

Frequency: Necessary on a daily basis

Comments: Arrests, movement of evidence, physical methods of arrest, moving required equipment (i.e. laptop computers, raid gear, boxes of evidence, cameras, surveillance equipment, etc.) Weights may vary from a 2 to 50 pound box to lifting or carrying an injured or combative person (average weights of 100 to 250 pounds).

6. Pushing, Pulling or Dragging

[9] . . . [9]

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E. Stamina/Endurance

1. Working effectively during periods of interrupted or no sleep
[¶] . . . [¶]
2. Physical activity(ies) for extended periods of time
Frequency: Daily
Comments: During the daily course of work Agents may be required to run to catch suspects, avoid obstacles while in pursuit, take statements from parties being investigated, climb over barriers and walls, crawl into attics, basements, and other small spaces, hike through mountainous areas or hilly terrain, wrestle suspects/physical methods of arrest while subduing suspects.

(Exhibit 12.)

36(a). Although Respondent DOJ also offered a document from the California State Personnel Board, entitled "Special Agent, Department of Justice, Series Specification" (Exhibit D), the evidence did not establish that this was part of Respondent Resendez's job duty statement. The document defined the different classifications of DOJ special agents and generally described qualifications (education, experience, abilities, characteristics) for each classification, but did not set forth the day-to-day essential duties of a Special Agent Supervisor.

36(b). Under a section entitled "Peace Officer Standards," the document specified:

Background Investigation: Pursuant to Government Code Section 1031, persons successful in peace officer examinations shall be required to undergo a thorough background investigation prior to appointment. Persons who have previously undergone a [DOJ] background investigation may be required to undergo an additional background investigation.

[¶] . . . [¶]

Medical Requirement: Pursuant to Government Code Section 1031, persons appointed to a peace officer class shall undergo a medical examination to determine that he or she can perform the essential functions of the job safely and effectively.

(Exhibit D.)

37(a). Respondent DOJ also submitted a DOJ form entitled "Medical Examination Report – Peace Officer (POST 2-253)" (Exhibit H), which lists a number of areas of medical examination which were to be filled out by a physician. The form included Instructions to Physician, which stated "This section is to be completed and submitted to the hiring department." There was a section to be filled out by the physician which included a blank for the "Candidate's Name," and a certification stating, "I completed a pre-employment medical screening evaluation on the above-named peace officer candidate in accordance with California Government Code Section 1031(f)..." (Exhibit H.)

37(b). Richard Lopes, Assistant Director of the Division of Law Enforcement for the DOJ testified credibly for Respondent DOJ. He verified that Exhibit H is not used for special agents returning from a long break in service such as military leave or for special agents returning from Family Medical Leave. He did not believe that it was used for special agents returning from disability status where they had not applied for disability retirement.

38. An excerpt from the Personnel Policy and Procedures, entitled "Appointments/Employment" indicated that a Health Questionnaire with Physician's Report (Std. 610) is required for applicants for specified classifications, including the Special Agent series. However, the document specified, "Medical clearances are not required in the following situations: [¶] . . . [¶] 2. When the Public Employees' Retirement System ([Cal]PERS) has given medical clearance for permissive reinstatement to a class in the same occupational group after a disability retirement." (Exhibit K.)

Physician Examination and Continued Rehabilitation

39(a). On February 8, 2010, Theodore Georgis, Jr., M.D., conducted an Independent Medical Evaluation of Respondent Resendez. Dr. Georgis has been licensed to practice medicine in California since 1981 and is certified by the American Board of Orthopedic Surgery. Since 2009, he has conducted approximately 50 to 75 evaluations for CalPERS to determine whether an employee was substantially incapacitated for his/her duties. Up to five of those involved law enforcement officers, and of those, only Respondent Resendez was seeking reinstatement. Dr. Georgis was familiar with Government Code section 1031. However, he has never performed a physical as mandated by that section or any other fitness-for-duty examinations of law enforcement officers.

39(b). Dr. Georgis took a Respondent Resendez's medical history and history of her relevant injuries. He reviewed Respondent Resendez's job description and some of Respondent Resendez's medical records from 2007 through 2009, including a March 2009 MRI of her lumbar spine.

39(c). Respondent Resendez informed Dr. Georgis that she had been free of neck pain for eight months and free of lower back pain for six months. She did inform him that she had mild residual decreased motion but stated that it did not interfere with any of her normal activities. She also noted some very slight residual numbness over the very tips of her right thumb, index and middle finger since 2001. Respondent Resendez informed Dr.

Georgis that she was not receiving any active treatment on her neck or back. Respondent Resendez also reported that she had been very vigilant with her self-directed rehabilitation (which included yoga, weight-lifting four times per week, and running for 30 minutes four times per week) and had gotten progressively better. She told Dr. Georgis that she had been wearing a gun belt for the prior three weeks, between eight to ten hours per day, and experienced no pain.

39(d). Dr. Georgis conducted a physical examination of Respondent Resendez, which included an examination of her spine and extremities, range of motion assessment, and other orthopedic and neurological testing. Dr. Georgis diagnosed Respondent Resendez as follows: "1. Status post anterior cervical discectomy and fusion at C4-C5 and C5-C6 with complete healing and rehabilitation, no current evidence of myelopathy or radiculopathy clinically. 2. Lumbar disc protrusion with full resolution of symptomatology, no radiculopathy."

39(e). In his report, Dr. Georgis concluded:

At this point in time, based on her extensive review of medical records, her thorough history as well as her examination today, I feel that [Respondent Resendez] has made a remarkable recovery to her neck and back injuries to a point where she has no current symptoms. Her function is excellent and the only residual on exam is very mild loss of neck motion. She has been training in the gym running several times a week and has been wearing her duty belt and equipment up to 10 hours a day, without increased symptoms. In my opinion, based on this evaluation, I do not feel there is any specific job duty that [Respondent] Resendez is unable to perform.

[¶] ... [¶]

[I]n my opinion, this patient is not substantially incapacitated for the performance of her regular duties, and I feel that she is ready to return to the said duties as of the date she was released by her operating surgeon, October 27, 2009.

(Exhibit 10.)

40(a). Dr. Georgis testified credibly at the administrative hearing. On direct examination, he confirmed his findings from his 2010 examination of Respondent Resendez.

40(b). On cross examination, he confirmed that Respondent was capable of performing her regular job duties including subduing and arresting a suspect and wearing a gun belt. Regarding the lumbar disc protrusion shown on the 2006 MRI, Dr. Georgis opined that the MRI did not show a full herniation or instability of the spine, and that, based on his physical examination, any disc injury had healed. Dr. Georgis noted that Respondent

Resendez did not display a severe loss of neck motion and that he did not identify any specific job duty affected; he opined that her mild loss of neck motion does not prevent her from performing the normal duties of a Special Agent Supervisor. Additionally, when asked about Dr. Haronian's June 9, 2008 report indicating that Respondent Resendez should avoid altercations due to possible dislodgment of the cervical fusion, Dr. Georgis noted that he would agree, if the fusion was not healed. However, Dr. Haronian's June 2008 opinion was only six months after Respondent Resendez's second cervical fusion, and Dr. Georgis pointed out that fusions can take up to a full year to heal. He noted that, with time, the fusion becomes stronger, and once the bone graft heals, the fusion is solid. Consequently, when he saw Respondent Resendez in 2010, there was no significant risk that the fusion would break due to physical activity.

41. Respondent DOJ submitted no evidence to contradict Dr. Georgis' finding that Respondent Resendez was not substantially incapacitated for the performance of her regular duties as a Special Agent Supervisor.

42(a). Respondent Resendez testified credibly at the administrative hearing. Her demeanor was calm and professional, and her responses were cooperative and candid.

42(b). When she received her reinstatement letter from CalPERS in February 2010, she believed she could return to duty without conditions. However, she was not reinstated to her position as Special Agent Supervisor, since Respondent DOJ's March 2010 letter had imposed conditions on her return. She does not believe that the conditions should apply since the entity that retired her, CalPERS, did not indicate in its reinstatement letter that there were any conditions to her reinstatement.

42(c). Respondent Resendez has not seen Dr. Georgis or any other CalPERS-referred physician since February 2010.

42(d). Even after seeing Dr. Georgis, Respondent Resendez wore her gun belt every day for a full week and was able to sit and walk and run with it. She believes she is still able to wear the gun belt as part of her regular duties.

42(e). When she applied for reinstatement, she believed that she was capable of performing the essential duties of a Special Agent Supervisor. She believes that she is still capable of returning to her duties as a Special Agent Supervisor and wishes to return to work.

43. Assistant Director Lopes confirmed that, if Respondent Resendez complied with the conditions set forth in the conditional offer, DOJ would re-employ her. However, he stressed that DOJ must comply with POST standards. These include completing an updated background investigation, a medical evaluation and psychological screening, all derived from the POST administrative manual.

44. Respondent DOJ submitted no evidence to establish that Respondent Resendez's mental or emotional status rendered her substantially incapacitated for performance of her regular duties as Special Agent Supervisor.

45. The totality of the evidence established that Respondent Resendez is no longer incapacitated for performance of the usual job duties of a Special Agent Supervisor. (See also Legal Conclusions below.)

LEGAL CONCLUSIONS

1(a). CalPERS has established that Respondent Resendez is no longer incapacitated for performance of her duties as a Special Agent Supervisor, as set forth in Factual Findings 2 through 45, and Legal Conclusions 2 through 9.

1(b). Respondent DOJ, which appealed CalPERS' determination, has not established that CalPERS determination was incorrect and that Respondent Resendez is still incapacitated for performance of her duties as a Special Agent Supervisor, as set forth in Factual Findings 2 through 45, and Legal Conclusions 2 through 9.

2(a). Respondent DOJ argued that CalPERS bore the burden of proof in this matter and that this point was conceded by CalPERS counsel on the first day of hearing. According to the transcript of the hearing, CalPERS counsel stated:

[Both Respondent Resendez and Respondent DOJ] were given the right to exercise an appeal, challenging that determination [that reinstatement was warranted]. And [DOJ] did exercise their right to challenge the determination. But it would be my position, Your Honor, that the challenge to the appeal is limited to the question of whether the CalPERS determination is, or is not, supported by competent medical evidence. And I understand that, representing CalPERS, that I would have the burden of proof in this matter. That I would go forward with my evidence that supports the determination made to reinstate [Respondent] Resendez. But, likewise, I would anticipate the [DOJ], who exercised their right to appeal, that their evidence would be focused on competent medical evidence challenging the determination made by CalPERS. (Transcript of March 22, 2012 hearing, p. 18, lines 2 through 19.)

2(b). According to the Administrative Procedure Act (APA) (Gov. Code, §§ 11340 et seq.), the burden of proof flows from the type of process initiated. If CalPERS initiates the process to take away a person's right (e.g. involuntarily discontinuing disability retirement), an Accusation is filed, and CalPERS has the burden of proving that the person is no longer disabled. Where CalPERS grants or denies a benefit to a member/applicant and either the member/applicant or another respondent appeals CalPERS' decision, the proceeding is initiated by a Statement of Issues, and the appealing respondent has the burden of proof that

the determination was incorrect. (See also, Evid. Code, § 500.) Nevertheless, as was noted by CalPERS counsel, CalPERS does have the burden of producing the evidence to support its determination that Respondent Resendez is no longer incapacitated for performance of her duties as a Special Agent Supervisor. Thereafter, the appealing party, Respondent DOJ, bore the burden of proof to establish that CalPERS' determination was incorrect and that Respondent Resendez is still incapacitated for performance of her duties as a Special Agent Supervisor. CalPERS met its burden; Respondent DOJ did not.

3. The Public Employees' Retirement Law (Retirement Law) governs disability retirement and reinstatements and grants sole jurisdiction to CalPERS to make such determinations. (See Gov. Code, §§ 20026, 20125, 21154, 21156, 21190, 21192 and 21193.)

4. Government Code Section 21192 provides:

The [CalPERS] board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement. (Emphasis added.)

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5. Government Code section 20026, states, in pertinent part:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

6. “Incapacitated for the performance of duty,” means the “substantial inability of the applicant to perform [her] usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) The increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d 854, 862 - 863.)

7(a). Respondent DOJ argued: (1) that the peace officer standards of Government Code section 1031 are part of Respondent Resendez’s job description, and (2) that CalPERS’s determination of whether reinstatement is warranted must include an assessment of all of the requirements of Section 1031, including that Respondent Resendez “(d) Be of good moral character, as determined by a thorough background investigation . . . [and] (f) Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer.” (Gov. Code, § 1031.) Respondent DOJ’s first argument is correct, and the second is not.

7(b). The requirements of Government Code section 1031 are not listed under the “essential functions of a peace officer within the [DOJ]” in Respondent Resendez’s Essential Duties Statement. However, Government Code section 1031, subdivision (f), is cited in that document, and its requirement that “peace officers shall meet all of the following minimum standards . . . [including] to be free from any physical, emotional, or mental condition which might adversely affect the exercise of the powers of a peace officer” is therefore part of Respondent Resendez’s job description. Moreover, the standards set forth in Government Code section 1031 “are incorporated by law into every peace officer’s job description” and thus into Respondent Resendez’s job description. (*Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1059.)

7(c). CalPERS and Respondent Resendez argue that Government Code section 1031 is not applicable in this case and that Precedential Decision, *In re Starnes*, No. 99-03, OAH No. 199906053, controls. *In re Starnes* was decided prior to *Sager*, and does not take into account the holding in that case that the provisions of Section 1031 are incorporated into every peace officer’s job description. Nevertheless, this does not invalidate the *Starnes* decision, which found that “in considering whether respondent Starnes continues to be disabled, the administrative law judge must apply the Retirement Law and the case law construing it, not Government Code section 1031(f).” The reinstatement analyses in *Starnes*

and this case are distinguishable from the determination of unfitness for duty in the *Sager* case.

7(d). In *Sager*, the employer, County of Yuba, found a peace officer unfit to perform her duties due to her mental condition, and therefore compelled her retirement. The findings of mental unfitness were based on observations by two of Sager's supervisors and the opinion of a mental health expert who found job-relevant psychopathology and determined that "[p]ursuant to the POST standards and Government Code section 1031, subdivision (f), [Sager] has emotional and mental conditions which adversely affect her exercise of peace officer powers and incapacitate her from performing her usual and customary duties as Deputy Sheriff." Among other things, Sager disagreed with the application of POST standards and appealed. The Court of Appeal held that Section 1031 applied as a matter of law to Sager's fitness and were incorporated into her job description, and her ability to comply with them formed an important part of her usual duties. The Court noted that peace officers must certify compliance with Section 1031 standards "'both as a matter of continuing education and after a break in active status.'" [citing *Pitts v. City of Sacramento* (2006) 138 Cal.App.4th 853]" Since Section 1031 standards must be maintained throughout a peace officer's career, her employer was allowed to determine if she continued to meet the mental fitness requirement.

7(e). While Section 1031 may be incorporated into a peace officer's job description, and while employers of peace officers may be required to verify continued compliance with Government Code section 1031 and regulations dealing with Peace Officer Standards and Training (POST), there is no authority which would require CalPERS to apply Section 1031 in all reinstatement cases or to verify that applicants for reinstatement to a peace officer position meet all of the POST standards. Additionally, while employers may impose conditions on a peace officer's return to active status (*Pitts v. City of Sacramento* (2006) 138 Cal.App.4th 853), this does not require CalPERS to implement any of those employment conditions in order to effect reinstatement. In *Pitts* (cited by Respondent DOJ to support its argument that it should be afforded an opportunity to inquire about a former employee's mental, physical and moral fitness before re-employment), the Court held that a peace officer who was found ineligible for disability retirement could not demand unconditional reinstatement to active status, but must comply with conditions the city imposed to make their discretionary evaluation of her fitness for duty, including standards under Section 1031. The Court noted, "[D]efendants could impose any condition on [Pitts'] return to active status to the end of making their discretionary evaluation of her fitness for duty, so long as these did not attempt to re-determine the binding ruling of the hearing officer that plaintiff's shoulder injury was not disabling." (*Pitts, supra*, at 856-857.) Consequently, any conditions in Respondent DOJ's offer of employment to allow it to evaluate Respondent Resendez's fitness for duty do not factor into CalPERS's determination of whether Respondent Resendez's neck and back injuries are still disabling. (See also *Phillips v. County of Fresno* (1990) 225 Cal.App.3d 1240, 1256 -1257 (Court recognized the difference between reinstatement to paid status after Retirement Board's denial of disability retirement and resumption of active status following the employer's assessment of whether the employee met Section 1031 standards).)

7(f). Additionally, although section 1031 (f) was specifically incorporated into Respondent Resendez's job description, its provisions are not at issue in this case. Unlike *Sager*, this case does not involve an employment issue where mental fitness has been called into question, but rather a return from temporary separation by disability retirement,² where CalPERS has found, pursuant to Government Code section 21192, that Respondent Resendez's prior physical disability (neck and back pain) no longer renders her substantially incapacitated for her usual and customary duties. While Respondent Resendez's compliance with POST standards was likely required for her employment as a Special Agent, and while Respondent DOJ may seek continued compliance in order for her to return to active status, her compliance with POST standards, and specifically her mental condition, was not at issue when she retired. Thus, when determining whether to reinstate her, CalPERS is required only to ascertain whether her claimed disability still exists (See Gov. Code, § 21192's requirement that the CalPERS Board determine whether the applicant for reinstatement is "still incapacitated.").

8. In this case, Respondent Resendez was previously substantially incapacitated for her usual duties as a result of a neurological (cervical spine) condition. However, the evidence established that Respondent Resendez's medical condition no longer rendered her substantially unable to perform her usual duties as a Special Agent Supervisor. Respondent DOJ did not produce any evidence to contradict this fact. Consequently, the evidence established that Respondent is no longer incapacitated for the performance of her usual duties as a Special Agent Supervisor.

9(a). CalPERS counsel maintained that the issue in this appeal is limited to whether, based on competent medical opinion, Respondent Resendez is substantially incapacitated for her usual duties. Indeed, Respondent DOJ's appeal letter indicated, "DOJ is challenging CalPERS' determination that [Respondent] Resendez is not incapacitated for duty in the position of Special Agent Supervisor." However, Respondent DOJ has pointed out that the determination to reinstate Respondent is a two-step process under Government Code section 21193.

9(b). Government Code section 21193 provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

² Disability retirement is considered a temporary separation from state service. (Cal. Code Regs., tit. 2, § 446.)

If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position.

If the recipient was an employee of a contracting agency other than a local safety member, with the exception of a school safety member, the board shall notify it that his or her disability has terminated and that he or she is eligible for reinstatement to duty. The fact that he or she was retired for disability does not prejudice any right to reinstatement to duty which he or she may claim.

9(c). Pursuant to Section 21193, in order for reinstatement to take place: (1) there must be a determination under Section 21192 that a person is not still incapacitated for duty and (2) the person's employer must offer to reinstate her. If these both occur, the person's "disability retirement allowance shall be canceled immediately."

9(d). Respondent DOJ correctly noted that CalPERS cannot compel a former employing agency to return a retiree to duty.³ Section 21193 does not compel an employer to make an offer or reemployment, but rather gives the employer the discretion to do so. If reinstatement was automatic upon determination that a person is not incapacitated for duty, the language requiring the employer's offer would be superfluous.

9(e). CalPERS's brief is silent on this issue. However, its February 25, 2010 letter to Respondent Resendez stated, "[CalPERS] can only reinstate an annuitant to active membership in the Retirement System; we cannot order your return to the job. . . . To complete the reinstatement action, [Respondent DOJ] must also submit a membership document verifying your entry into compensated employment." The letter also noted that Respondent Resendez has mandatory reinstatement rights when "(1) CalPERS has determined that she is no longer substantially incapacitated and (2) the employer has offered the job. Your disability retirement will be stopped on the effective date of your job offer." (Exhibit 4.)

³ Respondent DOJ acknowledged that the issue of re-employment (which CalPERS cannot order) is a matter for the State Personnel Board

9(f). Respondent Resendez argued that, once a determination is made (under Government Code section 21192) that a state employee is not incapacitated for duty, she must be mandatorily reinstated. However, this argument disregards the specific language of Section 21193. Additionally, unlike *Pitts* and *Phillips*, this case does not involve automatic reinstatement after denial of disability retirement. Consequently, Section 21193 controls, and one of the requirements for reinstatement is that the employer offer to reinstate the employee. Respondent Resendez also argued that allowing agencies to condition reinstatements would “create a category of retirees who have been found to no longer be incapacitated within the meaning of Government Code sections 21192 and 21193, but who remain on the disability roles [*sic*] because the reinstated department refuses to reinstate them.” (Exhibit R, p. 5, lines 21 through 24.) It does appear that, in giving employers the discretion to offer re-employment, Section 21193 may allow situations where non-disabled employees continue to receive disability retirement payments. However, this potential statutory lapse cannot be remedied in this proceeding.

9(g). Respondent DOJ argued that Section 21193 prevents Respondent Resendez’s reinstatement because Respondent DOJ’s offer of employment was only conditional, and thus the second step of section 21193 has not been met. However, Section 21193 does not specify that the offer to reinstate be “unconditional.” Therefore, DOJ’s “conditional” offer constitutes an “offer to reinstate” within the meaning of section 21193.

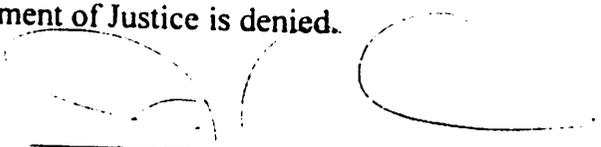
9(h). This finding is not a determination regarding whether Respondent’s employer may or may not impose conditions (such as satisfaction of POST requirements) on their reinstated employees. That is an employment issue which is not before this tribunal.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The appeal of Respondent Department of Justice is denied.

DATED: September 25, 2012



JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings