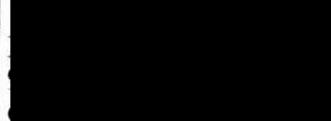


ATTACHMENT C
RESPONDENT(S) ARGUMENT

1 CHRISTOPHER J WARNER #78499



2 Respondent

3 CalPERS, aka JRSII

4 vs.

5 Christopher J Warner

6 Respondent

Received

NOV - 1 2012

CalPERS Board Unit

Case No. : 2011 0999

OAH NO. 2012020693

RESPONDENTS ARGUMENT

7
8
9 **OVERVIEW**

10 On October 22, 2010, Respondents exemplary judicial career came to an untimely end.
11 Following statutory procedures mandated by JRSII, the Commission on Judicial Performance and the
12 Chief Justice confirmed that Respondent could no longer perform the functions of a Superior Court Judge
13 due to medical disability. CalPERS acknowledged this by letter on October 28, 2010. On November 05,
14 2010 CalPERS sent Respondent his Annual Statement, which confirmed that CalPERS held (in trust)
15 over \$540,000.00 in monetary credits earned. CalPERS also confirmed that Respondent was entitled to
16 payment of those contributions based upon having left office with more than 5 years' service.
17 Subsequently CalPERS refused to give Respondent his money. The reasons cited by CalPERS were
18 wrong and unsupportable, as is evident by complete absence in the proposed decision. Respondent
19 suffers financially because CalPERS has failed and refused to perform its' fiduciary responsibilities, and
20 continues to seek a way to escape payment. It is not CalPERS money. CalPERS is a trustee with a
21 Constitutional mandate to place Respondents interests first.

22 **CALPERS IS A TRUSTEE OF RESPONDENTS FUNDS**

23 Cal Const. Art XVI § 17 provides as follows:

24 "(b) The members of the retirement board of a public pension or
25 retirement system shall discharge their duties with respect to the
26 system solely in the interest of, and for the exclusive purposes of
27 providing benefits to, participants and their beneficiaries,
28 minimizing employer contributions thereto, and defraying reasonable
expenses of administering the system. A retirement board's duty to
its participants and their beneficiaries shall take precedence over
any other duty."

1 **On October 21, 2010 Respondent (and his spouse) unequivocally owned over**
2 **\$540,000.00 (monetary credits) being held in trust by the state treasurer. Adoption of**
3 **the proposed decision will establish that on October 22, 2010 because a public body**
4 **and the Chief Justice declared Respondent permanently disabled, unable to perform**
5 **the duties of his office, all of Respondents credits (including the interests of the**
6 **marital community) simply vanished.¹ The law abhors such a forfeiture.**

7 With respect, the proposed decision of the Administrative Law Judge is fatally flawed, and if
8 adopted, will cause a forfeiture, will deprive Respondent of his earnings (property), will render
9 provisions of the JRSII law nugatory and will fly in the face of the plain provisions of these statutes.
10 CalPERS will also breach its fiduciary responsibilities to Respondent as a trustee of his funds.

11 Respondent is involuntarily medically disabled. He is not a service retiree and his circumstance
12 is substantially different from that of a retiree in the real world and under JRSII. This critical distinction
13 is contemplated by the statutory scheme, but not by the proposed decision.

14 **RESPONDENTS PROPERTY INTEREST UNDER THE STATUTES IS**
15 **CLEAR**

16 1. **Articles 2, 3 and 5 of the JRSII law address service retirement** and the consequences
17 thereof, both as to the retiree and his/her spouse and/or domestic partner (with respect to community
18 property implications). There is *no* reference to or incorporation of Article 4 (Disability) in articles 2, 3
19 or 5. Early departure from the bench is covered specifically in Article 2 at § 75521, plainly, simply and
20 with clarity. This structure recognizes the difference between retirement and disability. If there were a
21 forfeiture provision, which the law requires when someone's property is taken, it would be here. No
22 such provision exists. To the contrary, §75521 specifically confirms Respondents entitlement to
23 monetary credits upon departure. *The proposed decision ignores this and imposes a forfeiture.*

24 2. **Article 4 addresses disability separately and distinctly**. There is no *incorporation* of any
25 provision of Article 2, 3 or 5. There is, however, a *single reference* to (G.C. § 75522(a)).

26
27 _____
28 ¹ Respondent was required to report his disability or be subject to disciplinary proceedings for dereliction. A "Hobbs choice", indeed. No "election" is required or allowed.

1 That provision is, by its' clear language, included solely for purposes of calculating the amount of
2 payment to be received due to disability. The proposed decision seizes upon this single reference and
3 goes off on an impermissible odyssey², articulating and engrafting other statutes not referenced in or
4 relevant to the disability provisions of Article 4. Those statutes (§ 75522 (c) and (f)) have absolutely
5 nothing to do with a disabled judge. They do not purport to. This unwarranted expansion of Article 4
6 (disability) violates black letter law regarding statutory construction.

7 **3. The proposed decision recites, relies and depends upon the word "shall" in holding, that**
8 **payment of the disability benefit is mandatory**³. As stated, this applies to Respondent.

9 **4. The language of §75521 (b) provides that a judge who leaves office**⁴ **"shall" be paid his**
10 **monetary credits**. This also unquestionably applies to Respondent. This "shall" provision applies to
11 Respondent every bit as much as the "shall" wording with respect to disability relied upon in the
12 proposed decision. There is simply no language anywhere in the entirety of JRSII which exempts or
13 disqualifies a disabled judge from the application of §75521(b), which mandates return of his credits.

14 **5. No language exists in §75521 (or anywhere else) which disqualifies the disabled.** The
15 funds in issue were uncontrovertibly respondents. The proposed decision, if adopted, accomplishes a
16 forfeiture of those funds without statutory authorization. CalPERS denied Respondents demand for
17 return of his funds for reasons the proposed decision totally ignores and disregards. One such reason was
18 forfeiture. This was clearly wrong, and was disregarded by the ALJ in the proposed decision. So too did
19 the ALJ reject the CalPERS assertion of an "election" or a disability benefit "in lieu" of return of
20 property.

21 The proposed decision, however, seeks the same outcome from a new and different approach, but does
22 not meet muster because it does not and cannot articulate any statutory language which supports the
23 result. Disability and retirement are "apples and oranges". The Articles of JRSII law related to each are
24 independent, not interdependent. . The "inescapable conclusion" arrived at by the ALJ is simply not
25 sustainable by any statutory language, particularly when the ramifications are examined, *infra*.

26 ² Respondent has extensively briefed rules of statutory interpretation and construction. The Trial Brief and Closing Brief are
27 incorporated by reference for completeness of the record.

28 ³ Proposed decision pg. 4.

⁴ with 5 or more years of service, as Respondent

1 duty) to explain the whereabouts of what for sure was Respondents property. CalPERS (JRSII) sent
2 Respondent his Annual Statement *after* confirming knowledge of his disability and his entitlement to
3 disability benefits. CalPERS has also issued 1099 statements to Respondent confirming that retirement
4 funds (respondents credits) did not fund the disability payments. Nothing in Article 4 allows CalPERS
5 to fund statutorily mandated disability coverage with Respondents savings. The disability coverage was
6 earned by virtue of the requisite 5 years of employment. That too is part of a cohesive statutory scheme.
7 The proposed decision relies on an “inescapable conclusion” which was unknown to CalPERS. That is
8 oxymoronic, at least. It is also unsupportable, given the harsh and unstated consequence it inflicts on a
9 disabled beneficiary. Loss of 35% salary came with the disability. Forfeiture of savings for retirement
10 (the credits) did not and is unconscionable. This is what the proposed decision accomplishes, without
11 statutory authorization.

12 **The following scenarios demonstrate that the proposed decision is fatally flawed:**

- 13
- 14 a) Assume a judge with the same statistical attributes as Respondent⁹ becomes disabled with a
15 terminal illness, death 6 months later, with no spouse. That judge got 65% of ½ of 1 years’
16 salary. About \$60,000. Where is the rest of his money? There is no provision for protection
17 of his earned property interests under the analysis of the proposed decision.
- 18 b) Assume a judge with the same statistical attributes as Respondent becomes disabled. Assume
19 that after one year of disability the judge recovers and returns to active employment on the
20 bench. What became of his contributions? Once again, the money is gone, and there is no
21 provision anywhere that garners relief or restoration of credits.
- 22 c) Assume the same judge, but with a spouse. Assume a post-disability dissolution. Where is
23 the provision which protects the community property interest of the divorced spouse in the
24 dissolution proceedings?
- 25 d) Assume the same judge has been convicted of a felony. He will receive a return!¹⁰.

26 ⁹ 14 years’ service with attendant contributions, age 50 at employment in 1996, age 64 at disability, over \$540,000 in credits.

27 ¹⁰ He is “penalized” because he only gets contributions, not credits §75526:”A judge who pleads guilty or no contest or is
28 found guilty of a crime ...that is punishable as a felony under California or federal law ... shall not receive any benefits from
the system, except that the amount of his or her contributions to the system shall be paid to him or her by the system.”

1 The foregoing are but a few of the very real situations that exist or may exist in this and other
2 cases. If Respondent dies, recovers or divorces, what happened to the money? The inequity of the
3 situation created by the proposed decision is patent, and flies in the face of the fiduciary relationship
4 which exists between Respondent as beneficiary and CalPERS as trustee. The fact that CalPERS is a
5 multi-billion dollar enterprise does not ameliorate its' responsibilities to those who are mandated to
6 entrust their earnings for safekeeping. By law, all doubts are to be resolved in favor of the pensioner¹¹.
7 The purpose of the statute (§75521) could not be clearer: to preserve Respondents earnings and distribute
8 them to Respondent in a manner dependent only upon length of service when he departs, unless he
9 qualifies for a service retirement (or is a felon). No exception is stated or implied.

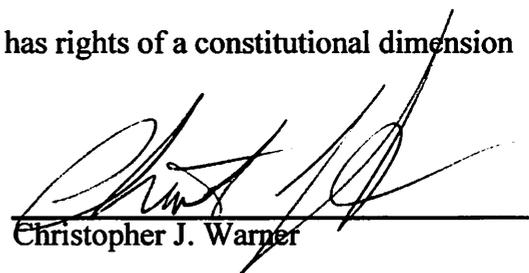
10 CONCLUSION

11 The progress of this matter discloses a mindset that treats the interests of CalPERS as paramount,
12 as if the funds in issue were its' property, rather than the earnings of Respondent, and with a premise that
13 disability and payment of credits are mutually exclusive. Why is that? It certainly is not found anywhere
14 in the law, regardless of how far people attempt to go in the face of both clear statutory language and law
15 regarding how statutes are to be construed. Opinions are constrained by rules of law.

16 Respondent requests that the board designate its decision as precedent and provide a statement of
17 decision addressing the points raised herein, as Respondent has rights of a constitutional dimension
18 which are worthy of redress.

19 October 30, 2012

Respectfully,


Christopher J. Warner

22
23 § 75562A judge who applies for disability retirement and against whom there is pending a criminal charge of the commission
24 of, or who has been convicted of, a felony under California or federal law, allegedly committed or committed while holding
judicial office, prior to the approval of the application:

25 (a) Shall be presumed not to be disabled and this presumption is a presumption affecting the burden of proof.

26 (b) Shall, in a disability retirement proceeding before the commission, be subject to the standard of proof of clear and
convincing evidence sufficient to sustain a claim to a reasonable certainty.

27 (c) Shall support the application with written statements described in subdivision(c) of Section 75560.1 from each of at least
two physicians or two psychiatrists.

28 ¹¹ Any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, but such
construction must be consistent with the clear language and purpose of the statute. Ventura County Deputy Sheriffs Assn. v.
Board of Retirement of Ventura County Employees Retirement Assn. (1997) 16 Cal.4th 483