ATTACHMENT E

THE PROPOSED DECISION

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

In the Matter of the Statement of Issues (Application For Industrial Disability Retirement) Of: DEBRA J. PEREZ-HASZ, Respondent, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent.	Case No. 9326 OAH No. 2012020471

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on August 9, 2012.

Jeanlaurie Ainsworth, Senior Staff Counsel, represented petitioner Mary Lynn Fisher, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Peter O. Slater, Attorney at Law, represented respondent Debra J. Perez-Hasz who was present at the administrative hearing.

Respondent California Department of Corrections and Rehabilitation was not represented.[1]

Evidence was received as well as closing oral arguments. The matter was submitted on August 9, 2012.

[1] Unless otherwise indicated, all references in the body of the Proposed Decision to "respondent" refer to respondent Perez-Hasz.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED September 7 2012
Roland Hynes

ISSUE PRESENTED

Whether respondent Debra J. Perez-Hasz was substantially incapacitated from the performance of her usual and customary duties as a Carpenter II with respondent California Department of Corrections and Rehabilitation at the time she applied for an industrial disability retirement?

FACTUAL FINDINGS

1. Petitioner Mary Lynn Fisher filed the Statement of Issues solely in her official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent Deborah J Perez-Hasz was employed by respondent California Department of Corrections and Rehabilitation. At the time respondent filed her application for retirement, she was employed as a Carpenter II. By virtue of her employment, respondent is a state safety member of CalPERS subject to government code section 21151.

3. On or about October 2, 2007, respondent signed an application for service retirement. Respondent retired for service effective December 31, 2007, and has been receiving her retirement allowance from that date. On or about February 22, 2008, respondent signed an application for industrial disability retirement. In filing the application, disability was claimed on the basis of an orthopedic (left carpal tunnel, left forearm, neck) condition.

4. CalPERS obtained medical reports concerning respondent's orthopedic condition from competent medical professionals. After review of the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of the usual and customary duties of a Carpenter II at the time the application for industrial disability retirement was filed.

5. Respondent was notified of CalPERS' determination and was advised of her appeal rights by letter dated March 4, 2009.

6. Respondent filed a timely appeal by letter dated April 3, 2009, and requested a hearing.

Usual and Customary Duties for a Carpenter II Employed by Respondent California Department of Corrections and Rehabilitation at California State Prison, Solano

7. A job description for the position of Carpenter II and a form completed by respondent detailing the physical requirements of the position were received in evidence. However, there were conflicts in the testimony provided by respondent and her past immediate supervisor regarding the actual usual and customary duties of a Carpenter II during respondent's tenure at California State Prison, Solano. The conflicts centered on the

extent to which respondent was required to engage in manual labor, and more specifically, the extent to which she was required to perform heavy to very heavy lifting. CalPERS' medical expert concluded that respondent was not incapacitated from her usual and customary duties as reflected in the job description and her description of her duties to him during his evaluation of her on November 19, 2008. Dr. Henrichsen recited in his report that respondent wrote in the job physical requirements document that he reviewed that she was occasionally required to lift from 75 to 100 pounds and frequently up to 75 pounds. At hearing, Dr. Henrichsen expressed his concern about respondent's ability to perform very heavy lifting on a repetitive basis based on her physical stature, irrespective of any chronic medical condition. The reports submitted by respondent prepared by Dr. Barber, a physician evaluating her worker's compensation claim, assumed that respondent was required to perform heavy to very heavy lifting on a repetitive basis and found incapacity based on that assumption. Although, as explained below, these reports were received as hearsay, Dr. Henrichsen commented upon them as well. Therefore, it is useful to resolve the conflict in the testimony between respondent and her former supervisor relating to respondent's actual usual and customary job duties.

8. Respondent worked at California State Prison, Solano, for approximately 15 years. Her last day of work was in or about July of 2007. In her testimony, respondent described some of the equipment that she used including a portable jackhammer, skil saw, pick, shovels, and various kinds of screwdrivers. She described the work she performed such as pouring and finishing concrete, raking, roof repairs on two-story buildings, construction of basketball and handball courts, and erosion work near the fences surrounding the prison. In addition to the equipment described above, respondent drove heavy equipment including tractors, backhoes, and dump trucks. Respondent recited some of the typical projects she was assigned as a Carpenter II. Parts of the institution, such as the kitchen, had ceramic tile floors. Respondent was required to remove and replace broken floor tiles. The tiles were 8" x 8" by 1/4'' and came in boxes of 25. Respondent said she used a portable jackhammer to remove the old tiles, shoveled the old tiles and related material into a wheelbarrow, and transported the material to a dumpster. Twenty-six buildings within the prison required repairs of the asphalt roofs. Some of this work required lifting 5 gallon buckets of latex paint two stories for use on the roofs. As many as 10 buckets, weighing 50 pounds each, were hauled by rope up to each of the roofs. Respondent testified that she performed the lifting herself. When concrete work was required, respondent built forms which required holding the backing board using a 5 pound sledgehammer with one foot while hammering portions of the forms in place. If wire or rebar was installed in the concrete, respondent hauled it to the jobsite and installed it. Respondent used a square shovel to spread concrete in the forms she built. Concrete was often mixed in a portable concrete mixer. Respondent testified that she was required to lift 90 to 100 pound bags of concrete by herself. Respondent's claimed orthopedic injuries occurred while she was working to protect the fences around the prison from erosion damage. The work entailed digging ditches, tamping down the dirt with a gas-powered heavy tamping device, and placing three-quarter inch gravel in the ditches. Respondent drove a tractor to move the three-quarter inch gravel to piles near the ditches, and hand dragged the gravel into the ditches using a shovel. Respondent performed the erosion control work over two to three months. Because of security concerns, no inmate

assistance was authorized and all of the tools and materials had to be taken to the jobsite each day and removed from the jobsite after the completion of a day's work. Respondent asserted that this work involved repetitive heavy lifting for six to seven hours each day that caused pain in her left wrist and forearm beginning in or about August of 2006.

9. Respondent described a typical day of work during the time that she was employed as a Carpenter II at California State Prison, Solano. She worked an eight-hour shift from 7:30 AM until 3:30 PM. As she put it, she "inhaled" her lunch during her lunch break on the job sites. Between 7:30 AM and 8:00 AM, she received her daily assignments and began to load the required tools and materials onto a golf cart-like truck. For smaller jobs, she placed needed tools in a tool belt, and for larger jobs she loaded the tools into a five-gallon bucket. Materials such as 2" x 4" or 2" x 6" lumber were loaded onto the vehicle's overhead rack. Respondent said that loading the tools and materials was her sole responsibility, and she was required to leave the shop by 8:00 AM. She performed her assigned tasks work until approximately 2:30 PM., when she returned to the shop. Between 2:30 and 2:45 PM, she unloaded the tools and material and conducted the second of the required two daily inventories of tools. She recorded what she had done and filled out time sheets reflecting the work performed by inmate crews on an hourly basis. Respondent described the skills of inmates who assisted her as minimal. She said most had no experience in the trades and they showed little interest in working except to earn their 14 cents per hour to spend in the prison store. Respondent testified that she performed 85 percent of the demolition, concrete and tile work. The tiles came in a box of 25 weighing approximately 30 pounds. The bags of thin set used to set the ceramic tiles weighed between 20 and 30 pounds. The tile grout weighed between 20 and 25 pounds. When tiles were removed and replaced, respondent used a tile saw which was too heavy for one person to carry.

10. Michael Junker is employed by the California Department of Corrections and Rehabilitation at California State Prison, Solano as a Chief Engineer I. Mr. Junker testified at the administrative hearing. Mr. Junker was respondent's immediate supervisor for approximately three years prior to her retirement. Mr. Junker confirmed the required tasks described by respondent, but maintained that inmate crews were available to perform virtually all of the manual labor. Mr. Junker explained that inmates participated in work training programs and were anxious following the training to use their skills to assist the prison staff, including the carpenters. The inmates were interviewed to choose the most skilled. Inmates with established skills could be used for up to three years, when they had to be rotated because of concerns about familiarity between the inmates and prison staff. Mr. Junker described the chief responsibility of a Carpenter II as supervising the inmates to ensure that the work performed by them met required standards. He said that because security was the paramount concern of all staff, carpenters were supposed to maintain a "stand back" posture to constantly observe inmates. Mr. Junker testified that the portable jackhammers weighed between 75 and 80 pounds, but were usually operated by inmates. He said that when the five-gallon buckets of latex paint had to be lifted to rooftops, the inmates lifted the buckets under the supervision of carpenters. Mr. Junker acknowledged that the erosion control work adjacent to the prison fences had to be done without the assistance of

inmates for security reasons. He testified, however, that there was always other staff available to help respondent perform the erosion control work that she described. He confirmed that the gas-powered tamping device was quite heavy and required more than one person to move it. Once moved, the device could be moved along the ditch by one person. Mr. Junker described the work performed on the basketball and handball courts as removing the old asphalt courts, setting concrete forms and installing new concrete courts. Mr. Junker said most of the manual labor was performed by inmates. When large concrete jobs were undertaken in the prison, private contractors were hired to supply ready-mixed concrete for delivery to the jobsite. Mr. Junker explained that there were several inmates assigned to work in the shop and they were available to help respondent load her tools and materials for assigned work, as were other staff members working in the shop.

11. Mr. Junker was the more credible witness regarding the performance of heavy lifting and other arduous physical labor required of Carpenter IIs when respondent worked for him. His responses to questions posed by counsel for both sides appeared objective and forthright. Whereas respondent characterized inmate crews as unreliable, unskilled and unmotivated, Mr. Junker not only debunked respondent's description, he offered a detailed explanation for the skills they possessed and their desire to assist the carpenters and other maintenance staff. He similarly provided a rationale for the need for carpenters to observe inmate crews, rather than becoming distracted by actually performed the work that inmates were capable of doing. In summary, Mr. Junker's version of the usual and customary duties, where it differed from respondent's, is found to be the more credible version and this matter is decided based on consideration of that version, along with the medical opinions of Dr. Hendrichsen recited below. Respondent's exaggeration of the arduousness of her Carpenter II position was consistent with the embellishment of symptoms reported by Dr. Henrichsen and Dr. Smith-Hoefer, the physician that performed a left carpal tunnel release surgery on respondent.

Competent Medical Opinion

12. The only "competent" medical opinion received in evidence comprised the testimony of Robert K Hendrichsen, M. D., a Board-certified orthopedic surgeon.[2] Dr. Hendrichsen evaluated respondent for CalPERS on November 19, 2008. Respondent complained of aching pain in her left wrist area and aching and stabbing pain in her left elbow and forearm. Respondent had carpal tunnel release surgery performed on her right wrist in 2005. Later, or about March 9, 2007, the same type of surgery was performed for symptoms related to carpal tunnel syndrome in respondent's left wrist. Respondent told Dr.

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[2] As noted below in the Legal Conclusions, applicable law requires that the incapacity for performance of duty be established "on the basis of competent medical opinion." Respondent called no medical experts to testify and reports of treating and evaluating physicians offered by respondent were received only as "administrative hearsay," pursuant to Government Code section 11513. That section allows the receipt of hearsay to supplement and explain non-hearsay evidence, but such evidence cannot, standing alone and over timely objection, support a finding. Ms. Ainsworth raised a timely objection.

Henrichsen that in her opinion the second surgery was unsuccessful and the condition of her left wrist was worse following surgery. Dr. Henrichsen's physical examination of respondent revealed good mobility and normal reflexes in both of respondent's wrists and no evidence of atrophy. Dr. Henrichsen could find no evidence of nerve entrapment in respondent's left wrist or forearm by examination. He found no indication of atrophy above or below respondent's elbow. Dr. Henrichsen concluded that respondent's carpal tunnel issues in both wrists had been resolved. Dr. Henrichsen acknowledged that respondent complained of pain in her left forearm that was consistent with possible radial tunnel syndrome, entrapment of the nerve which runs from the neck to the back of the hand. The muscle below the elbow entraps the nerve resulting in radial tunnel syndrome. However, Dr. Henrichsen, while suspicious, could find no confirming evidence by examination of radial tunnel syndrome. There are electrical studies which can be performed that may rule out this condition, but the electrical studies performed on respondent were only performed on her wrists. Based on his examination, Dr. Henrichsen saw no reason for surgical release of radial tunnel syndrome. Dr. Henrichsen opined that even though respondent complained of pain and tenderness in her left forearm, this condition would not incapacitate her from the performance of her usual and customary duties as a carpenter II. Dr. Henrichsen found no basis for imposing weight lifting limitations on respondent based on concerns relating to her left wrist and or forearm. He concluded that respondent was not incapacitated from her usual and customary duties as a Carpenter II. He noted that, "as I look at the entire picture, I find embellishment of the symptoms..."

13. Dr. Henrichsen commented on portions of other medical reports received in evidence as "administrative hearsay." He had considered these reports in the preparation of his report to CalPERS. The other reports were generally related to respondent's worker's compensation claim, based in part on the same injuries that she claimed as the basis for her industrial disability retirement eligibility. Dr. Smith-Hoefer, an orthopedic surgeon, performed the surgical release of the left carpal tunnel. Dr. Smith-Hoefer reported on August 11, 2007, that respondent felt that the surgery had not made her carpal tunnel syndrome any better. Respondent related to Dr. Smith-Hoefer that she was unable to use a drill and did not feel that she could lift normally. Dr. Smith-Hofer's physical examination of respondent demonstrated full range of motion of the left wrist and no obvious swelling in the left palm. Grip strength was measured and there was a significant reduction in respondent's grip strength with her left hand, but Dr. Smith-Hoefer recorded that respondent's "effort is questionable." Dr. Smith-Hoefer recommended a qualified medical evaluator examination (QME) to "sort out the objective and subjective complaints." Dr. Smith-Hoefer noted that respondent's subjective complaints were "significant," based on the minimal carpal tunnel findings preoperatively. Dr. Smith-Hoefer released respondent to return to work with a 15 pound lifting limit and "urgently" requested the QME evaluation. Respondent did not return to work, because the California Department of Corrections and Rehabilitation does not allow limited term light duty assignments. Dr. Smith-Hoefer saw respondent again on October 10, 2007, for another follow-up evaluation relating to the left carpal tunnel release surgery. Respondent complained of pain in her left forearm with no neurologic symptoms. Once again, Dr. Smith-Hoefer described excellent range of motion of the left wrist. Respondent had good stability with testing and again demonstrated reduced grip strength with her left

hand. Respondent told Dr. Smith-Hoefer that respondent did not feel that she could perform highly repetitive activities using her hands or any heavy lifting. Dr. Smith-Hoefer expressed in her report following the visit that it was "extremely important for the patient to have a QME evaluation performed, as at this point there appeared to be more pain concerns that can be explained by her current post op course."

14. Respondent visited an Agreed Medical Examiner (AME), orthopedic surgeon Dr. Brian Barber. In a January 9, 2008 orthopedic evaluation, Dr. Barber reported that respondent complained of some pain and numbness as well as tingling in her non-dominant left wrist and hand. She also reported pain in her left forearm and some neck pain. Respondent told Dr. Barber that her right wrist was fine after the carpal tunnel release surgery. She related that the pain in her left wrist and forearm began in the summer of 2006. Dr. Barber reviewed Dr. Smith- Hofer's reports described above. In Dr. Barber's physical examination of respondent, he noticed pain in her left forearm with firm pressure over the radial tunnel. Dr. Barber reported some reduced range of motion in the left wrist. His diagnosis was left radial tunnel syndrome. Dr. Barber issued his second report on February 28, 2008. He noted that respondent had decided not to have radial tunnel surgery. Dr. Barber next saw respondent on or about June 23, 2010. Respondent complained of ongoing pain her left forearm, wrist, hand, and fingers. Dr. Barber reported pain consistent with radial tunnel syndrome. He noted that another orthopedic surgeon had found the same syndrome and on May 30, 2008, had injected the respondent's left elbow with steroidal medication. The relief was short term, 50 percent relief. At the time of this visit, respondent was wearing a wrist splint at night for left carpal tunnel pain and numbness and she was using a soft wrist support 50 percent of daytime hours. Dr. Barber reported that he could reproduce pain with firm pressure over the left radial tunnel which also resulted in numbness and tingling that radiated down the forearm into respondent's thumb-indexed web space. Dr. Barber found no loss of grip strength in the left hand. Dr. Barber opined that respondent could not return to work based on her description of the heavy to very heavy lifting of lumber, tiles, sheet rock, and concrete bags by herself. Dr. Barber issued his last report on February 14, 2011, reiterating his findings and conclusions.

15. Dr. Henrichsen testified that Dr. Smith-Hoefer's findings corroborated his own relating to respondent's good mobility and the absence of atrophy in her left wrist. He also noted diminished grip strength in the left wrist. Dr. Henrichsen said that Dr. Barber's opinion relating to a requirement of a five- pound lifting limit for respondent was not consistent with what Dr. Henrichsen found, and Dr. Henrichsen saw no reason for any weight lifting limitations.

16. To summarize the factual findings, respondent has experienced carpal tunnel syndrome for which she had surgical releases and has essentially fully recovered. She does experience some pain and tenderness in her left forearm which may or may not be related to radial tunnel syndrome, but this condition did not incapacitate her from performing the usual and customary duties of a Carpenter II on the date that she applied for industrial disability retirement.

LEGAL CONCLUSIONS

1. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement absent a statutory provision to the contrary. (*Greatorex v. Board of Administration* (1979) 91 Cal. App.3d 57.)

2. Government Code section 20026 reads, 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....

3. Incapacity for performance of duty means the substantial inability to perform usual duties. (*Mansperger v Public Employees' Retirement System* (1970) 6 Cal. App.3d 873, 876.) In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, at page 860, the court rejected contentions that usual duties are to be decided exclusively by State Personnel Board job descriptions or a written description of typical physical demands. The proper standard is the actual demands of the job. (See also, *Thelander v. City of El Monte* (1983) 147 Cal. App.3d 736.) The ability to substantially perform the usual job duties, though painful or difficult, does not constitute permanent incapacity. (*Hosford, supra*, 77 Cal. App.3d 854, at p. 862.)

4. Respondent failed to establish that she was substantially unable to perform her usual job duties as a Carpenter II at the time that she applied for industrial disability retirement. Respondent is therefore not entitled to industrial disability retirement and her application should be denied.

ORDER

Respondent's appeal from CalPERS' determination that she was not permanently disabled or incapacitated from performance of her usual and customary duties as a Carpenter II at the time that her application for disability was filed, is denied.

Dated: September 5, 2012

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings