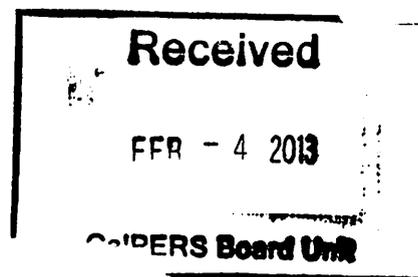


ATTACHMENT C
RESPONDENT(S) ARGUMENT

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BEFORE THE
 BOARD OF ADMINISTRATION
 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for
 Disability Retirement of:

JONI K. FORSHT,

Respondent,

and

**DEPARTMENT OF CORRECTIONS AND
 REHABILITATION (PELICAN BAY
 STATE PRISON),**

Respondent.

Case No. 8183

OAH No. 2010090246

Respondent Joni Forsht's
 Response to Proposed Decision
 And Order By
 ALJ David L. Benjamin,

Hearing Date: 10/25/12
 Board Meeting: 2/21/13

Comes now Respondent, Joni K. Forsht (hereafter, "Respondent Forsht") and hereby appeals the Decision and Order, issued by the honorable Administrative Law Judge, David L. Benjamin on December 4, 2012.

I. Denying Respondent Use of The Transcript From The Evidentiary Hearing Is A Denial of Due Process

Respondent Forsht is aggrieved by the Proposed Decision and her due process rights are violated by the Board and their representative's decision to not allow Respondent Forsht additional time to respond to the Proposed Decision. At the end of the evidentiary hearing before Administrative Law Judge David Benjamin, the judge instructed the parties that they could order a transcript of the proceedings. Respondent Forsht thereby timely contacted the court reporter, paid the \$1000 required for a copy of the transcript, and was told that due to the holidays and the fact the court reporter would be on vacation for three weeks, also, the transcript would not be available until the end of January, at the earliest, leaving Respondent Forsht almost no time to formulate a response. Respondent Forsht contacted the Board and requested additional time to formulate her response to the Proposed Decision, and was told by Board counsel, Renee Salazar, that there would be no extension of time granted, based on the statutory time limits for the Board to act on a Proposed Decision.

Respondent Forsht believes the transcript of the proceedings is essential in formulating her response to the Proposed Decision, and maintains the Proposed Decision is inconsistent with the evidence presented at the hearing, and does not rely on substantial evidence for its conclusions. Without a transcript of the hearing, Respondent Forsht cannot point to the actual testimony presented at the hearing by respondent and the witnesses, and the Board is left with a one-person summary of the proceedings.

Respondent Forsht maintains that the decision by counsel for the Board, Renee Salazar, not to allow additional time, is a violation of Respondent Forsht's due process rights, and violates Gov. Code § 11517(c)(2)(E).

Government Code § 11517 (c)(2)(E)(iv) states in pertinent part: "If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying decision for no more than 30 days and specifying reason thereof."

Case law has established that the time limits found in Section 11517 apply, and the time frames "reflect the desire, by the Legislature, for a timely hearing and resolution of administrative proceedings" [*Matus v. Board of Administration* (2009) 177 Cal. Ap. 4th 597, 607-608]. In *Matus*, CalPERS had argued that the Board had an indefinite period of time to order a transcript of the evidentiary hearing themselves. The Appeals Court found otherwise, saying the language of the statute was clear: the agency must decide whether to adopt, mitigate, modify or reject the proposed decision within 100 days of receiving it from the ALJ; if the agency opts to reject, it must issue a decision within 100 days of its rejection; if the agency orders a transcript, it must do so before that 100 days expires, and then it has 100 days from the receipt of the transcript to issue its final decision; and a final decision may be delayed if special circumstances require [*Ibid.*].

Clearly, under section 11517 and *Matus*, the Board itself has discretion to delay a decision under special circumstances, for 30 days. The Board itself is given, by statute, 100 days to reach a decision AFTER receiving a transcript. It does not follow, then, that the Board can deny a respondent, aggrieved by a Proposed Decision, additional time, when the Board itself claiming special circumstances, can grant itself an additional 30 days to make a decision, especially when the Board is given 100 additional days AFTER receiving the transcript to make their decision. Due process then requires that a respondent, aggrieved by the Proposed Decision, be allowed to get a copy of the transcript of the hearing so that she might make an informed and detailed response to the proposed decision.

The *Matus* court said: "This statutory scheme, when read as a whole, requires an agency to decide a case within 100 days of rejecting an ALJ's proposed decision. And this statutory scheme, when read as a whole, is mandatory: if the agency fails to act as outlined in subparagraph (E) of section 11517, subdivision (c)(2) inclusive, the proposed decision is deemed adopted by the agency" [*Matus v. Board of Administration, supra*, 177 Cal. Ap. 4th 597, 610].

What Respondent Forsht is asking is a short 30-day delay, the same delay afforded the Board in the statute, so that she might secure a copy of the transcript. The short 30-day delay harms no one. Deprived of the transcript of the record, Respondent Forsht hereby responds as best she can to the Proposed Decision, and requests the Board reject it.

II. The Reports Relied Upon By Judge Benjamin Are Not Substantial Evidence

Judge Benjamin relies solely on the reporting of the CalPERS-selected examiners and finds that everyone else involved was either absent or that their opinions are based on conjecture and surmise. Judge Benjamin also finds that "(t)he details of respondent's injury; treatment; time off work, if any; and subsequent work restrictions, if any, were not established by the evidence" [see Proposed Decision, page 2, paragraph 4].

Similarly, Judge Benjamin also found that the it was not established by the evidence whether the September, 2004 injuries caused respondent to miss time from work, or whether there were any restrictions imposed because of her injuries [see Proposed Decision, page 3, paragraph 6].

The judge relies, as noted, solely on the reporting of the two CalPERS selected doctors, who have an obvious bias. In particular, the reporting of Dr. Rambach is filled with conjecture and surmise and contradictory conclusions. For instance, in his 8/4/06 report, Dr. Rambach presents his diagnosis of Ms. Forsht: "1. Chronic cervical musculoligamentous strain *with no evidence of any radiculopathy*. 2. Chronic lumbrosacral pain *probably secondary* to degenerative disc disease in the lumbar spine. 3. *Probable* herniated intervertebral disc, L4-L5 right side, *stable without evidence of radiculopathy*" [see Independent Medical Evaluation, by Baer I. Rambach, M.D., dated 8/4/06, page 13, Diagnostic Impressions, emphasis added].

However, Dr. Rambach relies mainly on conjecture and surmise to reach his impressions, and he ignores findings in his own report. On Impression 1, he states emphatically that there is no evidence of any radiculopathy. Yet, on page 11, under Chief Complaint/Current Status, the doctor notes: "She complains of

tingling and pain in her legs going down to her ankles, and when she is lying in bed at night it becomes worse over time” [*Id.* at page 11]. On Impression 2, he states that her lumbrosacral pain is PROBABLY secondary to degenerative disc disease”. “Probably” indicates a finding arrived at via conjecture or surmise, and it is not evidence that Dr. Rambach’s reporting is substantial evidence. Likewise, on Impression 3, Dr. Rambach again uses the word “probable”; and also on Impression 3, the doctor states that there is no evidence of radiculopathy, even though just a few pages earlier, he noted evidence of radiculopathy [*Ibid.*].

Dr. Rambach repeats the same diagnoses in his report dated 2/13/12 and continues to rely on the job description supplied by CalPERS [see Independent Medical Evaluation, by Baer I. Rambach, M.D., dated 2/13/12, page 6], which merely lists the “usual duties” but fails to take into account the essential functions of the position. Dr. Rambach also now finds that applicant is now incapacitated from the performance of her regular job duties. He finds that she is incapacitated as of the date of his examination; and says he comes to this conclusion because, at her initial evaluation by him, “I did not find any significant abnormal objective musculoskeletal or orthopedic neurologic findings to explain the need for her being disabled” [*Id.* at page 7, question #2]. In so doing, Dr. Rambach completely ignores the time in between his examinations. He points to reports he’s reviewed from 2011 and an MRI from 2011; yet neither gives him, apparently, any insight into when respondent’s condition so drastically changed from his first examination in 2006 and the second evaluation, in 2011. Somehow, he concludes it must have all occurred that very day, the day he last saw Respondent Forsht. Such a conclusion is not based on any legitimate medical theory and also defies logic. And it is not substantial evidence.

III. The Reporting of Drs. Rambach and Perliss, Relied Upon For The Proposed Decision Uses An Incorrect Legal Standard

Both Drs. Rambach and Dr. Perliss rely on the standard of “usual duties”, and ignore the essential functions of the job Respondent Forsht was asked to perform as a Corrections Officer assigned to the Special Housing Unit at Pelican Bay State Prison.

Respondent Forsht maintains that both Drs. Rambach and Perliss rely on an incorrect legal standard, which relies on a “usual duties” analysis; both state they do not believe there are any specific duties she cannot perform; relying on a statement supplied by CalPERS that CalPERS has determined to represent her “usual duties” [see Independent Medical Evaluation, by Baer I. Rambach, M.D., dated 8/4/06, page 13-14, Discussion and Conclusion; see Independent Medical Evaluation, by Herbert Perliss, M.D., dated 1/10/12, page 9]. Their reports do not take into account all of the essential functions of the job Respondent Forsht was expected to perform, but could not, due to her disabilities, and on this basis also do not constitute substantial evidence, and cannot be relied upon.

Yet, the Proposed Decision relies solely on the reporting of the these two doctors, Rambach and Perliss. As noted, Judge Benjamin found that there was no evidence that Ms. Forsht was off-work or returned with any restrictions. In so doing, Judge Benjamin appears to have overlooked the extensive evidence offered in Dr. Rambach’s reporting and review of the medical record.

Evidence that Respondent was off work and returned with restrictions is detailed in the 2006 Rambach report. For instance:

- on page 3 of the 8/4/06 Rambach report: “9/22/1998 to 10/1/1998 -0 A form from Pelican Bay State Prison signed by Perry Barnhill, D.C. with comments indicating for the interest of the patient *she should remain off duty until a re-exam is performed the following week*” [emphasis added];
- on page 3 of the 8/4/06 Rambach report: “10/7/1998 to 10/19/1998 - Progress notes from Dr. Barnhill. It is noted that she has been receiving physical therapy concurrent with her chiropractic care and her condition was improving. *He anticipated her returning to work on 10/19/1998*” [emphass added];
- on page 3 of the 8/4/06 Rambach report: “10/19/1998 - Perry E. Barhnhill D.C. indicated that Ms. Forsht had just completed her prescription for physical therapy and *her condition still had not improved enough for her to return to full duty*” [emphasis added];

- on page 3 of the 8/4/06 Rambach report: “10/21/1998 to 10/29/1998 - Perry E. Barnhill, D.C. report. He indicates that *Ms. Forsht’s condition had not improved enough for her to go back to full duty*. She is being referred to a specialist for evaluation and possible treatment” [emphasis added];
- on page 4 of the 8/4/06 Rambach report: “12/16/1998 - Denver H. Nelson, M.D.: Note to Dr. Barnhill indicating that Ms. Forsht returned to his office for followup and *she had not gone back to work as of yet*” [emphasis added];
- on page 4 of the 8/4/06 Rambach report: “It is noted as of 2/18/1999 in a report from Dr. Barnhill that Ms. Forsht’s assessment was lumbar disk herniation at L4-L5, severe cervical strain and thoracic strain or sprain associated with muscle spasm. **Ms. Forsht was working light duty at the time in a mail room at Pelican Bay State Prison**” [emphasis added];
- on page 5 of the 8/4/06 Rambach report: “9/7/1999 - Arcade Chiropractic office evaluation with the diagnostic studies and diagnostic impression which is a history of industrial aggravation.... It was the chiropractor’s opinion that the patient’s status was permanent and stationary as of September 1999. *Work restrictions included that it was his opinion that the patient would be permanently precluded from heavy work, or Category D under the guidelines*” [emphasis added];
- on page 6 of the 8/4/06 Rambach report: “10/18/2000 to 11/10/2001 - Primary treating physicians’s report from Sean Gray, *with further reports indicating same diagnosis and work status. Noted that she would be off work at that time*” [emphasis added];
- on page 6 of the 8/4/06 Rambach report: 3/28/2001 to 8/14/2001 - Gray Chiropractic, primary treating physician’s report with diagnosis remaining the same: Cervicalgia, pain in the thoracic spine, and lumbar neuritis. **She was to remain off work**” [emphasis added];
- on page 7 of the 8/4/06 Rambach report: “12/11/2002 - This is a Redwood Medical Offices notation *indicating off work from 12/28/2002 to 12/10/202, and return to full duty 12/11/2002*” [emphasis added].

In addition to the ten entries noted by Dr. Rambach of the off-work status and work restrictions placed over a period of nearly three years between 9/22/98 and 8/14/2001, Dr. Rambach also notes an extensive history of treatment for the industrial injuries, treatment by Dr. Barnhill, Dr. Gray and a Dr. Nelson.

So too, at trial, evidence of treatment, off-work status, and return-to-work restrictions was offered through the testimony and cross examination of Respondent Forsht and the medical witnesses who appeared. However, as noted, the transcript of the trial is not available timely.

Yet, somehow, the judge found that there was no evidence of any treatment, no evidence of any off-work status, and no evidence of any restrictions.

Judge Benjamin also relies exclusively on the case law found in *Mansperger* [*Mansperger v. Pub. Employees’ Retirement System* (1970) 6 Cal. App. 3d 873] and *Hosford* [*Hosford v. Board of Administration* (1978) 77 Cal. App. 3d 854].

Respondent Forsht believes that the facts in this matter are readily distinguishable from *Mansperger* and *Hosford*, and therefore the judge is using an incorrect legal standard for his findings and ruling.

IV. The Proposed Decision Imposes A Contradictory Double Standard on Respondent and Other Like State Employees

Corrections Officers must meet many standards, physical and mental, in order to be qualified to hold, and maintain, the position. At any one time while in the performance of their “regular duties” a dangerous life-threatening situation could arise, and if ordered they would HAVE to respond. Any inability to respond places themselves and all concerned in extreme danger, and subject to termination.

The Proposed Decision relies on a double standard that CalPERS wants to impose on Respondent Forsht: one standard is in play while she is employed by the State of California in the capacity of a Corrections Officer. In that capacity, she must be able to perform all the usual duties of a Corrections Officer, as well as all the

essential functions of the position. As a Corrections Officer with Pelican Bay State Prison, assigned to the Secure Housing Unit, Respondent Forsht is required to respond as ordered, adhere to all POST orders in effect, and be able to respond as ordered without delay. Those orders can and do include orders to perform tasks her disability now, and in 2006 when she sought disability retirement, precluded her from performing. The standard Corrections Officer Forsht was under while employed as a Corrections Officer with the State of California, assigned to duty in the Secure Housing Unit of Pelican Bay State Prison, required, without exception, her to meet ALL the standards and be able to perform ALL the duties of the position, including some that she might not regularly and usually be required to perform. For instance, to a violent situation created by two or more inmates that required immediate physical response, something that may not happen every day, or every week, or every month, but COULD happen at any time. Failure to do so can and does result in Adverse Actions that can and do lead to suspensions and/or terminations. Failure to do so could and does result in death of inmates and officers. CalPERS would subject Ms Forsht to this situation, placing her and every other Corrections Officer on duty at the time , as well as every inmate in that Unit, in grave danger.

And even though Ms. Forsht was subject to the standards set forth by the employer for that job position, once she sought to retire based on her disability from injuries suffered on that job, CalPERS would impose a totally different set of standards on Ms. Forsht. A standard NOT present for non-disabled employees. For what CalPERS is doing, is establishing an ambiguous set of post-injury standards for state employees that have little to do with the actual requirements of the job they were performing before they were injured. CalPERS's post-injury standard is patently unfair, and a violation of Ms. Forsht's and every other state employee's due process rights.

The Proposed Decision subjects Respondet Forst to this second set of standards, those apparently imposed by CalPERS, standards that are decidedly different than those imposed while employed. The Proposed Decision would allow a disabled employee to sit in a position as Corrections Officer, unable to perform the essential functions, but able to perform the usual functions, and apparently, just hope for the best. This is patently a double standard, that no employee is ever given any prior notice of.

For while the "essential functions" standards are available and published, for everyone to see, including the employer, the employee, the union, potential employees, treating and evaluating doctors, and so forth; there is no corresponding published standard for "usual duties," the standard CalPERS would now hold Ms. Forsht to. A standard of usual duties is no standard.

The Proposed Decision relies on cases from the 1970's. In a more recent case from 2007, the Appellate Court looked at both *Mansberger* and *Hosford*, and said: "'Disability' and 'incapacity for performance of duty' as a basis for retirement, mean disability of permanent or extended duration..." (Gov. Code sec. 20026)... [T]o be 'incapacitated for the performance of duty' within [a prior statute] means the *substantial* inability of the applicant to perform his usual duties." [*Sager v County of Yuba* (2007) 156 Cal. App. 4th 1049, 1057; citing *Mansberger v. Pub. Employees' Retirement System* (1970) 6 Cal. App. 3d 873, 876, original italics; see *Hosford v. Board of Administration* (1978) 77 cal. App. 3d 854, 859-860].

In *Sager*, the court said that "[Gov. Code] section 1031 applied as a matter of law to Sager's fitness, and the POST standards were conceded to be relevant... In fact, they are incorporated into Sager's job description, and therefore her ability to comply with them forms an important part of her 'usual' duties" [*Sager v. County of Yuba, supra*, 156 Cal. App. 4th 1049, 1057]. Section 1031 provides, in relevant part: "Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standards:... (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." [emphasis added].

The *Sager* court went on to say: "Section 1031 standards must also be maintained throughout a peace officer's career. Section 1031 reflects a *minimum* set of standards for a recruit to become a peace officer and it would be illogical to conclude that the Legislature believed those standards disappeared once an officer began working" [*Sager v. County of Yuba, supra*, 156 Cal. App. 4th 1049, 1059]. The court also said that the statute refers to every peace officer in California, which of course also includes Corrections Officer Forsht. "In our view, the section 1031 standards are incorporated by law into every peace officer's job description" [*Ibid.*]. "Sager may be able to serve warrants, drive a patrol car and do many other tasks listed on her 'class specification' job description, as she asserts, but if the evidence shows she is not able to maintain *mental fitness*, that is, control her anger, work with other officers, and make sound judgements, then she is not performing the

duties described above *in the proper manner*" [*Ibid.*, emphasis in original decision].

And finally, the *Sanger* court addressed the issue of potential harm if an employee is unable to perform her duties in the proper manner: "The County should not have to wait until harm occurs before taking action to have Sanger retired due to her mental disability. It is not the appropriate public policy to wait until Sanger actually shoots the other woman in the court room, kills herself on duty, overreacts to a perceived threat or loses her temper in a dangerous situation to conclude that she is mentally unfit for the job" [*Sager v. County of Yuba, supra*, 156 Cal. App. 4th 1049, 1061].

In the case of Respondent Forsht, she should likewise not have to wait until she is faced with a situation at Pelican Bay State Prison which she is neither physically or mentally capable of performing to retire from those disabilities. The Proposed Decision would have the harmful event happen first. Like the *Sanger* court said, that makes no sense, was never intended by the Legislature as such, and is an inappropriate public policy.

V. Case Law Has Established That Respondent's Awards From The Workers' Compensation Appeals Board Are Res Judicata In Subsequent Proceedings Where The Same Facts Are In Issue

Finally, Judge Benjamin finds that the awards received by Respondent Forsht in the workers' compensation system are not binding or controlling on the Respondent's eligibility for retirement. The judge points to two cases, both of which approach the matter through the legal concept of collateral estoppel. Both cases cited [*Bianchi* and *Smith*], offer the same analysis, saying that "the courts have more frequently declined to give WCAB rulings collateral estoppel effect in subsequent retirement proceedings, either because of a lack of identity of parties [citations removed] or because of differences between the nature of the issues considered" [*Bianchi v. City of San Diego* (1989) 214 Cal. App. 3d 563, 568].

However, as the Appellate court said in *Bianchi*, the courts have "more frequently declined" to give WCAB rulings collateral estoppel effect. Which implicitly means there are those less frequent occasions where it does, and that such a finding is not absolute, but based on facts. Judge Benjamin does not say if he found the issues and parties different or the same, thus making a legal determination in THIS matter. The rulings in *Smith* and *Bianchi* clearly state that either issues or parties must be different for collateral estoppel NOT to apply. The Proposed Decision does not indicate at all what facts, if any, were relied upon to reach the conclusion that ALL workers compensation decisions are not binding or controlling.

Our Supreme Court has said: "It is immaterial that the pension board was not a party to the Industrial Accident Commission proceeding" [*French v. Rishell* (1953) 40 Cal. 2d 477, 482]. The Court also noted that despite procedural differences [between the two tribunals] "there are, as we have seen, a number of cases in which the doctrine of res judicata has been applied to the determinations of the commission" [*Id.* at page 481].

In short, case law has firmly established that there are matters where collateral estoppel applies, and there are matters where res judicata applies to decisions by the Workers' Compensation Appeals Board in subsequent pension proceedings.

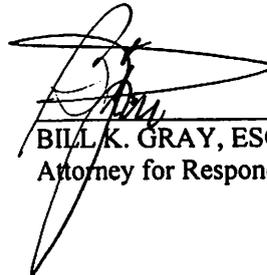
Respondent Forsht maintains that the decision on permanent disability in the workers' compensation forum is res judicata here. And Judge Benjamin's finding that it is not is not supported and should be set aside.

Respectfully submitted,

Dated: January 31, 2013

GRAY & PROUTY

By:



BILL K. GRAY, ESQ.,
Attorney for Respondent, Joni Forsht

1 Re: Inb the Matter of Application for Disability Retirement of JONI K. FORSHT
Case No.: 8183; OAH No.: 2010090246

2 **PROOF OF SERVICE BY MAIL**
3 **(1013a, 2015.5 C.C.P.)**

4 STATE OF CALIFORNIA)
5 COUNTY OF SAN LUIS OBISPO) ss:

6
7 I am a citizen of the United States and a resident of the County of San Luis Obispo; I am over
8 the age of 18 years and not a party to the within above-entitled action; my mailing address is 4119
Broad Street, Suite 210, San Luis Obispo, CA 93401.

9 On the below date I served the attached **RESPONDENT JONI FORSHT'S RESPONSE**
10 **TO PROPOSED DECISION AND ORDER BY ALJ DAVID L. BENJAMIN** in the above
11 matter on the interested parties by placing true copies thereof in sealed envelopes with postage
thereon fully prepaid before the close of the business day in the designated area for outgoing mail
in accordance with this firm's practice, whereby the mail is deposited in a United States mailbox in
the City of San Luis Obispo, California, as follows:

12 **via fax and US Mail**

13 Cheree Swedensky, Assistant to the Board
14 CalPERS Board
15 CalPERS Executive Offices
16 P.O. Box 942701
Sacramento, CA 94229-2701
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Joni Forsth

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22
23 I declare under the penalty of perjury of the laws of the State of California that the foregoing
24 is true and correct and that this declaration was executed on **January 31, 2013**, at San Luis Obispo,
California.

25 
26 Paul Dattilo
27
28