

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of Accepting the Application for  
Disability Retirement of:

MARC BLACKMAN,

Respondent,

and

LOS ANGELES COUNTY SANITATION  
DISTRICT NO. 2,

Employer.

CASE NO. 2011-1014

OAH NO. 2012080111

(STATEMENT OF ISSUES)

**PROPOSED DECISION**

This matter came on regularly for hearing before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, in San Diego, California on August 27 and 28, 2013.

Jane H. Oatman, Esq., represented Marc Blackman (respondent) who personally appeared

John A. Mikita, Esq., senior staff counsel, represented the California Public Employees' Retirement System (CalPERS).

Adam L. Johnson, Esq. represented Los Angeles County Sanitation District No. 2 (employer) on August 27, 2013. On the second day of hearing, August 28, 2013, no appearance was made on behalf of employer.

Oral and documentary evidence was received and the matter was submitted on August 28, 2013.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

*October 2, 2013*  
*Rathie K. Schretz*

## FACTUAL FINDINGS

### *Jurisdictional Findings*

1. Mary Lynn Fisher made and filed the Statement of Issues while acting in her official capacity as the Division Chief of the Benefit Services Division of CalPERS.
2. Respondent was employed by employer as an Industrial Waste Inspector II. By virtue of this employment respondent is a local miscellaneous member of CalPERS.
3. Effective January 15, 2010, employer terminated respondent due to respondent's "unavailability" for work.
4. On February 3, 2011, respondent signed and thereafter submitted a completed application for disability retirement. Respondent's application was based on "mental problems" (severe panic and anxiety attacks) and "physical injuries" (back, neck, hip and nerve functions).
5. By letter, dated July 25, 2011, CalPERS notified respondent that his application for disability retirement could not be accepted. In pertinent part, the July 25, 2011 letter stated:

We have received your application for disability retirement, however, we are unable to accept it. The case of *Haywood v. American River Fire Protection District* (1999) 67 Cal. App. 4th 1292, 79 Cal Rptr. 2d 749, holds that where 'an employee is terminated for cause and the discharge is neither the ultimate result of the disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement.'

Following a review of your application and file, it has been determined that the facts of your case fit within the *Haywood* case. You were dismissed from employment for reasons which were not the result of a disabling medical condition. . . . Therefore, under the *Haywood* case, you are not eligible for disability retirement. For that reason, CalPERS cannot accept this application for disability retirement.

The application has been cancelled. . . . (Exh. C<sup>1</sup>-4)

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<sup>1</sup> "C" refers to CalPERS' exhibits.

6. By letter, dated July 8, 2011, respondent appealed CalPERS' "cancellation" of his disability retirement application.

*Issue*

7. The issue is whether the appellate court's holding in *Haywood* prevents respondent from applying for disability retirement.

*Summary of Respondent's Physical Problems*

8. On October 3, 1990, and September 23, 1991, respondent suffered work related injuries that caused low back pain. The injuries resulted in lumbar laminectomy surgeries in 1990 and 1991. In October 1991 respondent had another work related accident. As a result of that accident, respondent had headaches, dizziness, and neck pain. In 1995 respondent had a non-work-related motor vehicle accident which aggravated his low back pain, neck pain and headaches. In January 1998 respondent had a work-related accident. That accident resulted in acute exacerbation of respondent's cervical strain and aggravation of respondent's cervical discogenic disease with C6-7 herniation. That accident also triggered migraine-type headaches. On July 26, 2002, respondent had a work-related motor vehicle accident. That accident aggravated respondent's low back pain. On October 30, 2008, respondent was involved in another work-related motor vehicle accident. That accident resulted in acute aggravation/exacerbation of respondent's chronic cervical strain, manifested by increased neck pain and migraine headaches. Respondent's diagnoses were: "failed back syndrome, status post L-4 and L-5 laminectomy; bilateral C-5 radiculopathy; myofascial pain syndrome; vascular/migraine headaches; left greater trochanteric bursitis; chronic pain syndrome secondary to his conditions; history of bipolar disorder." (R<sup>2</sup>-73)

*Summary of Respondent's Psychological Problems*

9. Respondent's October 30, 2008, motor vehicle accident in conjunction with his previous motor vehicle accidents caused respondent to seek psychological assessment(s) and treatment(s). On March 9, 2009, Respondent began treatment with Chuck Leeb, Ph.D., a licensed clinical psychologist. On August 12, 2009, respondent began treating with Dr. Donald S. Horowitz, a Diplomate of the American Board of Psychiatry and Neurology. Drs. Leeb and Horowitz co-treated respondent from August 12, 2009, through April 13, 2011, and Dr. Leeb continued treating respondent via "regular psychotherapy sessions" until January 19, 2012.

10. Dr. Leeb and Dr. Horowitz agreed that respondent suffered from PTSD as a result of his motor vehicle accidents.

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<sup>2</sup> "R" refers to respondent's exhibits.

### *Termination of Respondent's Employment*

11. As previously mentioned, on October 30, 2008, respondent was involved in a work related motor vehicle accident. Respondent had been involved in previous motor vehicle accidents over the years and the cumulative effects of the accidents resulted not only in physical problems, but mental problems, as well. Consequently, on November 26, 2008, Dr. Horowitz notified employer of the following: “[Respondent] is currently under my care. He was last examined by me today. I am placing him on medical leave from 12/1/08—2/1/09 due to stress. His return to work date is 2/1/09.” (Exh. R-13)

12. By letter, dated January 22, 2009, Dr. Horowitz informed employer of the following: “[Respondent] remains under my care. He was last examined by me today. I am extending his medical leave from 2/1/09—4/1/09. His return to work date is 4/1/09.” (Exh. R-1)

13. By letter, dated March 24, 2009, Dr. Horowitz informed employer of the following: “[Respondent] continues to be under my care. He was last examined by me on March 4, 2009. I am extending his medical leave from 4/1/09—7/1/09. His return to work date is July 1, 2009.” (Exh. R-20)

14. In a “Primary Treating Physician’s Initial Orthopedic Medical Evaluation and Treatment Plan,” dated April 14, 2009, Dr. Ray Khan, M.D., QME, ACOEM, AAUCM, ACSM, reached the following diagnoses concerning respondent’s physical and mental conditions:

1. CEPHALGIA—784.0
2. CERVICAL SPINE STRAIN/STRAIN—847.0
3. LUMBO-SACRAL SPINE SPRAIN/STRAIN—847.2
4. LUMBAR RADICULOPATHY—724.4
5. ABDOMINAL PAIN SECONDARY TO ABOVE—789.0
6. CHEST PAIN SECONDARY TO ABOVE—786.5
7. STRESS SECONDARY TO ABOVE—308.3
8. ANXIETY SECONDARY TO ABOVE—300.2
9. INSOMNIA SECONDARY TO ABOVE—780.52 (Exh. R-23)

Dr. Khan noted that respondent's "signs & symptoms are consistent with the history of the work related injury as described," and Dr. Khan placed respondent on "Total Temporary Disability for 45 days pending further work-up." (Exh. R-23)

15. On April 24, 2009, Dr. Khan informed employer that respondent's Total Temporary Disability (TTD) was being extended for 45 days. (Exh. R-26)

16. On June 22, 2009, via a "Primary Treating Physician's Progress Report (PR-2)," Dr. Khan notified employer that respondent's TTD status was extended for another 45 days. (Exh. R-35)

17. On July 1, 2009, Dr. Horowitz informed employer that respondent's medical leave was being extended and respondent's "return to work date is 9/1/09." (Exh. R-37)

18. On July 20, 2009, Dr. Horowitz informed employer that he was extending respondent's medical leave until January 4, 2010. (Exh. R-41)

19. On August 17, 2009, Dr. Khan, notified employer in a "Periodic Report (required 45 days after last report)" that respondent's TTD status was extended for another 45 days. (Exh. R-42)

20. By letter, dated September 2, 2009, employer notified respondent of the following:

You have been off work continuously since November 24, 2008. Although you have provided several notes indicating that you are under a doctor's care, we have not received a doctor's note that indicates your prognosis or your ability to resume your duties when you return. Consequently, there is no indication that you will actually return to work and resume your duties as a[n] Industrial Waste Inspector II in the foreseeable future.

While we are sympathetic to your medical needs, your unavailability for work has negatively impacted your work group. The Districts will require a doctor's note that states that you are presently unable to perform your job and provides a prognosis of your ability to resume your duties.

You have until September 15, 2009 to provide me with the above described doctor's note. If you have not provided the requisite note by September 15, 2009, it will be assumed that you are no longer interested in continued employment with the Sanitation Districts. (Exh. R-47)

The September 2, 2009 letter from employer's representative, a Supervising Engineer II, inaccurately described the status of respondent's case. Respondent did not just provide

“several notes” indicating he was under a doctor’s care, he provided numerous detailed reports concerning his TTD status and the underlying medical diagnoses resulting in his “unavailability” for work.

21. On September 9, 2009, respondent telephoned the supervisor who wrote the letter described in Finding 20. A September 9, 2009 letter from respondent’s supervisor, who was acting on behalf of employer, summarized the conversation as follows:

On September 9, 2009, you telephoned in regard to my September 2, 2009, letter asking for a written note from your Doctor. The note was to outline your present inability to return to work and to provide a prognosis for your return and resumption of duties. Because of your claim that you didn’t receive my letter until yesterday, you asked for and were granted an extension for submittal of the requested note. The requested extension is now granted to October 1, 2009.

During our conversation I informed you of my intention to place you back on the day shift upon your return to active duty. In response you indicated that you had previously provided documentation from a medical professional outlining the justification for originally moving from the day shift to the night shift. In order for the Districts to evaluate your request to remain on the night shift, I need you to reiterate your request for accommodation and to outline the justification for providing such accommodation. Please include this justification along with the previously requested Doctor’s note by October 1, 2009. (Exh. R-48)

22. In a Progress Report-2 (PR-2), dated September 14, 2009, Dr. Khan provided an update concerning respondent’s physical problems to employer. The PR-2 also informed employer that respondent’s TTD status was again being extended for 45 days.<sup>3</sup>

23. On September 23, 2009, respondent sent employer a Family Leave Request form via facsimile. In the form respondent estimated that his “date of return to work” was 1/4/10. (Exh. C-7) By this point employer was aware that respondent’s TTD status had been constantly extended on the bases of respondent’s physical and mental disabilities. By letter, dated October 8, 2009, employer confirmed receipt of respondent’s Family Leave request. In the letter, Valerie Hall, employer’s Human Resources Manager, stated, in pertinent part:

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<sup>3</sup> By this date, employer had received numerous PR-2 reports (progress reports) from Dr. Khan and was on notice that Dr. Khan’s custom and practice was to extend respondent’s TTD status for 45 days, if appropriate, from the date of respondent’s last medical evaluation.

The Districts are in receipt of your letter dated September 22, 2009, in which you request Family Medical Leave. We received your letter by fax on September 30, 2009. In your letter to me dated September 20, 2009, you made a very clear request for Family Medical Leave and outlined your reasons you felt you were eligible. At your request, this leave was granted. This leave has been approved effective October 11, 2009, continuing through January 3, 2010. . . . (Exh. R-55)

It should be noted that Ms. Hall's letter incorrectly stated that respondent's September 22, 2009, Family Medical Leave request was received "by fax on September 30, 2009." A review of Exhibit C-7, respondent's request for Family Leave, reveals that it was faxed on September 23, 2009, and signed by Ms. Hall on September 24, 2009.

24. On September 28, 2009, after respondent had submitted his Family Leave request to employer, Dr. Leeb updated employer concerning respondent's mental status. In the update, Dr. Leeb stated in unequivocal language:

I read a copy of your letter to [respondent] . . . . Do I correctly understand that it is the intent of the County Sanitation District of Los Angeles County to place [respondent] back on day shift when he returns to work?

If so, it is my professional opinion that you are making a decision that is both precipitous and counter-productive. [Respondent] was beginning to make significant progress in dealing with his disability until he received your letter. Your letter created such a highly charged environment and threatening internal environment for [respondent] that he was unable to sleep for over 36 hours; he was extremely depressed, very agitated, and highly anxious. Any progress that had been made was lost. The threat of being forced back into the situation that contributed to his disability has cost [respondent] months of progress. I had been hoping to see him return to work by January of 2010. Thanks to your letter, *I am now hoping to have him return in April or May of 2010. . . .* (Emphasis added. Exh. R-51)

This letter put employer on notice that respondent was in a very fragile mental condition and that he would be mentally incapable of returning to work any time prior to April or May of 2010.

25. By letter, dated September 29, 2010, employer notified respondent of the following:

The Districts are in receipt of your request for Family Medical Leave. This leave has been approved effective October 11, 2009, continuing through January 3, 2010. . .

You indicated in the Family Medical Leave request form that you will return to work on January 4, 2010. As indicated in the Family Medical Leave request form, if you do not return to work on that date, you will be considered to have voluntarily terminated employment with the Districts. If you are unavailable for work on January 4, 2010, appropriate administrative action will be taken to separate your employment from the Districts. (Exh. C-7)

It is unclear whether this letter was sent before employer received Dr. Leeb's September 28, 2009, letter; however, it was evident that employer received Dr. Leeb's letter around the time employer sent its September 29, 2010, letter to respondent.

26. In an October 19, 2009, PR-2 report, Dr. Khan advised employer that respondent's TTD status was again being extended for 45 days. (Exh. R-56)

27. By letter, dated December 28, 2009, respondent notified employer of the following:

Attached you will find, as you have been supplied for the past year, a PR-2 Form. A (PR-2) FORM AS YOU KNOW, BEING EXPERTS ON WORKERS COMPENSATION LAW, is the STATE REQUIRED NOTIFICATION OF AN EMPLOYEE'S PROGRESS ON RECOVERING FROM A WORK INJURY.

This note; as I have highlighted, is for 45 days past the date listed on the note (12/23/2009). This earliest possible release date exceeds YOUR DEMAND that I RETURN to work from my WORK INJURY before the WORKER'S COMPENSATION DOCTOR says I am PERMANENT AND STATIONARY. Your arbitrary (sic) date of 01/04/2010 will be passed until my next appointment with DR. KAHN. (Emphases in original; Exh. R-58)

28. By January 5, 2010, employer was, or reasonably should have been, aware that three different doctors, Dr. Horowitz, Dr. Leeb and Dr. Khan had placed respondent on disability status that extended well beyond January 4, 2010. Nonetheless, on January 5, 2010, employer sent respondent a "Notice of Intent to Terminate." The notice, which was sent by certified mail<sup>4</sup>, stated:

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<sup>4</sup> Why employer insisted upon sending the letter via certified mail is puzzling and disconcerting given the fact that in respondent's December 28, 2009, letter (quoted in part in

This letter is to advise you of the Districts' intent to terminate you from Districts' services and your position of Industrial Waste Inspector II effective Friday, January 15, 2010. You have been off work continuously since November 24, 2008. The reason for your intended termination is your unavailability for work.

Between now and January 12, 2010, you may respond either orally or in writing, or both, to the charges contained in this letter. To respond in writing you have until 10:00 a.m., Tuesday, January 12, 2010, to provide Mr. Robert Wienke with your answer to these charges. If you wish to respond orally, you may meet with Mr. Wienke (sic) at [address omitted] on Tuesday, January 12, 2010, at 10:00 a.m. If you wish to discuss this with Mr. Wienke orally before that time, he may be reached at [telephone number omitted].

If you have not contacted Mr. Wienke by 10:00 a.m., Tuesday, January 12, 2010, it will be assumed that you do not want to avail yourself of these procedures.

29. In January of 2010, Dr. Khan sent employer two more PR-2 reports, one of which contains an illegible date and the other of which was dated January 11, 2010. Both PR-2 reports notified employer that respondent's TTD status was again extended for 45 days from the dates of the reports.

30. In a January 12, 2010, memorandum from Mr. Wienke to Ms. Hall, Mr. Wienke notified Ms. Hall of the following:

On January 12, 2010, at 10:00 a.m. a Skelly Hearing was scheduled at [location omitted]. [Respondent] was noticed of the Hearing by letter dated January 5, 2010, from Ramon Cortez, Assistant Human Resources Manager. In attendance were Supervising Inspector II William Garrett, Assistant Human Resources Manager Ramon Cortez and me. The Hearing was

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Finding 27), respondent expressly told employer of the following: "FINALLY, you continue to attempt to send a letter to me CERTIFIED RETURN RECEIPT REQUESTED. There is a problem with this that you seem to refuse to acknowledge." (Emphases in original. Exh. R-58.) Respondent then lists numerous reasons why he could not obtain/receive certified letters, including, but not limited to his inability, due to PTSD, to drive to the post office to retrieve the letters, and the fact that his wife was not available to drive to the post office while the post office was still open. In the letter, respondent suggested several other modes of delivery that would ensure his receipt of the mailings.

concluded when [respondent] failed to make himself available for these proceedings

Given that [respondent] failed to contact me prior to the Hearing and failed to present any new evidence that could potentially have had a bearing on the Districts' intended actions I feel that I have no choice but to recommend that the Districts continue to process to terminate [respondent] due to his unavailability for work. (Exh. R-62)

As with some of the other communications from employer's representatives, this memorandum inaccurately set forth the facts. A comparison of the memorandum with the January 5, 2010, letter, which was sent certified mail, return receipt requested, revealed that the January 5, 2010, letter did not notify respondent of a Skelly Hearing. The January 5, 2010, letter informed respondent that he could respond with relevant information in writing in lieu of meeting with Mr. Wienke on January 12, 2010. The letter failed to mention a Skelly Hearing or that there was any formal meeting whatsoever scheduled on January 12, 2010. Because the letter was sent certified mail, respondent did not receive it. In any event, as set forth in Finding 29, two PR-2 reports were provided to employer prior to the January 12, 2010, cut-off date. These PR-2 reports, in conjunction with the numerous other reports that had been provided to employer were not vague and ambiguous; the constant, regularly provided reports and communications to employer concerning respondent's status clearly and unequivocally documented that respondent was "unavailable" due to his TTD status and that respondent's TTD status was the result of his inability to perform his job functions, particularly driving, due to physical injuries and PTSD.

31. On January 13, 2010, employer sent respondent a "Notice of Termination." The notice of termination informed respondent of the following:

This letter is to advise you of your termination from Districts' service effective Friday, January 15, 2010. The reason for your termination is your unavailability for work. In a letter dated January 5, 2010, the Districts advised you of the intent to terminate you from Districts' service. In addition, you were advised of the procedures available to you to respond to the Districts['] intended actions.

According to the attached memo from Mr. Robert Wienke, dated January 12, 2010, you did not avail yourself of these procedures. Therefore in accordance with Districts' policy, you are terminated from your position of Industrial Waste Inspector II. . . . (Exh R-63)

Employer, as was done with the Notice of Intent to Terminate, sent this notice via certified mail and it is unclear when respondent received actual notice of his intended

termination and his termination.

32. To date, respondent has remained TTD due to his physical injuries and PTSD. Respondent has never been medically released for work by any of his treating doctors. Additionally, respondent's psychologist appeared at the instant hearing and testified that respondent was mentally incapable of attending the January 12, 2010, meeting due to PTSD and that respondent's appearance at the instant hearing was causing him to regress in the progress that had been made in treating his PTSD.

*CalPERS' Refusal to Accept Respondent's Application for Disability Retirement*

33. CalPERS' refusal to accept respondent's application for disability retirement was based on employer's having fired respondent prior to the date upon which respondent submitted his disability retirement application. As set forth in Finding 5, by letter, dated July 25, 2011, CalPERS notified respondent that his application for disability retirement could not be accepted based on the *Haywood*, supra, analysis:

*Analysis of the Facts*

34. Based on the limited information available to CalPERS when it cancelled respondent's application, CalPERS was incorrectly led to believe that respondent was "dismissed from employment for reasons which were not the result of a disabling medical condition." In truth and in fact, respondent was dismissed from employment based exclusively on his "unavailability" for work and unquestionably, respondent's unavailability was due to his disabling medical (physical and psychological) conditions.

LEGAL CONCLUSIONS

1. California Government Code section 21152 provides, in pertinent part: "Application to the board for retirement of a member for disability may be made by . . . (d) The member or any person in his or her behalf."

2. California Government Code section 21154 provides, in pertinent part: "The application shall be made only . . . (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application . . . ."

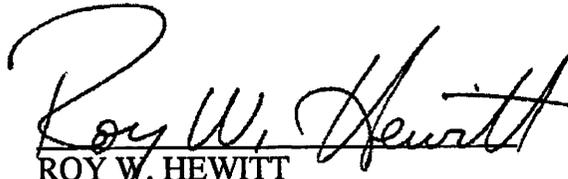
3. In this case the Factual Findings, considered in their entirety, establish that respondent has been physically and mentally incapacitated to perform duties from the date of discontinuance of state service to the time of his application for disability retirement. Consequently, his application must be accepted and processed by CalPERS. The court's decision in *Haywood* does not change this determination. This is so because here, unlike in *Haywood*, respondent's discharge was the ultimate result of his disabling medical condition(s). Consequently, given the facts present here, the appellate court's holding in

*Haywood* does not preclude CalPERS' from accepting respondent's disability retirement application.

ORDER

Respondent's appeal is granted and his Disability Retirement application is accepted for processing.

Dated: September 27, 2013

  
ROY W. HEWITT  
Administrative Law Judge  
Office of Administrative Hearings