

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Application for
Disability Retirement of:

CHRISTINA MERINO,

Respondent,

And

SAN DIEGO UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. 2012-0551

OAH No. 2012120259

PROPOSED DECISION

On December 5, 2013, in San Diego, California, Alan S. Meth, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter.

Rory J. Coffey, Senior Staff Counsel, represented the California Public Employees' Retirement System.

Joan H. Oatman, Attorney at Law, represented respondent Christina Merino.

Respondent San Diego Unified School District did not appear at the hearing.

The matter was submitted on December 5, 2013.

FACTUAL FINDINGS

Jurisdiction

1. Anthony Suice, Chief, Benefit Services Division of the California Public Employees' Retirement System (CalPERS), filed Statement of Issues No. 2012-0551 in his official capacity on June 18, 2013.

2. On April 19, 2010, respondent signed a Disability Retirement Election Application and submitted it to CalPERS. Respondent sought a disability retirement with a retirement date of February 15, 2009. Before filing her application, she was employed by the San Diego Unified School District (District) as a custodial crew leader. In filing her application, respondent claimed a disability on the basis of ulcerative colitis. By virtue of her employment, respondent is a local miscellaneous member of CalPERS subject to Government Code section 21150.

By letter dated June 13, 2011, CalPERS informed respondent that she was not substantially incapacitated for the performance of her job, and denied the application. Respondent appealed.

Job Description

3. The District's Position Description of a Custodial Crew Leader provides that the basic function is to "Direct and participate in the work of a night crew of custodial staff" Physical requirements of the job are described as:

Physical condition sufficient to maintain a rigorous work schedule requiring continuous physical exertion and heavy lifting, occasional lifting, carrying, and maneuvering heavy objects, occasional standing, squatting, climbing, kneeling, twisting, simple grasping, frequent to constant walking, including walking on gravel or uneven surfaces, bending at the neck or waist, stooping, reaching, pushing, and pulling.

Testimony Relating to Job Duties

4. Phil Baertschi is a custodial services supervisor with the District. He has held that position for more than eight years, and is responsible for about 45 schools. Before that, he was a building services supervisor at Hamilton Elementary School and three other schools. In that capacity, he was respondent's direct supervisor. He has held various custodian jobs for more than 30 years.

Mr. Baertschi was familiar with the position of custodial crew leader, the position respondent held at the time she submitted her application for disability retirement. He has read the job description of the position many times. He testified that the position of custodial crew leader involved the constant lifting of many objects, including floor machines, carpet extractors, buffers, wet extractors, vacuums, brooms, mops, buckets filled with water, full trash cans, tables and chairs, file cabinets, bookcases, reams of paper, and science kits. He knew that the lifting requirement for a custodial crew leader was 35 pounds, and estimated that many of the tasks a custodian performed required the lifting of more than 35 pounds. He noted that heavy-duty extractors, for example, weighed 55 to 65 pounds. While they had wheels, there were some places where they had to be lifted a short distance, such as up a few stairs in front of bungalows. Mr. Baertschi testified that a mop and bucket filled with water weighed about 52 pounds and had to be lifted into a sink to dump the water. He estimated

that some trash cans, particularly those where lunch trash had been dumped, could weigh up to 75 pounds, requiring two people to lift them in order to dump the trash into a dumpster. He estimated that science tables weighed more than 40 pounds while regular tables weighed less than 30 pounds, and believed a full filing cabinet weighed more than 65 pounds. He described the position of custodial crew leader as a "physical job."

Mr. Baertschi testified that a typical custodial crew consisted of a crew leader, two custodians, and a supervisor. Each of the three custodians was assigned a different area of the school grounds, called a "beat," and each crewmember worked independently. He added that the crew might work together on occasion if a particular job required heavier lifting.

Mr. Baertschi testified that lifting 25 pounds or more occurred on a daily basis. He was aware that respondent had a restriction limiting her to lifting no more than 25 pounds, and did not believe that she could perform the job with that restriction. He was concerned that respondent could reinjure herself by trying to lift too much.

At the hearing, Mr. Baertschi reviewed the District's job description and a document called "Physical Requirements of Position/Occupational Title on the CalPERS letterhead. A human resources officer had prepared it. He agreed with the job description that the job of a custodial crew leader was a physical one. He disagreed with some of the information reflected on the CalPERS document.

5. Sylvia Liscum is a custodian at Emerson Elementary School and Knox Middle School in the District. She worked for the District as a substitute custodian for three years and was recently hired as a full time custodian. She worked as a substitute at Hamilton Elementary School several times. She was familiar with the job duties of a custodial crew leader. She is also respondent's sister.

Ms. Liscum testified that the job of custodian, whether a regular custodian or crew leader, involved a great deal of lifting and walking. She indicated that lifting trash and mop buckets was the most common types of lifting she did. She noted that a mop bucket could be wheeled from place to place or even put on a cart for transportation, but there always came a time when it had to be lifted into a sink to dump the water. She noted that trash cans near the lunchroom became very heavy with leftover food and trash cans near where students ate snacks also became very heavy. She estimated that by the end of a shift, the trash cans weighed 35 to 40 pounds, and they had to be lifted up four feet in order to be dumped into a dumpster. She added that the lid to the dumpster was heavy and had to be pushed up to a level high enough for it to be secured in an open position.

Ms. Liscum also pointed to stage setup as a job that required rigorous work. This task required the lifting, unfolding, and placing of dozens of chairs from the chair rack to the proper location in an auditorium. She testified that clerical supplies like paper and pencils came to the school in bulk and had to be moved to storerooms or classrooms. She indicated the same was true for cleaning supplies such as paper towels, toilet paper, jugs of bleach, and so forth. In Ms. Liscum's opinion, a custodian lifted more than 25 pounds daily.

Ms. Liscum lives about five miles from respondent's home and saw her frequently. She was aware of respondent's ulcerative colitis and knew respondent's intestines and stomach muscles had been removed. She testified that this made respondent constantly uncomfortable, and it was difficult for respondent to bend. She observed respondent in pain when she bent over or tried to get up from a chair. Ms. Liscum tried to stop respondent from lifting anything because she knew that doing so caused respondent pain. In her opinion, it would be difficult for respondent to return to her job because constant bending, walking, and lifting was required and would be hard for her. She pointed out that it was not possible for respondent to call for help every time she needed to lift something heavy. She noted that respondent could not perform many household chores, such as lifting baskets of clothes, lifting bags of groceries, and lifting her daughter into a car seat. She added that respondent had to use the bathroom frequently because she did not have a large intestine, and that made respondent reluctant to leave home.

Respondent's Medical Evidence

6. Dr. Thomas Bruff is a board-certified internist and a qualified medical evaluator. He is also board-certified in Occupational Medicine and Medical Toxicology. He performed a medical consultation of respondent for the District on December 14, 2009, and wrote a report. Dr. Bruff evaluated respondent to determine respondent's current status and whether she was able to perform the essential functions of her job. He examined respondent and reviewed medical records.

Dr. Bruff's review of records indicated that respondent had lengthy history of ulcerative colitis, epilepsy, depression, and asthma. In January 2008, respondent underwent a subtotal colectomy and end ileostomy. A bowel procedure was performed in January 2009, and a colostomy take down was performed in June 2009. Respondent told Dr. Bruff that since the colectomy, she was doing much better and she did not require as many medications because her colon had been removed.

Dr. Bruff had respondent perform a lift test of 50 pounds. He determined that she was able to lift 50 pounds, but it was difficult for her and she became out of breath.

Dr. Bruff concluded that respondent was unable to perform the essential functions of her job as a result of her physical condition. He recommended a reevaluation in three months.

7. A physician at Kaiser Permanente in San Diego submitted a Physician's Report on Disability to CalPERS dated February 2010, and indicated that respondent was substantially incapacitated for the performance of her usual duties because of her ulcerative colitis.

8. Dr. T. Glenn Elias, a physician at Sharp Rees-Stealy Medical Centers Occupational Health Services completed a Fitness for Duty Examination dated March 23, 2010, on behalf of the District. Dr. Elias determined that respondent was not permitted to lift objects greater than 25 pounds, and recommended no heavy lifting.

9. Dr. Joseph Cutler, a physician at Kaiser Permanente in San Diego, submitted a Physician's Report on Disability to CalPERS in February 2011, and indicated that respondent was substantially incapacitated for the performance of her usual duties because of her ulcerative colitis.

10. Dr. Bruff reexamined respondent on April 20, 2013, and wrote a report. He performed a physical examination and reviewed recent medical records. He found that respondent had pain in the abdomen when lifting, bending, or twisting. Based upon his examination and review of records, he reiterated that respondent was unable to perform the essential functions of her job as a custodial crew leader, and that this condition would not change in the near future.

11. Dr. Elias submitted a declaration at the hearing, which was admitted as direct evidence. He wrote that he took a history from respondent, reviewed her medical records, and examined her for a Fitness for Duty Evaluation on March 23, 2010. He indicated in his declaration that respondent should not be permitted or required to lift objects weighing greater than 25 pounds or to carry objects weighing more than 25 pounds. He recommended no heavy lifting. He reasoned that respondent had a history of three recent abdominal surgeries, and the restriction precluding heavy lifting was to prevent discomfort, aggravation, or complications relating to her surgeries.

Independent Medical Evaluation

12. Dr. Gabriel Fabella performed an independent medical evaluation of respondent at CalPERS' request and wrote a report dated April 4, 2011. Dr. Fabella wrote that respondent reported to him that she had undergone colectomy, colonstomy, and a J pouch formation in 2009 because of her ulcerative colitis. She reported that she had loose stools every three hours and that she had been told not to do any heavy lifting. Respondent told Dr. Fabella that heavy lifting caused back pain and irritated her abdominal J pouch.

Dr. Fabella performed a physical examination and reviewed respondent's medical records. His diagnosis was "status post colectomy for ulcerative colitis." He determined there was minimal limitation in lumbar range of motions and no evidence of radiculopathy or intravertebral disk syndrome. Based on these findings, Dr. Fabella concluded that respondent was able to return to work on the day of the evaluation and she was not substantially incapacitated for the performance of her job or disabled.

In a supplemental report dated August 23, 2011, Dr. Fabella wrote that he reviewed a job description and additional medical records, including Dr. Bruff's 2009 report and Dr. Elias' restriction of no heavy lifting. Dr. Fabella concluded that this additional information did not change his opinion.

Dr. Fabella's Testimony

13. Dr. Fabella testified he is board-certified in internal medicine and was familiar with the standards for determining disability in his capacity as an independent medical examiner. He reiterated that his initial opinion was that respondent was not substantially incapacitated for the performance of her job.

Dr. Fabella listened to Mr. Baertschi and Ms. Liscum testify at the hearing. Based upon their testimony, he changed his opinion and concluded that respondent was substantially incapacitated for the performance of her job as a custodial crew leader.

Stipulation

14. Based upon Dr. Fabella's changed opinion, Mr. Coffey on behalf of CalPERS stipulated that a Proposed Decision should be issued that found in favor of respondent, and that respondent's appeal be granted on the ground that she is substantially incapacitated for the performance of her job as a custodial crew leader and she was entitled to disability benefits.

LEGAL CONCLUSIONS

1. Government Code section 20026 provides in 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.

2. Government Code section 21150 provides in part:

Any member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if her or she is credited with five years of state service, regardless of age....

3. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state service...On receipt of an application for disability retirement of a member...the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty.

4. Government Code section 21156 provides in part:

(a)(1) If the medical examination and other available information show to the satisfaction of the board...that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability....

5. For respondent to receive a disability retirement, she must establish she is disabled and incapacitated for the performance of duty as a custodial crew leader for the District. The phrase "incapacitated for the performance of duty" means "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Further, respondent must establish that her disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863.)

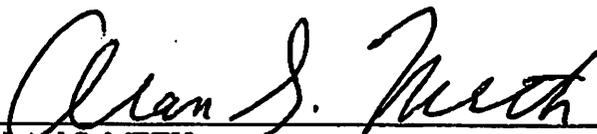
6. Based upon Dr. Fabella's revised opinion, supported by respondent's medical evidence, and the job description and the testimony of Mr. Baertschi and Ms. Liscum, it was established that respondent is substantially incapacitated for the performance of her job as a custodial crew leader and is entitled to disability benefits.

7. Cause for granting respondent's application for disability retirement pursuant to Government Code sections 20026 and 21150 was established by reason of Factual Findings 3 through 11, 13, and 14, and Legal Conclusion 6.

ORDER

The application for disability retirement of Christina Merino is granted.

DATED: December 20, 2013


ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings