ATTACHMENT C

RESPONDENT'S ARGUMENT

Received
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CalPERS Board Unit

January 31, 2014

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701
RE: Application of David Bowman for Industrial Disability Retirement

I am writing this letter to express my disagreement with the Proposed Decision to reject my application for industrial disability retirement. I believe the rejection of my application is based upon a misunderstanding of the facts surrounding my injuries and dismissal from the California Department of Corrections and Rehabilitation. I will attempt to explain the facts in this letter, and I am hopeful that after reviewing this letter that the Board will decline to adopt the Proposed Decision and allow my application for industrial disability retirement to be reviewed on the merits.

In reviewing the Proposed Decision, the facts are largely not in dispute. On January 16, 2008, I was attacked by two inmates while performing my duties as a Correctional Officer. I submitted an "Employee's Report of Job Related Injury/Illness to Supervisor" on January 16, 2008. A workers' compensation claim was filed on January 17, 2008. This claim is still ongoing, and the injuries at issue in that claim are the very same injuries that serve as the basis from my application for disability retirement.

As early as August 25, 2008, Dr. Peter McGann was stating that it was advisable for me to retire from being a Correctional Officer because my injuries placed me at a high risk for further injury if I returned to work as a Correctional Officer. On September 26, 2008, Dr. Paul Rudolph wrote "Retirement advised" on his progress report to the Division of Workers' Compensation. On October 16, 2008, Dr. McGann stated that I was "pending probable retirement." On November 6, 2008, Dr. Rudolph wrote "Advised retirement" on his progress report to the Division of Workers' Compensation.

Since these initial recommendations of retirement, I have undergone continuous medical care through the workers' compensation system. On June 27, 2011, I had back surgery where a multi-level fusion of three vertebra was accomplished by inserting a titanium rod into my spine. This back surgery was necessitated because of the injury suffered on January 16, 2008. On September 21, 2012, I had a visit with a Qualified Medical Evaluator, who once again confirmed that I am totally disabled based upon the injuries suffered on January 16, 2008. I was not dismissed from CDCR until 2011.

The only reason my application for disability retirement was not submitted prior to my dismissal from CDCR was because the doctors had not completed the necessary paperwork. My injuries indisputably justified disability retirement prior to my dismissal from CDCR. There have been no new injuries after my dismissal from CDCR. My disability retirement is based solely upon injuries that predate my dismissal from CDCR.

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Board Unit

It is these facts that distinguish my case from *Haywood v. American River Fire Protection Dist.* (1988) 67 Cal.App.4th 1292. In *Haywood*, the applicant filed for disability retirement based upon his claim that the disciplinary actions that resulted in his termination for cause had rendered him disabled. The court rejected the applicant's claim for disability retirement because the injuries suffered after the termination for cause could not constitute adequate grounds for disability retirement. Importantly, the court stated that ". . . there is no claim, or evidence which would support a claim, of eligibility for disability retirement that could have been presented before the disciplinary actions were taken." (*Id.* at 1306.) In contrast to the applicant in *Haywood*, I had a claim of disability retirement that could have been presented prior to my dismissal. Thus, *Haywood* is not controlling to my application for disability retirement.

The Proposed Decision also relies on *Smith v. City of Napa* (2004) 120 Cal.App.4th 194. As detailed in the Proposed Decision, *Smith* stands for the proposition that a "matured" right to disability retirement must be in place prior to the employee's dismissal. *Id.* at 206. However, in *Smith*, the court also left open the possibility that a disability retirement claim could survive a dismissal for cause. *Id.* at 207. Here, although I was dismissed for cause prior to submitting my application for disability retirement, it is undeniably true that I have a titanium rod inserted in my spine, and it is undeniably true that I could not serve as a correctional peace officer with that titanium rod inserted into my spine. It is also undeniably true that the titanium rod was inserted into my spine because of the attack from the two inmates on January 16, 2008. Thus, my need for disability retirement was a foregone conclusion as contemplated in *Smith* as of January 16, 2008. My doctors began to state this fact long before I was dismissed for cause. The merely fortuitous chronology of events concerning my application for disability retirement and the dismissal for cause should not control my application for disability retirement, as the lengthy time it took for the back surgery to be approved and scheduled is the only reason I was not retired prior to my dismissal. That delay was beyond my control.

Prior to my dismissal from CDCR, I provided years of loyal service. The injuries I suffered on January 16, 2008, long before I was dismissed from CDCR, are the basis for my application for disability retirement. I did not ask to be attacked by two inmates, and disability retirement is my only hope of supporting myself now that I am totally disabled because of the attack.

Sincerely,

David Bowman