

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

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February 7, 2014

Sent via U.S. Mail & Facsimile: (916) 795-3972



Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

Re: *In the Matter of the Application for Disability Retirement of MICHELE G. DEGUZMAN, Respondent, and DEPARTMENT OF HEALTH CARE SERVICES, Respondent*

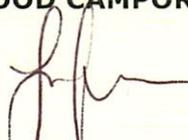
Dear Ms. Swedensky:

Enclosed please find Respondent's Written Argument. The original documents will follow in the mail.

Please contact me if you have any questions or concerns.

Very truly yours,

**DREYER BABICH BUCCOLA
WOOD CAMPORA, LLP**

By 
Lisa J. Ventura

/LJV
Enclosures

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7

8 BOARD OF ADMINISTRATION
9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
10

11 In the Matter of the Statement of Issues OAH Case No.: 2013030884
12 Against: **RESPONDENT'S ARGUMENT**

13 MICHELE [REDACTED],
14 Respondent,
15 and
16 DEPARTMENT OF HEALTH CARE
SERVICES,
17 Respondent.

18
19 Respondent, Michele [REDACTED], submits this written argument in response to the
20 Proposed Decision dated January 6, 2014.

21 **I.**
22 **UNDISPUTED FACTS**

23 Respondent was involved in a two car collision which occurred on June 25, 2010 in
24 Sacramento, CA. Michele came to a gradual and controlled stop due to a red traffic signal at
25 the intersection of Truxel Avenue and Garden Highway. Respondent had been at a complete
26 stop, when she was struck from behind.

27 At the time of this accident, Respondent was employed by the Department of Health
28 Care Services as an Associate Governmental Program Analyst and had been employed by the

1 Department of Health Care Services for approximately 15 years. Approximately one year after
2 her motor vehicle accident, on June 21, 2011, Respondent applied for disability retirement,
3 which was denied.

4 **II.**
5 **CALPERS' DENIAL OF DISABILITY BENEFITS IS SOLELY BASED ON THE OPINION OF**
6 **ONE DOCTOR, HIRED BY CALPERS, WHO EVALUATED MICHELE ON ONE OCCASION**

7 CalPers' denial is based on the opinions of CalPers retained evaluator, Joseph Serra,
8 M.D. In his report and at the hearing, Dr. Serra suggests Michele is exaggerating her
9 symptoms and that she had some sort of "agenda" in seeking disability benefits. Dr. Serra is
10 not a psychiatrist, and could only offer innuendo, not an explanation of this "agenda." This is
11 certainly not in the purview of medical orthopedic expert testimony.

12 In the Proposed Decision, Judge Shimomura recognizes that following the motor vehicle
13 accident, Michele received treatment from a number of doctors at Kaiser, eventually
14 undergoing lumbar surgery on June 4, 2011, performed by Kaiser surgeon, Thomas L. Voegeli,
15 M.D. In addition to reviewing Michele's Kaiser records, Dr. Serra also reviewed a "Physician's
16 Report on Disability," a CalPers form, signed by Dr. Voegeli that indicated Michele was
17 substantially incapacitated from performing her job duties. Dr. Serra simply dismissed this
18 form suggesting that Dr. Voegeli committed the crime of perjury, and signed it as an act of
19 friendship to his patient. When questioned at the hearing regarding whether he was suggesting
20 Dr. Voegeli violated his Hippocratic oath in signing a document he believed not to be true, Dr.
21 Serra refused to provide a responsive answer. (See page 5, paragraph 15 of the Proposed
22 Decision wherein Judge Shimomura indicates Dr. Serra testified at the hearing that "Dr.
23 Voegeli signed the disability retirement form as an act of friendship to his patient.")

24 The Proposed Decision appears to be critical of the Respondent for not having her
25 Kaiser medical doctors testify in person. Attached as Exhibit A is a fee schedule provided by
26 Kaiser's legal department. If Michele were to call Dr. Voegeli to testify, it would have cost at
27 least \$1,800.00, which would have to be paid out of Respondent's pocket. Certainly, any
28 Kaiser doctor who would testify would also need to review records, at a rate of \$450.00 per
hour according to the fee schedule. Respondent is unaware of any provision that allows a

1 prevailing party to seek reimbursement of their costs from such a hearing. It is Respondent's
2 position that the expectation for her to produce such witnesses and incur such significant costs
3 is burdensome and oppressive, particularly when medical evidence is available by way of her
4 medical records. Respondent contends it was reversible error to not admit Respondent's
5 medical records, in lieu of expecting the member to incur significant costs calling her Kaiser
6 doctors to testify.

7 On page 7 of the Proposed Decision, footnote one, Judge Shimomura states that the
8 disability form signed by Dr. Voegeli is "hearsay to the extent it is used to prove the truth of
9 the matters asserted and cannot be considered sufficient "competent medical opinion" to
10 support a finding of disability under Government Code section 20026. On page 7, paragraph 3,
11 Judge Shimomura further states, "Government Code section 20026 requires a disability
12 retirement to be based on "competent medical opinion." Respondent did not call any doctors to
13 testify on her behalf or present other sufficient competent medical opinion to establish her
14 claim for a disability retirement." Again, it appears the statement of disability signed by Dr.
15 Voegeli was not considered simply because Dr. Voegeli was not there to testify.

16 Dr. Serra essentially suggests Dr. Voegeli commits perjury by signing the disability
17 form because he is "friends" with the Respondent. This is a bold accusation, especially against
18 a licensed physician. The form Dr. Voegeli signed is actually a form created and provided by
19 CalPers for doctors to sign regarding disability. Yet, CalPers now refuses to accept the signed
20 form as true here in this case. This is certainly a "business record" and not hearsay. The form
21 should have been admitted and considered as evidence relating to Michele's disability.

22 **III.**
23 **RESPONDENT'S REAL AGENDA WAS TO RETIRE WHEN HER BENEFITS WOULD BE**
24 **FULLY VESTED**

25 Both Respondent and her husband testified that it was their plan that Michele would
26 work the full 20 years of service with the State so that she could retire fully vested with
27 retirement and health insurance benefits. This was a person who loved her job of 15 years.
28 Contrary to what CalPers contends, Michele was highly motivated and worked hard to move up
the ladder as far as promotions. In fact, at the time of her motor vehicle accident, Michele

1 testified that she was being considered for a managerial position. Michele was only a few years
2 away from retirement and had every intention to complete her 20 years with the State, until
3 this motor vehicle accident occurred.

4 Perhaps it is CalPers' "agenda" to remove Michele from these benefits. Dr. Serra is
5 critical that Michele did not attend "pain classes" at Kaiser, supporting his contention that she
6 had some separate agenda, yet ignores the fact that Michele followed up with her medical
7 providers on a regular basis rather than attend pain classes. If the contrary were true, for
8 example, if Michele only went to the pain classes and did not follow up with her medical
9 doctors, Dr. Serra would more likely than not be critical of Michele for not following up with her
10 doctors.

11 Again, this is the opinion of a doctor hired by CalPers who evaluated Respondent on one
12 occasion. Not one of Michele's treating physicians believed Michele had some hidden "agenda"
13 with regards to her symptoms, only the expert hired by CalPers came to this conclusion.

14 **IV.**
15 **CONCLUSION**

16 Michele testified that her orthopedic (low back) condition has had a significant effect on
17 what she is able to do on a daily basis. Here, the denial of Respondent's disability retirement
18 benefits is based on the opinions of Dr. Serra. As previously stated, Dr. Serra's opinions were
19 contrary to the opinions of Respondent's medical providers who treated and evaluated
20 Respondent numerous times over the years. Government Code Section 20026 provides in part:

21 "Disability" and "incapacity for performance of duty" as a basis
22 of retirement, mean disability of permanent or **extended** and
23 **uncertain duration**, as determined by the board, . . . on the
basis of competent medical opinion.

24 Currently, Respondent continues to require medical treatment for her orthopedic condition.
25 Respondent attempted to submit medical records evidencing her current treatment at the
26 hearing, but such records were not admitted in addition to the disability form signed by Dr.
27 Voegeli. Respondent has since been referred back to physical therapy and physical medicine in
28 order to undergo additional injections to her lower back and there is no question that

1 Respondent's low back condition remains ongoing, and the duration of her ongoing condition
2 remains uncertain.

3 Given the "extended and uncertain duration" of Respondent's condition, Respondent
4 asks that the Board reverse the Proposed Decision, particularly since it was reversible error to
5 exclude medical evidence in the form of records that were available.

6 DATED: 2/7/14

DREYER BABICH BUCCOLA WOOD CAMPORA, LLP

7
8 By:  _____
9 LISA J. VENTURA

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EXHIBIT A



KAISER PERMANENTE
KAISER PERMANENTE PREPAYMENT POLICY
(North Valley Medical Legal Department)
IRS Tax # 94-2728480

**Pre-payment is required for all legal appointments. Please make checks payable to:
THE PERMANENTE MEDICAL GROUP and mail to:**

**Kaiser Permanente
Medical Legal Department
2025 Morse Avenue
Sacramento, CA 95825**

You have requested the following:

- Deposition
- Pre-Deposition
- Trial Appearance
- Arbitration/Hearing
- Attorney Conference
- Phone Conference

Professional fee for Kaiser Permanente Staff is as follows:

For Physicians:

- \$ 450 per hour (depositions, pre-depositions, attorney conferences, phone conferences)
- \$ 1,800 half day (trials, hearings, arbitrations - requiring less than one hour travel time)
- \$ 3,600 full day (trials, hearings, arbitrations - requiring one hour or more travel time)

For Non-Physicians:

- \$ 175 per hour (depositions, pre-depositions, attorney conferences, phone conferences)
- \$ 700 half day (trials, hearings, arbitrations - requiring less than one hour travel time)
- \$ 1,400 full day (trials, hearings, arbitrations - requiring one hour or more travel time)

Please note there is a 50% charge for legal appointments cancelled less than 48 hours in advance. For trials that are continued, there will be a waiver of the 48 hour cancellation policy.

Sent via Fax
Signature Agreement

01/27/14
Date

1 **PROOF OF SERVICE**

2 *In the Matter of the Application for Disability Retirement of MICHELE DEGUZMAN, Respondent*
3 *and DEPARTMENT OF HEALTH CARE SERVICES, Respondent.*

4 I, Steven Schultz, declare that:

5 I am a citizen of the United States and am over the age of eighteen years and not a
6 party to the within above-entitled action. I am an employee of Dreyer Babich Buccola Wood
7 Campora, LLP and my business address is 20 Bicentennial Circle, Sacramento, CA 95826.

8 On February 7, 2014, I served the within document:

9 **RESPONDENT'S WRITTEN ARGUMENT**

10 On the parties in said action addressed as follows:

11 Cheree Swedensky, Assistant to the Board
12 CalPERS Executive Office
13 400 P Street Suite 3340
14 Sacramento, CA 95811

15 **BY FACSIMILE MACHINE (FAX):** On February 7, 2014, at **9:55 a.m.** by use of
16 facsimile machine telephone number (916) 379-3599, I served a true copy of the
17 aforementioned document(s) on the parties in said action by transmitting by facsimile
18 machine to the numbers as set forth above. The facsimile machine I used complied
19 with California Rules of Court, Rule 2.301 and no error was reported by the machine.
20 Pursuant to California Rules of Court, Rule 2.306, I caused the machine to print a
21 transmission record of the transmission, a copy of which is attached to this Declaration.

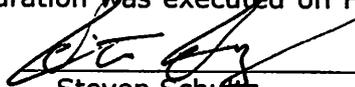
22 **BY MAIL:** I am familiar with my employer's practice for the collection and processing of
23 correspondence for mailing with the United States Postal Service and that each day's
24 mail is deposited with the United States Postal Service that same day in the ordinary
25 course of business. On the date set forth above, I served the aforementioned
26 document(s) on the parties in said action by placing a true and correct copy thereof
27 enclosed in a sealed envelope with postage thereon fully prepaid, for collection and
28 mailing on this date, following ordinary business practices, at Sacramento, CA,
addressed as set forth above.

BY ELECTRONIC TRANSMISSION: Based on a Court order or an agreement of the
parties to accept service by electronic transmission, I caused the documents to be
electronically sent to the persons on the attached service list. I did not receive, within
a reasonable time after the transmission, any electronic message or other indication
that the transmission was unsuccessful.

BY PERSONAL SERVICE: By personally delivering a true copy thereof to the office of
the addressee above.

BY OVERNIGHT COURIER: By causing a true copy and/or original thereof to be
personally delivered via the following overnight courier service:

I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct, and that this declaration was executed on February 7, 2014, at
Sacramento, CA.



Steven Schultz