

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

BEFORE THE  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA

In the Matter of the Application for Disability  
Retirement of:

STEPHANIE R. ROBERT,

Applicant/Respondent

and

KERN COUNTY SCHOOLS,

Respondent.

Case No. 2013-0073

OAH No. 2013050077

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on February 25, 2014, in Fresno, California.

Elizabeth Yelland, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Applicant Stephanie R. Robert represented herself.

No one appeared for or on behalf of respondent Kern County Schools.<sup>1</sup>

Evidence was received, the record was closed, and the matter was submitted for decision on February 25, 2014.

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<sup>1</sup> The Statement of Issues identified applicant's employer as "Kern County Schools." In her application for benefits, however, applicant identified her employer as "Kern County Superintendent of Schools." For the sake of consistency, this decision will refer to her employer as "Kern County Schools" with the understanding that such reference also includes Kern County Superintendent of Schools.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM

FILED 3 Mar 14  
*Steph R. Robert*

## SUMMARY

Applicant was employed by Kern County Schools as a Transportation Aide. She applied for disability retirement benefits on the basis of a neurocardiogenic syncope condition.<sup>2</sup> The persuasive medical evidence established that she is substantially incapacitated for the performance of her usual job duties due to such condition. Therefore, applicant's application for disability retirement benefits should be granted.

## FACTUAL FINDINGS

### *Procedural History*

1. On December 15, 2011, applicant signed an application for disability retirement (application). In filing the application, disability was claimed on the basis of a neurocardiogenic syncope condition.
2. At the time applicant filed her application, she was employed by Kern County Schools as a Transportation Aide. By virtue of her employment, applicant was a state miscellaneous member of CalPERS subject to Government Code section 21150.<sup>3</sup>
3. CalPERS obtained or received medical reports concerning applicant's disability from competent medical professionals. After review of those documents, CalPERS determined that applicant was not permanently disabled or incapacitated for the performance of her duties as a Transportation Aide with the Kern County Schools at the time she filed her application.
4. Applicant was notified of CalPERS's determination and advised of her appeal rights by letter dated November 1, 2012.
5. Applicant filed a timely appeal from the denial of disability retirement by letter dated November 15, 2012, and requested a hearing.
6. Anthony Suine, Chief of the Benefit Services Division of CalPERS, filed the Statement of Issues in his official capacity on March 19, 2013.

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<sup>2</sup> Neurocardiogenic syncope is a condition that occurs when the area of the brain that controls blood pressure and heart rate is not working correctly. It causes fainting spells.

<sup>3</sup> Government Code section 21150, subdivision (a), states: "a member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076, 21076.5, or 21077."

7. On May 8, 2013, CalPERS served a Notice of Hearing on applicant and Kern County Schools.

8. On May 29, 2013, attorney Melissa H. Brown acknowledged receipt of the Statement of the Issues and Notice of Hearing that were served on her client, Kern County Schools, in this matter. She also wrote: "Please be advised that KCSOS does not intend to call witnesses or present other evidence at the hearing."

9. This matter was called for hearing on the date and at the time and location stated in the Notice of Hearing. No one appeared for or on behalf of Kern County Schools, and an evidentiary hearing was conducted as a default proceeding, as to Kern County Schools only, pursuant to Government Code section 11520.

*Job Duties of a Transportation Aide*

10. A job description for the position of Transportation Aide with Kern County Schools identifies the duties of such position as: 1) assisting with the transportation needs of children, 2) performing a variety of functions related to the special needs of the children being transported, and 3) other related duties as assigned.

Examples of duties performed identified in the job description include: 1) assisting bus drivers with the loading and unloading of students, 2) supervising the students while they are riding the bus, 3) attending to any special needs that may occur on the bus, including behavioral issues, 4) working with parents, teachers, instructional aides, and drivers to meet the needs of the students and their Individual Education Plans, as applicable, and 4) administering first aid on an as needed basis.

11. Julia Beverly is a retired bus driver for Kern County Schools. In the past, applicant has been the Transportation Aide assigned to Ms. Beverly's bus. When applicant was assigned to other buses, she served children and performed duties similar to those she served and performed when assigned to Ms. Beverly's bus.

12. Ms. Beverly transported special education students, providing door-to-door service (from the front door of the particular student's home to his classroom, and back). Her route included anywhere from 15 to 30 students, and some of her students were blind, deaf, had behavioral issues where they could "just go off any minute," "special,"<sup>4</sup> in wheelchairs, etc.

13. Ms. Beverly was the type of bus driver who treated the students she transported as "my children." And it was readily apparent from the demeanor and substance of her testimony that she cared for them as a mother would care for her own children. She explained that if a student wanted her, as opposed to her assigned transportation aide, she

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<sup>4</sup> Ms. Beverly explained that it is no longer appropriate to use the description "mentally retarded."

would walk that student from his or her front doorstep onto the bus and then from the bus to his or her classroom, duties normally performed by the transportation aide. Ms. Beverly also described loading and unloading students in wheelchairs onto and off of her bus's wheelchair lift, also duties generally performed by the transportation aide. But she also explained that she is aware of certain bus drivers who will not perform any of the duties normally performed by a Transportation Aide, instead insisting that the assigned Transportation Aide perform them.

#### *Applicant's Injury and Subsequent Work History*

14. Applicant testified at hearing that she first began fainting when she was in her early 20s. She initially thought the cause was her "partying." She recalled going to the Department of Motor Vehicles on her 25th birthday to renew her driver's license. She also remembered hearing papers sliding across the countertop and then waking up on the ground because she had fainted. Shortly thereafter, applicant felt better and attempted to get up. The next thing she remembered was spitting teeth out because she had fainted a second time and knocked some of her teeth out when she fell to the ground.

15. Applicant also described an incident on her hairdresser's driveway when she "just felt funny." She began to stand up when she fainted, fell to the ground, and injured her face. In June 2013, applicant was entering the door from her back porch to her kitchen when she fainted and hit her head on the kitchen counter while falling to the ground. A day or two later, she sought medical treatment and had x-rays taken of her jaw to determine if she suffered any injuries. On another occasion, applicant was a passenger in a car being driven by Ms. Beverly when applicant fainted.

16. Applicant estimated that she has suffered 15 fainting episodes since February 2013, two within the last one and one-half weeks. She was at home with her son when the two most recent episodes occurred, and did not seek medical treatment because she did not injure herself when she fell to the ground. Applicant explained that she seeks medical treatment only if she injures herself while falling after fainting. She also explained that she often feels pain in her back or abdomen, feels "hot," or gets a "funny feeling" just before she faints. These signs usually occur within either "seconds" or "minutes" of her actually fainting.

17. Darlene Forbes grew up with applicant. She was at the Department of Motor Vehicles when applicant fainted on her 25th birthday. She also recalled an instance when applicant fainted while sitting and having her hair braided.

18. Ms. Forbes estimated that she has been present on seven or eight occasions when applicant has fainted. She said she has not noticed any "triggers" for applicant's fainting spells. Ms. Beverly explained that the lack of advanced warning is "scary." Once she was driving a bus full of students when she looked up in her rearview mirror and thought she saw applicant "nodding off." Ms. Beverly then realized that applicant had fainted. Ms.

Beverly explained that since she was driving at the time, there was nothing she could do to help applicant.

### *Medical Evidence*

19. Applicant did not call any medical experts to testify at hearing. Instead, she introduced a note from the Central Bakersfield Community Health Center, the medical clinic she has been receiving treatment from since June 2013. The note said:

Please be advised that the above pt has been with the clinic since June 2013. The condition of neurocardiogenic was documented at that time. We have been attempting to get proper follow-up.

20. At CalPERS's request, applicant underwent an Independent Medical Examination with Harcharn S. Chann, M.D., a cardiologist, on June 19, 2012. In forming his opinions about applicant, Dr. Chann relied on his personal interview and examination of her, review of her pertinent medical records, and his understanding of the usual duties of a Transportation Aide. Afterward, he prepared a written report and testified at hearing.

21. At hearing, Dr. Chann explained that neurocardiogenic syncope is a condition that presents with "no physical findings." In fact, there may be no objective evidence that the patient suffers from such condition. Therefore, the fact that his physical examination of applicant did not reveal anything of concern to him from a medical standpoint did not surprise him. Rather, he considered his findings to support the conclusion that applicant suffers from neurocardiogenic syncope.

22. Dr. Chann also explained that neurocardiogenic syncope is usually diagnosed based on the patient's self-reporting of having suffered fainting skills. Additionally, tests can be administered to rule out other medical conditions. In reviewing applicant's medical records, Dr. Chann noted that it was documented that applicant had previously suffered fainting spells. He also explained that her previous physicians had administered the proper tests for neurocardiogenic syncope, the results of which were consistent with her having such condition. The fact that applicant reported having suffered more fainting episodes than are documented in her medical records was not surprising to Dr. Chann because, in his experience, most patients do not seek medical treatment for having fainted unless they suffered an injury from falling as a result of fainting. He explained that most people who suffer fainting spells know what to do after experiencing one.

23. Dr. Chann offered inconsistent opinions about whether applicant is substantially incapacitated for the performance of her usual duties as a result of neurocardiogenic syncope. In his written report, he opined that she was, explaining: "And he cannot predict syncopal episodes this patient should be considered incapacitated for her

transportation duties [*sic*].”<sup>5</sup> But in a subsequent addendum report, Dr. Chann wrote: “As the patient has no further documented episodes of syncope, she should be considered stable and could return back to her usual duties.” He also wrote: “As already answered above. Person is not incapacitated at the present time. Her incapacity started with her documented episodes of passing out which was June 28, 2011, and should not exceed more than six months. Since this date is already passed and she has no further documented episodes of syncope, she should not be considered disabled presently.”

24. Dr. Chann explained at hearing that he initially thought applicant’s job duties included driving a bus. But he explained that there were other duties she performed that he felt she could not perform safely due to the unpredictability of her fainting spells. He also explained that in his personal opinion as a physician, only one or two fainting episodes each year is sufficient to render applicant substantially incapacitated because of the nature of her job working with children. Dr. Chann said he wrote in his supplemental report that she was stable and able to return to work based on the assumption that her employer deemed one or two fainting episodes each year to be an acceptable risk, a proposition he does not agree with.

25. Dr. Chann also explained at hearing that he thought applicant’s disability was only temporary because she reported having only one or two fainting episodes per year. Therefore, he said he would want to reevaluate her in two years to determine if the frequency of her episodes has changed.

26. Dr. Chann stated “I would be very hesitant” to allow his children to ride a bus on which the transportation aide had a medical history similar to applicant’s. He explained that it would be a “real problem” if the aide was assisting a student and fainted. Additionally, the aide’s medical condition would potentially take the bus driver’s attention away from what should be her primary focus – the safety of the children onboard the bus.

27. Ms. Beverly said she would be uncomfortable with applicant being the transportation aide assigned to her bus knowing what she now knows about applicant’s medical condition. Ms. Beverly explained that some of the students in wheelchairs will start squirming when riding the wheelchair lift, which requires the transportation aide to hold on to the student and wheelchair while operating the lift. If applicant were to faint while doing that, there would be the potential for both her and the student to fall off the lift and get hurt.

### *Discussion*

28. When considering Dr. Chann’s opinions, those expressed in writing as well as at hearing, as a whole, the persuasive medical evidence established that applicant is substantially incapacitated for the performance of the usual duties of a Transportation Aide with Kern County Schools. It was uncontested that applicant suffers from neurocardiogenic

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<sup>5</sup> At hearing, Dr. Chann explained that he prepared his report using the dictating software “Dragon Naturally Speaking,” which often causes unintended typographical errors.

syncope. The dispute appears to be over whether such condition renders applicant substantially incapacitated, and Dr. Chann's opinion that it does is persuasive. He explained that the risk of only one or two fainting episodes each year was sufficient to render applicant substantially incapacitated, and she explained that she suffered approximately 15 episodes in the last year alone, two within one and one-half weeks of the hearing. Furthermore, the danger posed by applicant fainting while at work is self-evident from the nature of her job working with special needs children. Dr. Chann would be "very hesitant" to have his own children ride applicant's bus, and Ms. Beverly would not want applicant as her assigned transportation aide.

## LEGAL CONCLUSIONS

### *Applicable Statutes*

1. Government Code section 20026 provides, in pertinent part:

"Disability" and "incapacity for performance of duty" as the 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: "A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076, 21076.5, or 21077."

3. Government Code section 21156, subdivision (a)(1), provides:

If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, 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, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

*Burden of Proof and Legal Standards for Determining Disability*

4. Applicant has the burden of proof to establish by a preponderance of evidence that she is “incapacitated for the performance of duty,” which courts have interpreted to mean “the substantial inability of the applicant to perform [her] usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.) Discomfort, which may make it difficult to perform one’s duties, is insufficient to establish permanent incapacity for the performance of her position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties, *supra*, 77 Cal.App.3d. at p. 863.)

*Conclusion*

5. As set forth in Factual Finding 28, the persuasive medical evidence established that applicant is substantially incapacitated for the performance of her usual duties as a Transportation Aide with Kern County Schools due to neurocardiogenic syncope.

ORDER

The Application of Stephanie R. Robert for disability retirement benefits is GRANTED.

DATED: February 27, 2014

  
COREN D. WONG  
Administrative Law Judge  
Office of Administrative Hearings