ATTACHMENT E

THE PROPOSED DECISION

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

In the Matter of the Involuntary Reinstatement from Disability Retirement of: ROBERT VALENZUELA, Respondent, and CALIFORNIA DEPARTMENT OF CORRECTIONS STATE PRISON – IRONWOOD, Respondent.	Case No. 2012-0979 OAH No. 2013050126

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 6, 2014, in San Bernardino, California.

Elizabeth Yelland, Senior Staff Counsel, represented Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California.

Respondent Robert Valenzuela represented himself and was present throughout the administrative proceeding.

No appearance was made by, or on behalf of, the California Department of Corrections and Rehabilitation.

On March 6, 2014, the matter was submitted.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
April 8 20 14

ISSUE

Is Mr. Valenzuela no longer permanently disabled or incapacitated from performing the usual and customary duties of a Supervising Cook as a result of an orthopedic condition and, thus, should Mr. Valenzuela be reinstated as Supervising Cook?

FACTUAL FINDINGS

Preliminary Matters

1. Respondent was employed as Supervising Cook by the California Institution for Men, California Department of Corrections and Rehabilitation (Department). By reason of his employment, Mr. Valenzuela was a state industrial member of the California Public Employees' Retirement System (CalPERS) and subject to Government Code section 21150.

Respondent was born on February 9, 1965. He was under the minimum age for voluntary service retirement applicable to members of his classification. (Gov. Code, § 21060.)

2. On February 14, 2002, Mr. Valenzuela submitted an application for industrial disability retirement. Mr. Valenzuela is left-handed. In his application, Mr. Valenzuela stated that he had weakened arm strength; he could not twist or squeeze or lift with his left arm; and as a result he could not turn the heavy keys needed to supervise inmates and or get out of the kitchen. He asserted that his limitations threatened prison security. CalPERS approved Mr. Valenzuela's application for industrial disability retirement on November 1, 2002, on the basis that he had a disabling orthopedic condition.

3. CalPERS may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service to undergo a medical examination. (Gov. Code, § 21192.) In a letter dated March 12, 2012, after conducting a review of Mr. Valenzuela's medical condition, CalPERS notified him that he was no longer disabled or incapacitated from the performance of his duties as Supervising Cook. CalPERS based its determination on an independent medical examination conducted by Neil J. Halbridge, M.D., and a videotaped surveillance of Mr. Valenzuela by CalPERS investigators. As a result of this determination, CalPERS requests that he be reinstated to his former usual job duties as a Supervising Cook with the California Department of Corrections State Prison Ironwood.

4. By letter dated March 23, 2012, Mr. Valenzuela timely appealed CalPERS's adverse determination.

5. On April 16, 2013, complainant signed the Accusation in his official capacity. The Accusation and other jurisdictional documents were served on Mr. Valenzuela and upon the Department. The matter was set for hearing.

6. On March 6, 2014, the record in the matter was opened and jurisdictional documents were presented. No appearance was made by, or on behalf of, the California Department of Corrections and Rehabilitation. Sworn testimony was received; official notice was taken; documentary evidence was produced; closing arguments were given; the record was closed; and the matter was submitted.

Mr. Valenzuela's Background and the Work of a Supervising Cook

7. Mr. Valenzuela lives in Desert Hot Springs with his wife. He worked for the California Department of Corrections at Ironwood for eleven years as Supervising Cook. In his position as Supervising Cook, Mr. Valenzuela was responsible for supervising inmate workers in the Ironwood central prison kitchen.

8. A supervising cook is responsible to ensure that food in the prison is properly prepared in a timely manner. The essential functions include evaluating inmate performance; taking or recommending appropriate disciplinary actions; maintaining the conduct of inmates; and preventing escapes and injury. During institutional emergencies, a supervising cook may be required to perform duties outside the scope of food preparation. Physical demands of the job include constant reaching above and below the shoulder, constant pushing and pulling, frequent power grasping, constant simple grasping and constant use of hands. The job requires the ability to constantly lift and carry 10 pounds, frequently lift and carry 11 to 50 pounds, and occasionally lift and carry 51 to 100 pounds.

The Report of Neil Halbridge, M.D.

9. CalPERS referred Mr. Valenzuela to Neil J. Halbridge, M.D. for an independent medical examination (IME). Dr. Halbridge is a Diplomate of the American Board of Orthopedic Surgery. He is a Fellow of the American Academy of Orthopaedic Surgeons and International College of Surgeons. He has served as a Qualified Medical Examiner in Worker's Compensation matters for the State of California.

10. Dr. Halbridge performed an IME of Mr. Valenzuela on August 19, 2011. He concluded that Mr. Valenzuela was able to perform the essential job duties of a Supervising Cook and was not disabled or incapacitated from performing his job duties because of a physical or mental condition. He documented his conclusion in a report signed on September 26, 2011, and in two supplemental reports dated May 31, 2012, and July 25, 2012. By agreement of the parties, Dr. Halbridge's reports were admitted into evidence.

11. As part of his IME of Mr. Valenzuela, Dr. Halbridge reviewed a surveillance video taken of Mr. Valenzuela between May 6, 2010, and December 8, 2010. A report of the investigation signed by CalPERS Investigator Mark Hitter and the video were received into the administrative record. At a car wash on October 26, 2010, Mr. Valenzuela repeatedly wipes his truck with his left arm using a large towel, after washing the vehicle with his left arm with a power hose. He lifts his arm above his shoulder to wipe the top of the vehicle, the top of the doors, and the hood. The surveillance video also shows Mr. Valenzuela on

December 7th and 8th using his left hand to pump gas, to push a shopping cart containing a propane tank, to carry large bags, and to place trash in a receptacle.
Dr. Halbridge referenced these instances in his report.[1]

12. Dr. Halbridge also reviewed medical records from 2001 to 2006 relevant to problems Mr. Valenzuela has had with his left elbow; these records include two surgeries performed on his elbow by Theron Tilgner, M.D. and Mark Mikulics, M.D. in 2001, and his post-surgical care with orthopedic doctors David Easley, M.D. and Douglas Rogers, M.D. These records include diagnostic studies. The most recent report is a final permanent and stationary report from Dr. Easley dated November 18, 2006. In this report, Mr. Valenzuela complained of dull aching sensation in his left elbow when he held greater than 10 pounds. Dr. Halbridge also reviewed the essential job duties and physical demands of a supervising cook.

13. Dr. Halbridge concluded that Mr. Valenzuela can return to work as Supervising Cook. Dr. Halbridge based his opinion on the surveillance video showing Mr. Valenzuela using his left arm without difficulty. Dr. Halbridge opined that Mr. Valenzuela can lift, push, and pull without difficulty, and that he was able to return to work effective May 6, 2010, when the first surveillance video was taken.

Dr. Halbridge felt that Mr. Valenzuela was not putting forth his maximal effort when his left hand grip strength was tested in the IME. Dr. Halbridge concluded the results obtained in the IME contrasted significantly with the left hand grip strength Mr. Valenzuela exhibited in the videotapes.

14. After he conducted his IME of Mr. Valenzuela, Dr. Halbridge reviewed a report of an examination of Mr. Valenzuela, performed by Sohail Ahmad, M.D., dated April 24, 2012. Dr. Halbridge stated that his review of the report did not change his opinion that Mr. Valenzuela can return to work. Dr. Halbridge gave little weight to Dr. Ahmad's report for two reasons: he noted that extensor carpi radialis tendon tearing, which Dr. Ahmad said precluded Mr. Valenzuela from returning to work, "is just the definitive finding that everybody has who has a lateral epicondylitis of the left elbow so that is not a finding unusual to Mr. Valenzuela." Dr. Halbridge, in addition, commented that Dr. Ahmad must not have reviewed the surveillance video of respondent because this video shows Mr. Valenzuela using his left arm without difficulty.

Mr. Valenzuela's Testimony and Documentary Evidence

15. Mr. Valenzuela testified that he cannot return to work. He said that if he had to return to work he would be a security threat because he can't use his left arm in the event of a prison emergency. His arm has gotten weaker every year. He has stinging and discomfort in his arm. He testified that he takes Vicodin for the pain in his arm. Mr.

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[1] The surveillance video also shows Mr. Valenzuela lifting a propane tank into a shopping cart with his left hand and lifting a bicycle on December 7, 2010, with both hands, out of the back of his truck. Dr. Halbridge did not reference these instances in his report.

Valenzuela accused Dr. Halbridge of conducting a very limited exam and of being biased against him because of the surveillance video.

16. In his March 23, 2012, letter appealing CalPERS's determination, Mr. Valenzuela stated that his family doctor prescribes Vicodin, Ibuprofren, and Codeine to him for pain,[2] and that the pain, weakness and discomfort in his left arm makes him unable to open 80 to 100 heavy doors a day at the prison and supervise inmates adequately.

17. Mr. Valenzuela submitted the report of Sohail Ahmad, M.D. Dr. Ahmad is a board certificated orthopedic surgeon. Complainant did not oppose admitting this report in evidence.

18. After he performed an independent medical exam of Mr. Valenzuela on April 24, 2012, Dr. Ahmad found that Mr. Valenzuela is unable to return to work. Dr. Ahmad wrote in his report that Mr. Valenzuela is unable to perform repetitive gripping, grasping and lifting activities with his left elbow and that he specifically is unable to open and close doors on a repetitive basis. Dr. Ahmad diagnosed Mr. Valenzuela with persistent left elbow weakness with associated extensor tendon carpi radialis brevis rupture; left elbow lateral collateral laxity and instability and persistent left elbow synovitis as a sequel of failed left elbow arthroscopy. For treatment, Dr. Ahmad recommended physical therapy, cortisone injections, medications, acupuncture, and consideration of future elbow surgery.

Dr. Ahmad noted that Mr. Valenzuela told him that he has not had any improvement in his symptoms after the two surgeries and that he continues to have pain in the left elbow that is worse with gripping and grasping. Although Dr. Ahmad examined Mr. Valenzuela after Dr. Halbridge examined him, Dr. Ahmad did not review Dr. Halbridge's report, which contained Dr. Halbridge's conclusion that Mr. Valenzuela could return to work and a summary of the surveillance video.

Evaluation of the Evidence

19. The surveillance video shows Mr. Valenzuela using his left hand and left arm without difficulty at various times between May 2010 and December 2010.

In his application for disability retirement in 2002, Mr. Valenzuela stated he has weakened arm strength and that he can't twist or squeeze or lift with his left arm. In his testimony at the hearing, he said that he remains unable to use his left arm to turn large keys and perform the work of a supervising cook. However, the videotape shows that he can use his left arm without restriction. Dr. Ahmad, who examined Mr. Valenzuela after CalPERS notified Mr. Valenzuela that he must return to work, did not review the video or Dr.

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[2] Mr. Valenzuela told Dr. Halbridge that he does not take pain medications because he has to get the pain medications through Workers' Compensation or through the retirement system. He also told Dr. Halbridge that he last took Celebrex in 2005. Dr. Ahmad also reported that Mr. Valenzuela does not currently take medications.

Halbridge's report summarizing the video. As a result, his opinion that Mr. Valenzuela cannot return to work is not accepted.

Mr. Valenzuela's testimony that he can't use his left arm to perform the work of Supervising Cook is also not accepted. The video contradicts this claim. Mr. Valenzuela, aside from seeing Dr. Ahmad after CalPERS notified him of its proposed action in addition, has not sought medical treatment for problems with his left arm since 2006. Contrary to his testimony at the hearing, he does not take pain medications, as Dr. Ahmad and Dr. Halbridge noted.

LEGAL CONCLUSIONS

1. Government Code section 21151, subdivision (a), provides: "Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service." Government Code section 20026 provides that " 'Disability' and 'incapacity for performance of duty' as a basis of retirement, means disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion."

2. Being "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, 875.)

3. Evidence of the employee's permanent incapacity must be based on competent medical evidence. (Gov. Code, § 31720.3.)

4. Government Code section 21192 provides as follows:

> The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who

> was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

5. It was established through competent medical evidence that Mr. Valenzuela's left arm condition no longer substantially incapacitates him from the performance of his usual and regular duties as a Supervising Cook. Dr. Halbridge's report, which was based on his review of medical records and the surveillance video, showed this. Dr. Halbridge convincingly opined that there are no job duties that respondent could not perform because of his physical condition, and that he is not substantially incapacitated from the performance of his duties. Dr. Ahmad did not review the surveillance video showing Mr. Valenzuela using his left arm without difficultly and his opinion is not given the weight Dr. Halbridge's opinion is given.

ORDER

CalPERS's determination that Robert Valenzuela is no longer disabled or incapacitated from performance of his duties as a Supervising Cook is affirmed.

CalPERS's request that Robert Valenzuela be reinstated to his former usual job duties as a Supervising Cook with the Department of Corrections and Rehabilitation is granted.

DATED: April 7, 2014

ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings