ATTACHMENT A

THE PROPOSED DECISION

ATTACHMENT A

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

In the Matter of the Application for Disability Retirement of: SOPHIA IBRAHIM, Applicant/Respondent, and DEPARTMENT OF DEVELOPMENTAL SERVICES, FAIRVIEW DEVELOPMENTAL CENTER, Public Entity Employer/Respondent.	CalPERS Case No. 2012-0539 OAH No. 2014010560

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 10, 2014, in Orange, California.

Applicant/respondent Sophia Ibrahim represented herself and was present throughout the administrative proceeding. She was assisted by Maher Ibrahim, her husband, who was also present throughout the administrative proceeding.

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

No appearance was made by or on behalf of public entity employer/respondent Department of Developmental Services, Fairview Developmental Center, State of California.

On June 10, 2014, the matter was submitted.

ISSUE

Was Sophia Ibrahim permanently disabled or incapacitated from performing the usual and customary duties of a teaching assistant for the Department of Developmental Services, Fairview Developmental Center, as a result of a right hand carpal tun

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED July 10, 2014
Alessa Moore

FACTUAL FINDINGS

Preliminary Matters

1. Applicant/respondent Sophia Ibrahim (Ms. Ibrahim or applicant) was employed by public entity/respondent Department of Developmental Services, Fairview Developmental Center (Fairview), as a teaching assistant. By reason of her employment with Fairview, Ms. Ibrahim was a state miscellaneous member of the California Public Employees' Retirement System (CalPERS) subject to Government Code 21150.

2. On June 22, 2010, Ms. Ibrahim signed a Disability Retirement Election Application that she filed with CalPERS. On the same day, she also filed an application for a service retirement. In her application for a disability retirement, Ms. Ibrahim claimed the right to receive a disability retirement on the basis of a right hand carpal tunnel condition.

Ms. Ibrahim retired from public service effective June 9, 2010, and she has been receiving a service retirement allowance since that time.

3. CalPERS obtained medical records and reports related to Ms. Ibrahim's carpal tunnel condition. CalPERS selected an orthopedic surgeon to conduct a disability evaluation. The physician selected by CalPERS provided a narrative report containing his findings and conclusions related to Ms. Ibrahim's asserted eligibility for a disability retirement.

After reviewing various records and reports, CalPERS determined that Ms. Ibrahim was not permanently disabled or incapacitated from performing the usual and customary duties of a teaching assistant at Fairview when she filed her application for disability retirement on June 22, 2010.

4. By letter dated May 31, 2011, CalPERS notified Ms. Ibrahim of its adverse determination related to her right to receive a disability retirement and of her right to appeal.

5. By letter dated June 27, 2011, Ms. Ibrahim timely appealed from CalPERS's adverse determination.

6. On January 6, 2014, petitioner, Anthony Suine, Chief, Benefit Services Division, California Public Retirement System, signed the statement of issues in this matter in his official capacity. The statement of issues and other required documents were served on Ms. Ibrahim and upon the Department of Developmental Services, Fairview Development Center.

The matter was set for an administrative hearing

7. On June 10, 2014, the record in the hearing was opened. No appearance was made by or on behalf of respondent Fairview. Jurisdictional documents were presented. The parties stipulated to the truth of the factual matters alleged in paragraphs I, II, III, V (other than the validity of CalPERS's ultimate conclusion), VI, VII, and VIII of the statement of

issues. Official notice was taken of the statutory law set forth in paragraph IV of the statement of issues. Sworn testimony was received; documentary evidence was produced; closing arguments were given; the record was closed; and the matter was submitted.

Applicant's Background and Experience

8. Ms. Ibrahim was born in Egypt in 1951. She obtained a high school diploma while living in Egypt. Ms. Ibrahim came to the United States at 21 years of age. She attended Orange Coast College, where she took English, general education classes, and computer science courses. She married Maher Ibrahim shortly after she arrived in the United States. She and her husband have two children, a 33-year-old daughter who holds an MBA, and a 31-year-old son who holds a bachelor's degree in Business.

9. Ms. Ibrahim began working at Fairview in June 1993 as a teaching assistant. She loved her work, and she loved the individuals she served. In her capacity as a teaching assistant, Ms. Ibrahim and another teaching assistant helped a fully credentialed teacher to provide individual and group classroom services and training to developmentally disabled consumers residing at the Fairview campus in Orange County. These individuals were quite fragile (most were confined to wheelchairs), and each of them had been diagnosed with mental retardation, cerebral palsy, epilepsy, autism, and/or a condition closely related to mental retardation or requiring services similar to those provided to individuals diagnosed with mental retardation.

Ms. Ibrahim worked eight hours a day, five days a week. She transported 25 to 30 Fairview consumers to and from their residential living areas to the classroom each working day, usually by pushing their wheelchairs. When she was in the classroom, Ms. Ibrahim helped the consumers in their wheelchairs, participated in wheelchair dancing, helped consumers with art and craft projects, helped consumers use classroom computers, and engaged in similar kinds of activities. She frequently accompanied consumers on field trips. She sometimes transported consumers across the Fairview campus in wheelchairs.

Ms. Ibrahim testified she was required to repetitively grasp, push and pull when transporting consumers by wheelchair. She testified she was required to repetitively grasp when she cut window screen material in the classroom to help consumers engage in job training projects. She testified she was often required to lift more than five pounds of materials, such as art and craft materials, classroom supplies, and consumer charts.

Ms. Ibrahim was required to interact constantly with consumers when she was at work. According to duty statements and other documentation, the physical demands related to her teaching assistant position included infrequent lifting of objects weighing over 25 pounds, occasionally lifting objects weighing as much as 15 pounds, occasionally pushing, pulling bending, stooping, squatting, grabbing, and twisting, and prolonged sitting, standing and walking. Ms. Ibrahim frequently worked in the presence of biohazards.

Ms. Ibrahim was considered an excellent employee.

The Carpal Tunnel Injury

10. According to Ms. Ibrahim, she was required to make clean cuts of screen material to assist consumers in job training projects. She said she was required to exert a great deal of pressure with her right hand to cut the screen material, and she cut window screen material many hours a day for a prolonged period of time. She testified that the repetitive trauma cause by this activity resulted in numbness and tingling in the fingers in her right hand, a pressure like sensation around her wrist, and pain in her right elbow. When she complained to her supervisor about her situation, she was directed to a Kaiser Permanente medical facility where she was seen by Joel S. Grubbs, D.O. (Dr. Grubbs).

11. The following supplements and explains other direct evidence related to the development and treatment of Ms. Ibrahim's right hand carpal tunnel condition.[1]

In September 2008, Dr. Grubbs began treating Ms. Ibrahim for tendinitis of the right hand. A nerve conduction study and an EMG conducted by Mark Glassberg, M.D. (Dr. Glassberg) in August 2008 revealed "no electrodiagnoistic evidence with carpal tunnel syndrome." In December 2008, Dr. Grubbs referred Ms. Ibrahim to Suzanne Ackley, M.D. (Dr. Ackley), an orthopedic surgeon specializing in upper extremity problems.

Dr. Ackley examined Ms. Ibrahim in January 2009. Ms. Ibrahim provided a history that included difficulty when using a utility knife to cut screen material and when pushing wheelchairs. Dr. Ackley offered a carpal tunnel injection to Ms. Ibrahim in February 2009, but Ms. Ibrahim declined the offer because occupational therapy had not been completed. A second nerve conduction study and another EMG conducted by Dr. Glassberg in February 2009 revealed "no electrodiagnoistic evidence with carpal tunnel syndrome."

In March 2009, Dr. Ackley diagnosed right hand carpal tunnel syndrome, lateral epicondylitis, and tendinitis of the right hand. Occupational therapy provided some relief.

In April 2009, Dr. Grubbs recommended to Ms. Ibrahim that she return to Dr. Ackley and undergo a carpal tunnel release.

Dr. Ackley provided Ms. Ibrahim with a carpal tunnel cortisone injection, and in August 2009, Dr. Ackley documented that Ms. Ibrahim "did very well for six weeks" before pain returned to her right hand and wrist after cutting a watermelon.

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[1] Carpal tunnel syndrome involves compression of the median nerve in the area of the wrist. The compression causes paresthesia, pain, numbness, and other symptoms in the hand and wrist. The main symptom is intermittent numbness of the thumb, index, long and radial half of the ring finger. Conservative treatment includes the use of splints and corticosteroid injections. Surgical treatment, known as a carpal tunnel release, involves cutting the transverse carpal ligament in the wrist to relieve compression on the medial nerve.

On September 28, 2009, Dr. Ackley performed a carpal tunnel release. In the operative report, Dr. Ackley stated the ulnar nerve was examined during the procedure and was noted to have moderate compression with moderate deformity and hyperemia. The thenar motor branch was identified, was intact, and was completely released.

Dr. Grubbs evaluated Ms. Ibrahim in November 2009 and released her to return to work on modified duties. In December 2009, Dr. Ackley evaluated Ms. Ibrahim and kept Ms. Ibrahim at work on modified duties.

Ms. Ibrahim testified she last worked on November 27, 2008, and that she has not worked since then. The precise circumstances surrounding her termination of employment were not established.

On January 18, 2010, Ms. Ibrahim was evaluated by Paul J. Casey, M.D., in connection with a workers' compensation action Ms. Ibrahim filed. Dr. Casey authored a report in which he set forth a history of the present illness, current complaints, an occupational history, the results of a physical examination, the result of diagnostic studies, and a recommendation. Dr. Casey diagnosed a right carpal tunnel syndrome, status post release, with the recommendation of further conservative therapy. He believed that if Ms. Ibrahim responded to the conservative therapy, she would be able to return to her full duty status. He believed her condition was not permanent and stationary at that time.

On June 22, 2010, Ms. Ibrahim signed a Disability Retirement Election Application that she filed with CalPERS. She claimed permanent disability in that application.

Dr. Dao's Evaluation and Testimony

12. On January 21, 2011, Khiem D. Dao, M.D. (Dr. Dao), conducted an examination of Ms. Ibrahim's claim at CalPERS's request. The examination was the result of Ms. Ibrahim having filed an application for disability retirement.

13. Dr. Dao obtained a medical degree from Creighton University School of Medicine in 1992. He graduated *cum laude* and was admitted to *Alpha Omega Alpha*, an honor medical society. Dr. Dao completed a five-year orthopedic residency at Creighton University/University of Nebraska in 1997. He completed a hand and upper extremity fellowship at Loma Linda University School of Medicine in 1998. He was on the orthopedic staff at Balboa Naval Medical Hospital in San Diego from 1998 through 2001, and he was the division head of hand surgery at Balboa from 1998 through 2001. He went into private practice in 2003, and he currently maintains a medical practice in Orange County where he specializes in hand surgery. Dr. Dao is board certified in orthopedic surgery and holds a certification of added qualification in hand surgery. Dr. Dao is very familiar with carpal tunnel syndrome, its treatment, and the disabilities arising out of that condition.

14. Dr. Dao evaluated Ms. Ibrahim at his Westminster medical office on January 21, 2011. His face-to-face meeting with Ms. Ibrahim lasted about an hour. He did not have the opportunity to review Ms. Ibrahim's medical records before meeting with her.

Ms. Ibrahim complained of right hand and wrist pain and numbness. She provided a history of the present illness that included employment at Fairview and being required to cut screen material with a razor blade device. She stated that she felt a sharp pain on August 18, 2008, that resulted in her reporting her injury to her supervisor. She described her treatment, including a carpal tunnel release performed by Dr. Ackley. She complained of right hand and wrist weakness and pain, and nocturnal numbness and tingling.

Dr. Dao obtained a medical history, a social history, and a work history (Ms. Ibrahim stated she last worked on December 1, 2008). Ms. Ibrahim said her job requirements included sitting, standing, running, walking, squatting, bending and twisting less than three hours a day. She also said that her job required reaching, pushing, pulling, fine manipulating, simple grasping, the use of keyboards, and the repetitive use of her hands. Dr. Dao reviewed a duty statement and essential tasks of the job report.

Dr. Dao conducted a physical examination of the neck, shoulders, elbows, wrists and hands that included range of motion testing, sensory testing, and muscle strength testing. There were positive results related to median nerve provocative testing (Tinel's testing, compression testing, and Phalen's testing), and diffuse pain was reported throughout the right wrist. Dr. Dao found there was right median and ulnar nerve neuropathy (carpal tunnel and cubital tunnel syndrome). However, the very abnormal results of grip strength testing caused Dr. Dao to believe that Ms. Ibrahim was magnifying her symptomotology far beyond that which actually existed and that she was being less than candid. Dr. Dao observed a healed scar on the right wrist that was consistent with a carpal tunnel release having been performed.

Dr. Dao reviewed Ms. Ibrahim's medical records following the conclusion of his physical examination, but not Dr. Casey's reports.

In his narrative report dictated immediately after his examination of Ms. Ibrahim, Dr. Dao opined that Ms. Ibrahim was not substantially incapacitated from the performance of her usual duties. While Ms. Ibrahim had some impairment related to her right wrist/hand, she was able to return to work with certain restrictions. Dr. Dao believed that Ms. Ibrahim's job activities did not require her to engage in frequent or constant pushing, pulling, twisting, gripping, grasping, or torquing using the right hand, and that those demands occurred only on occasion. He found evidence of symptom magnification.

15. Dr. Dao testified in this matter. Before providing his testimony, he reviewed three narrative reports authored by Dr. Casey. His review of those reports did not change the opinions or conclusions he reached following his examination of Ms. Ibrahim on January 21, 2011. In fact, he believed those reports corroborated his opinions and conclusions.[2]

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[2] In his July 7, 2011, and July 30, 2012, reports, Dr. Casey wrote, "The patient is now almost 2 years post right carpal tunnel release and she demonstrates more pain, less range of motion, and less strength than would be anticipated after surgery. . ." because of a lack of therapy since the surgery. In neither of those reports did Dr. Casey find that Ms. Ibrahim's condition was permanent or stationary.

Dr. Dao testified about the materials he reviewed and his evaluation of Ms. Ibrahim. He testified that Ms. Ibrahim's performance on grip strength testing, using a Jamar dynamometer, was so aberrant that he had to conclude Ms. Ibrahim was magnifying her symptoms. He reviewed other medical reports that suggested similar conduct in connection with physical examinations performed by other medical examiners. Dr. Dao testified that the negative EMG and nerve conduction velocity testing may have been a false negative, since the cortisone injection provided some relief of the hand pain, but that Ms. Ibrahim's continuing complaints of great pain, numbness and disability after the successful carpal tunnel release represented a highly unusual outcome. He continued to believe, based upon his understanding of the physical demands required of Ms. Ibrahim in the position of a teaching assistant, that Ms. Ibrahim could perform the usual and customary duties of a teaching assistant. Dr. Dao's understanding of her duties was based on a duty statement, a form setting forth the physical demands of the job that Ms. Ibrahim prepared, and her statements to him during the January 2011 examination.

16. Dr. Dao was a qualified medical expert who responded in an appropriate fashion to the questions he was asked. He provided competent medical evidence. He demonstrated no bias.

Other Medical Opinions

17. Ms. Ibrahim provided testimony concerning her duties, her medical condition, and her disability. While she was a credible witness, she did not possess the medical expertise necessary for her testimony to constitute "competent medical opinion."

18. Besides Dr. Casey's report dated February 1, 2010, Ms. Ibrahim provided two additional medical reports authored by Dr. Casey, one dated July 7, 2011, and another dated July 30, 2012. These reports arose out of the workers' compensation action. Counsel for CalPERS objected to the introduction of Dr. Casey's reports on the basis of hearsay. The reports were admitted as administrative hearsay. As such, Dr. Casey's reports may supplement or explain other evidence in the record that is not subject to exclusion under the hearsay rule.[3]

Even if Dr. Casey's reports were admitted as direct evidence, they would not establish Ms. Ibrahim's right to a disability retirement. First, the July 7, 2011, and July 30, 2012, reports discuss a condition as it existed after Ms. Ibrahim filed her application for a disability retirement on June 22, 2010. Second, Dr. Casey's reports, by their own terms, do not describe a disability or incapacity that is permanent or indefinite. Third, even if the condition described in those reports was the same as the condition existing on June 22, 2010,

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[3] Government Code section 11513, subdivision (d), provides: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration."

and was of a permanent or indefinite nature, Dr. Casey based his disability evaluation on a workers' compensation disability standard that is unrelated to the CalPERS disability standard.[4] Finally, even though Dr. Casey's reports discuss work restrictions that should be imposed, those restrictions are not identified as being actual work restrictions or as prophylactic work restrictions. It cannot be determined from the three reports whether Ms. Ibrahim could actually perform her customary duties, or whether she could perform her duties even though doing so might be difficult or painful.

19. Dr. Casey did not testify, and his background, education, training and experience in the area of the evaluation of hand and wrist injuries were not established. Dr. Casey's qualification to provide a competent medical opinion in the area of Ms. Ibrahim's right to a disability retirement was not subject to cross-examination.

Resolving Conflicting Expert Testimony

20. There is no conflicting expert testimony. Dr. Dao was the only physician who testified in this matter. Dr. Dao is a highly educated, well trained, experienced, board certified orthopedic surgeon who specializes in the evaluation and treatment of hand and wrist injuries. He examined Ms. Ibrahim and evaluated her for her complaints related to her right handed carpal tunnel condition. He was familiar with her job duties. His understanding of Ms. Ibrahim's job duties was consistent with her testimony about them.

Arguments

21. Ms. Ibrahim argued that the condition of her right hand and wrist, as well as her elbow, has precluded her from returning to work and performing the usual and customary duties of a teaching assistant at Fairview. She was very proud of the service she provided at Fairview, and she clearly loved the consumers for whom she provided valuable services. She was an honest woman who loved her work. She testified that she was not trying to take advantage of the system, and that she only wanted the benefits to which she is entitled.

22. Petitioner's counsel argued that no competent medical opinion supported granting Ms. Ibrahim's application for a disability retirement.

Evaluation

23. Ms. Ibrahim is a very pleasant woman who provided much valuable service to the Department of Developmental Services at Fairview in her capacity as a teaching assistant. She was a highly competent teaching assistant, and she loved those for who she provided service.

However, no competent medical opinion was presented that established that Ms. Ibrahim's right hand carpal tunnel condition prevented her from performing the usual and customary duties required of a teaching assistant at Fairview when she filed her application

[4] Legal Conclusion 10.

for a disability retirement. Indeed, the competent medical opinion was to the contrary. For this reason, Ms. Ibrahim's application for a disability retirement must be denied.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Applicable Statutes

2. Government Code section 20026 provides in part:

> "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.

3. Government Code section 21151 provides in part:

> Application to the board for retirement of a member for disability may be made by:
>
> (a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.
>
> [¶] . . . [¶]
>
> (c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.
>
> (d) The member or any person in his or her behalf.

4. 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. . . .

5. Government Code section 21156 provides in part:

> (a)(1) If the medical examination and other available information show . . . that the member in the state service is incapacitated physically . . . for the performance of . . . her duties and is eligible to retire for disability, the board shall immediately retire . . . her for disability . . . .
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> (2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion . . . .

Appellate Authority

6. "Incapacitated" means the applicant has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.)

7. Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854; *Bowman v. Board of Administration* (1984) 155 Cal.App.3d 937.)

8. Although the Public Employees' Retirement Law and the workers' compensation law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. Courts cannot assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Pearl v. W.C.A.B.* (2001) 26 Cal.4th 189, 197.) Medical opinions of a permanent disability for purposes workers' compensation claims are not binding on the issue of eligibility for a CalPERS disability retirement because the focus of the issues and the parties are different. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing with approval *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567.)

Evidentiary Matters

<u>Hearsay Evidence – the Medical Reports</u>

9. Government Code section 11513, subdivision (d), provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support

a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

Credibility Determinations

10. Evidence Code section 411 provides: "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."

11. A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1318-1319.) An expert witness may give opinion testimony based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion. The trial court's determination that a witness qualifies as an expert is a matter of discretion that will not be disturbed absent a showing of manifest abuse. (*People v. Brown* (2014) 2014 WL 2450812, 7.)

12. Uncontroverted expert opinion testimony, like any other testimony, may be rejected by the trier of fact, so long as the rejection is not arbitrary, even though the witness is uncontradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.)

13. Ms. Ibrahim provided no competent medical opinion from a medical expert to establish her right to receive a disability retirement. Ms. Ibrahim lacked the education, training, and experience required to provide a competent medical opinion.

Cause Exist to Grant the Application

14. A preponderance of the evidence failed to establish that cause exists to grant Ms. Ibrahim's application for a disability retirement. No competent medical opinion established that Ms. Ibrahim was incapacitated from the performance of duty as a result of a right hand carpal tunnel condition or that her disability rendered her incapable of performing the usual and customary duties of a teaching assistant at Fairview when she filed her application for a disability retirement with CalPERS.

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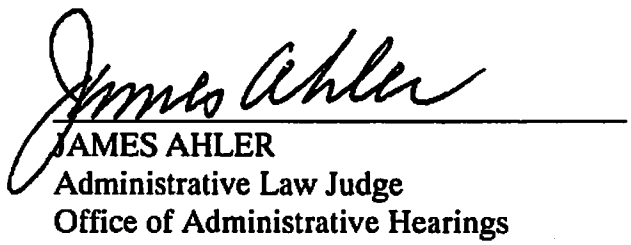
ORDER

The application for a disability retirement filed by Sophia Ibrahim is denied.

DATED: June 30, 2014



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings