

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

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues  
Against:

LUCILLE MCGOWAN,

Respondent,

and

CERRITOS COMMUNITY COLLEGE  
DISTRICT,

Respondent.

PERS Case No. 2014-0409

OAH No. 2014060993

**PROPOSED DECISION**

This matter came on regularly for hearing on November 17, 2014, at Glendale, California, before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California. Complainant California Public Employees' Retirement System (PERS) was represented by Christopher Phillips, Staff Attorney. Respondent Lucille McGowan appeared and represented herself. Respondent Cerritos Community College District did not appear, despite having been properly served with notice of the hearing.

Evidence was received by way of testimony and documents. The record was closed and the matter was submitted for decision on November 17, 2014.

**FINDINGS OF FACT**

The Administrative Law Judge finds the following facts:

*Parties and Jurisdiction*

1. The Statement of Issues was signed on behalf of PERS by complainant Anthony Suine in his official capacity as Chief, Benefits Services Division of PERS.

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FILED December 22, 2014  
*Christa Kunes*

2. Respondent McGowan was employed by the Cerritos Community College District (CCCD) as a custodian, starting January 22, 2007. By virtue of her employment, respondent McGowan is a state miscellaneous member of PERS subject to Government Code<sup>1</sup> sections 21152 and 21154, under which a state member who is “incapacitated for the performance of duty” may apply to retire for disability.

3. Due to the failure to appear at the hearing by respondent CCCD after service of proper notice of the proceedings, its default is noted pursuant to section 11520. (All further references to respondent refer to respondent McGowan.)

4. Respondent resigned from her position on July 16, 2007. She wrote that the reason for her resignation was due to illness. (Exh. 8.)

5. Respondent’s application for disability retirement was signed March 30, 2012. Respondent credibly explained that she did not apply for disability retirement in 2007 because she believed she must wait until she became 50 years old. Much information was missing from the March 2012 application. Respondent submitted a more complete application, dated November 9, 2012, in which she claims disability on the basis of rheumatoid arthritis, diabetes-type II, hypertension and interstitial lung disease conditions. Respondent currently receives service retirement benefits.

6. PERS believed that respondent had resigned in lieu of being terminated and determined that, under such circumstances, her application was precluded by operation of law. PERS notified respondent in writing on February 4, 2014. Respondent filed a letter of appeal dated March 1, 2014, and this hearing ensued.

7. The issue in this hearing is whether PERS can reject respondent’s application because it believes she resigned in lieu of being terminated. The issue of whether respondent medically qualifies for disability retirement is not included, as PERS has preliminarily rejected the application without deciding if respondent qualifies.

8. PERS contends that respondent received poor evaluations of her work and was involved in an incident where she became verbally abusive and acted inappropriately in front of CCCD staff. As discussed in more detail below, PERS did not prove these allegations by competent evidence.

9. Respondent and her husband testified credibly that she was hospitalized twice in July 2007. Hospital documents (Exh. G) show she was in the emergency room and then admitted July 9, was treated for an allergic reaction, and was discharged July 12, 2007. Respondent was again in the emergency room, due to joint pains on July 16, 2007, and was to take medications and seek follow up. Mr. McGowan testified credibly that he had been bringing medical documentation to CCCD during respondent’s treatment and, when he asked about resignation, he was told that respondent needed to personally submit her resignation.

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<sup>1</sup> All statutory references are to the Government Code unless otherwise noted.

Mr. McGowan picked up respondent when she was discharged from the on hospital July 16, 2007, and took her to CCCD so she could submit her resignation in person.

10. In the Statement of Issues, PERS alleges that CCCD informed PERS, by letter dated October 10, 2013, that respondent had resigned in lieu of termination or rejection on probation. The letter, Exhibit 9, was objected to as hearsay, and the objection was sustained. The document was received in evidence as “administrative hearsay,” discussed in more detail in Legal Conclusion 3. As discussed in more detail below, under section 11513, subdivision (d), hearsay can be used in a limited fashion; that is, to supplement or explain other competent evidence but, if objection is made, it “shall not be sufficient in itself to support a finding . . . .” Respondent testified credibly, and there was no competent contradictory evidence, that she was not told she could resign or would be terminated because she did not pass her probationary period. There was insufficient competent evidence in support of this allegation.

11. In the Statement of Issues, PERS alleges that CCCD informed PERS that, immediately prior to her resignation, respondent was issued a probationary report with an overall rating of “Unsatisfactory,” she was not recommended for continued employment, and that a reason for that decision was an incident involving a campus police officer. Respondent testified credibly that she was never informed of the probationary report or the recommendation that she had not passed probation. The Performance Evaluation Report, Exhibit 6, dated July 5, 2007, was objected to as hearsay, and the objection was sustained. A letter from CCCD to PERS, dated October 22, 2013 (Exhibit 10), attaching the Performance Evaluation Report, the police report, and other documents, was objected to as hearsay. The objection was sustained. The document was received in evidence as “administrative hearsay.” Respondent had not seen the attached notes from the lead custodian or the CCCD police department report. Respondent disputed the accuracy of the lead custodian’s notes and the police department report. In particular, respondent denied that she used profanity or that she was angry during the incident involving the officer, as stated in the report. She said she may have been a little upset. Mr. McGowan was on the phone with respondent during the incident and he testified credibly that respondent was not irate, that the officer raised his voice, and that any profanity used was spoken by the officer. There was insufficient competent evidence in support of the allegations relating to: poor performance, the recommendation that respondent would not pass probation, that respondent was to be terminated, that respondent was verbally abusive and acted inappropriately with the officer, and that respondent was given the option to resign or be terminated.

12. Several other documents offered by PERS during the hearing were objected to as hearsay. The objections were sustained. The documents were received in evidence as “administrative hearsay.”

13. In the Statement of Issues, PERS alleges that it reviewed the decision in *Hayward v. American Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Hayward*), and determined respondent “was terminated for cause and her discharge was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for

disability retirement; thus, barring respondent McGowan from any entitlement to a CalPERS disability retirement.” (Statement of Issues, paragraph IV, page 6, in Exhibit 1.) PERS alleges further that the application and eligibility are precluded by operation of *Hayward*. These allegations are unfounded, as discussed in more detail below.

14. Under the totality of the evidence, PERS’ objections to respondent’s filing of her application for disability retirement are rejected. PERS should consider the merits of the application.

### CONCLUSIONS OF LAW AND DISCUSSION

Based upon the foregoing findings of fact, the Administrative Law Judge makes the following conclusions of law.

1. Decisions on disability are governed generally by the Government Code. PERS’ actions here are not based on those code sections. Therefore it is not necessary to set forth those sections.

2. PERS has raised objections to processing respondent’s application based on its understanding of the underlying reasons for her separation from employment by CCCD. However, PERS did not submit competent evidence to establish those underlying reasons.

3. Under section 11513, subdivision (d), hearsay evidence, when objected to and not otherwise admissible, may be used to supplement or explain other evidence, but may not, by itself, support a factual finding. This is often referred to as “administrative hearsay.” Therefore, evidence that is not hearsay can be used for any purpose, but evidence that is administrative hearsay can be used only for these limited purposes.

4. Section 11513, subdivision (d), states: “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.”

5. Respondent raised timely objections based on hearsay, and those objections were sustained. The documents were received in evidence nevertheless as, under section 11513, subdivision (c), relevant evidence “shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.”

6. Section 11513, subdivisions (c) and (d), operate together in this case with the following result. Exhibits 6, 7, 9 and 10, offered by PERS, and Exhibits A, D, F, G, and page three of Exhibit B, are received in evidence. However, these exhibits are hearsay, timely objections were raised, and these exhibits would not otherwise be admissible over

objection in civil actions. Therefore, these exhibits can be used only to supplement or explain other evidence.

7. There was no other competent evidence submitted to support CCCD's contentions of the events leading up to respondent's separation from employment. In many instances, respondent and her husband provided competent evidence that directly countered CCCD's contentions and the allegations based thereon brought by PERS in the Statement of Issues. Hearsay is not competent evidence to support an administrative decision. (*Furman v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 416.)

8. The decision in *Hayward* is of no use under these circumstances. The employee in *Hayward* had been fired for cause, and the court determined the firing was not due to a medically disabling condition or preemptive of an otherwise valid claim for disability retirement. The termination of the employment relationship under those circumstances rendered the employee ineligible for disability retirement.

9. PERS refers to its Precedential Decision in *Vandergroot and California Department of Forestry and Fire Protection (Vandergroot)* (Precedential Decision 13-01, in Exhibit 12). The government employee in *Vandergroot* had settled an adverse employment action against him, which sought his termination for cause, by an agreement that he would resign for personal reasons. The Administrative Law Judge in *Vandergroot* determined that, under these circumstances and relying on *Heyward*, the employee did not qualify for disability retirement.

10. Unlike in *Hayward* and *Vandergroot*, in this matter there was no competent evidence that respondent retired for any reason other than the one cited in her resignation in 2007, "due to illness," or for the specific medical conditions noted in her application for disability retirement in 2012, as noted in Factual Findings 4, 5 and 9.

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11. PERS' objections to respondent's filing of her application for disability retirement are rejected. Respondent's application and eligibility are not precluded by operation of *Hayward*.

ORDER

Respondent Lucille McGowan may file an application for disability retirement based on rheumatoid arthritis, diabetes-type II, hypertension and interstitial lung disease conditions.

DATED: December 17, 2014.



DAVID B. ROSENMAN  
Administrative Law Judge  
Office of Administrative Hearings