

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



## ISSUE PRESENTED

Whether respondent Flores was substantially incapacitated for the performance of his usual duties as a correctional officer with respondent California Department of Corrections and Rehabilitation, High Desert State Prison, at the time he applied for an industrial disability retirement?

## FACTUAL FINDINGS

1. Petitioner/complainant Anthony Suine filed the Statement of Issues solely in his official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent Flores was employed by respondent California Department of Corrections and Rehabilitation, High Desert State Prison. At the time respondent Flores filed his application for retirement, he was employed as a correctional officer. By virtue of his employment, respondent Flores is a state safety member of CalPERS subject to Government Code section 21151.

3. On or about July 5, 2011, respondent Flores signed an application for industrial disability retirement. In filing the application, disability was claimed on the basis of a left shoulder injury.

4. CalPERS obtained medical reports concerning respondent Flores' left shoulder condition from medical professionals. After review of the reports, CalPERS determined that respondent Flores was not permanently disabled or incapacitated for performance of the usual duties of a correctional officer at the time his application for industrial disability retirement was filed.

5. Respondent Flores was notified of CalPERS' determination and was advised of his appeal rights by letter dated November 27, 2012.

6. Respondent Flores filed a timely appeal by letter dated December 13, 2012, and requested a hearing.

### *Usual Duties for a Correctional Officer Employed by Respondent California Department of Corrections and Rehabilitation, High Desert State Prison*

7. A High Desert State Prison Correctional Officer duty statement, a State Personnel Board job specifications statement for Correctional Officer, a Correctional Officer Essential Functions list and Classification Description and a CalPERS' list of Physical Requirements of Position/Occupational Title for Correctional Officer were received in evidence. The essential functions document includes among the required duties the ability to perform the duties at all of the various posts. Other relevant requirements, based on respondent Flores' claim of incapacity, include the ability to swing a baton to strike an

inmate; the ability to disarm, subdue and apply restraints to an inmate; the ability to defend against an inmate armed with a weapon; climbing ladders; lifting and carrying over 100 pounds; pushing and pulling locked gates and cell doors and during an altercation with inmates; and occasional lifting above the shoulders.

### *Competent Medical Opinion*

8. Respondent Flores was examined by independent medical examiner Andrew Brooks, M.D. a board-certified orthopedic surgeon, at the request of CalPERS. Dr. Brooks examined respondent Flores on June 20, 2012, and prepared a report the same day that was received in evidence. Dr. Brooks testified at the administrative hearing.

9. Dr. Brooks had respondent fill out a brief written questionnaire and followed up with a verbal history from respondent Flores that included a description of the injury that led to respondent Flores's claim of incapacity. Dr. Brooks also reviewed records relating to the treatment provided respondent Flores for his injury and treatment of the same shoulder by other physicians on earlier occasions. Dr. Brooks was provided the documents described above reciting the usual job duties for a Correctional Officer at High Desert State Prison.

10. Respondent Flores was 45-years-old when he saw Dr. Brooks. He began working at High Desert State Prison as a correctional officer in June of 2000 and his last day of employment was in or about November of 2010. He was injured on August 5, 2010, when he tried to prevent a 400-pound food cart from tipping over while being pushed on asphalt by inmates. He reached up with his left shoulder to stabilize the cart and heard a "pop" that was followed by pain in his left shoulder. Respondent Flores saw a physician who prescribed physical therapy that provided no relief from the pain. Respondent Flores was referred to orthopedic surgeon Kyle E. Swanson of the Tahoe Orthopedics and Sports Medicine group in Carson City, Nevada, for evaluation. Dr. Swanson was initially reluctant to perform surgery on respondent Flores' left shoulder because respondent Flores had previously had two surgical repairs of the same shoulder for debridement and a rotator cuff repair. Dr. Swanson eventually performed the third arthroscopic surgery on respondent Flores' left shoulder on December 23, 2010. The post-surgical diagnoses were left shoulder impingement, left shoulder adhesions, and left shoulder bursitis. The surgery included lysis of the adhesions and an acromioplasty. Post-surgery visit notes reflected greater range of motion and less pain, but continued weakness in the shoulder. At the time that respondent Flores visited Dr. Brooks, he was taking Norco, Soma, Amitriptyline, and Xanax to try and manage his shoulder pain.

11. Dr. Brooks performed a physical examination of respondent Flores, focusing on the left upper extremity. Respondent complained of tenderness over the surgical scars. Respondent described pain in the top of his left shoulder which worsened if he tried to elevate the shoulder or reach above shoulder level. The pain radiated as far as the left elbow but not below the elbow. Respondent claimed that he could not hold more than five pounds with his left arm. Range of motion examination revealed what Dr. Brooks described in his report as a "clearly restricted" range of motion in the left shoulder. Respondent could only

abduct the left shoulder to 80 degrees and 110 degrees on the right. His forward flexion of the left shoulder was 90 degrees compared to 180 degrees on the right side. His internal rotation extended to L1 on the left and to L3 on the right. External rotation was 20 degrees on the left compared to 60 degrees on the right. Respondent Flores' left bicep was one inch smaller in circumference than the right bicep. Respondent Flores complained of pain as he reached the extremes of the range of motion exercises.

12. Dr. Brooks' diagnoses were chronic left shoulder pain, weakness and adhesive capsulitis with a history of three prior surgeries. Dr. Brooks concluded that respondent Flores was substantially incapacitated for his duties as a correctional officer. More specifically, he felt respondent Flores could not reach above shoulder level, even occasionally; he could not push or pull with the left shoulder; he could not lift more than 25 pounds; he was unable to disarm, subdue and restrain an inmate; he could not defend himself; and he could lift and carry no more than 20 pounds.

13. On July 3, 2012, Dr. Brooks submitted a supplemental report based on his review of six DVDs showing respondent Flores and his adult son "detailing" a van on October 2, 2011. The DVDs were compiled based on surreptitious videotaping by agents of the Department of Corrections and Rehabilitation internal affairs unit in connection with respondent Flores' worker's compensation claim based on the same injury. The DVDs show the two men working continuously on the van at least two hours. Dr. Brooks observed that both men appeared to have normal use of their left arms. Dr. Brooks reported that the range of motion and strength in the left shoulder exhibited by both men were "certainly markedly different" than the examination that he performed of respondent Flores on June 20, 2012. Because the men were not identified in the request for a supplemental opinion, Dr. Brooks did not change his original opinion.<sup>2</sup>

14. On July 31, 2012, Dr. Brooks submitted a second supplemental report to CalPERS after learning which of the two men depicted in the DVDs was respondent Flores. Dr. Brooks opined that unless there had been an intervening injury to the left shoulder between October 2, 2011, and the date of his examination of respondent Flores on June 20, 2012, respondent Flores had been exaggerating his symptoms to a significant degree when he was evaluated by Dr. Brooks. Based on this new information, Dr. Brooks concluded that respondent Flores was not limited at all in the use of his left upper extremity and was therefore not substantially incapacitated for the performance of his usual duties as a correctional officer.

15. Respondent Flores called no medical experts to support his claim of industrial disability. He did testify at the administrative hearing. Respondent Flores related that he applies ice packs to his shoulder all night long to help him sleep. He said that it took three days to recover from the detailing work that he performed on October 2, 2011. According to

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<sup>2</sup> Dr. Brooks was also provided another DVD depicting respondent Flores' activities on May 22, 2012, and prepared by CalPERS investigators. The DVD did not include activities demonstrating respondent Flores' range of motion in his upper left extremity.

respondent Flores, his detailing business had only been operating for a week and the van was the first vehicle that he worked on with his son whom he was trying to teach the skills required of an automobile detailer. The business closed the next week according to respondent Flores. Respondent Flores called his mother to testify in support of his application. She lives with respondent and his family. Respondent's mother said she has witnessed her son's pain and his use of ice packs at night. On one occasion, respondent Flores raked the yard and spent two days in bed recovering from the effort. Respondent Flores' testimony was given little credit, given his exaggeration of symptoms and mobility during Dr. Brooks' examination.

## LEGAL CONCLUSIONS

1. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement absent a statutory provision to the contrary. (*Greator v. Board of Administration* (1979) 91 Cal.App.3d 57.) The party asserting the affirmative at an administrative hearing has the burden of proof including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn.5, citing *So. Cal. Jockey Club v Cal. etc. Racing Bd.* (1950) 36 Cal.2d 167, 177.)

2. Government Code section 20026 reads, in pertinent part:

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

3. Incapacity for performance of duty means the substantial inability to perform usual duties. (*Mansperger v Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, at page 860, the court rejected contentions that usual duties are to be decided exclusively by State Personnel Board job descriptions or a written description of typical physical demands. The proper standard is the actual demands of the job. (See also, *Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736.) The ability to substantially perform the usual job duties, though painful or difficult, does not constitute permanent incapacity. (*Hosford, supra*, 77 Cal.App.3d 854, at p. 862.)

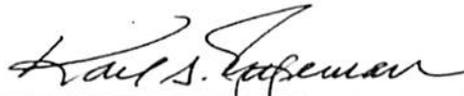
4. Respondent Flores had the burden of producing evidence to support his application for industrial disability retirement, including the burden to produce "competent medical opinion" that his physical condition rendered him substantially incapacitated for the performance of his usual duties. No evidence was introduced to satisfy that burden. Moreover, CalPERS presented competent medical evidence establishing that respondent

Flores is not substantially incapacitated for the performance of his usual duties as a correctional officer by reason of injury to his left shoulder. Therefore, respondent Flores' application must be denied.

ORDER

Respondent Flores' appeal from CalPERS' determination that he was not permanently disabled or incapacitated for the performance of his usual duties as a correctional officer with respondent California Department of Corrections and Rehabilitation, High Desert State Prison, at the time that his application for disability was filed is DENIED.

Dated: August 24, 2015



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KARL S. ENGEMAN  
Administrative Law Judge  
Office of Administrative Hearings