ATTACHMENT E

THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Involuntary Reinstatement from Industrial Disability Retirement of: JOEL E. MARZAN, Respondent, and CALIFORNIA STATE PRISON SACRAMENTO, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILTATION, Respondent.	Case No. 2014-0735 OAH No. 2014080567

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on June 4, 2015, in Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by Cynthia Rodriguez, Senior Staff Attorney.

Joel Marzan (respondent) was present and represented himself.

There was no appearance by or on behalf of the California Department of Corrections and Rehabilitation (Department). The Department was duly served with Notices of Hearing. The matter proceeded as a default against the Department, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on June 4, 2015.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED July 1st 2015
C. Bodily

ISSUE

On or about March 23, 2011, respondent applied for industrial disability retirement, on the basis of psychological conditions of post-traumatic stress disorder (PTSD) and anxiety (psychological conditions). Respondent's application was granted. His disability retirement was effective November 1, 2011. Because respondent was under the minimum age for voluntary service retirement, pursuant to Government Code section 21192, on March 11, 2014, CalPERS sent respondent for an independent medical examination. After reviewing medical reports and other information, CalPERS determined that respondent was no longer substantially incapacitated from performing the duties of a Correctional Officer with the Department. Respondent appealed from CalPERS' determination.

The issue for Board determination is whether CalPERS established that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Officer on the basis of his psychological conditions.

PROCEDURAL FINDINGS

1. On March 23, 2011, respondent signed and thereafter filed an application for industrial disability retirement (application) with CalPERS. At the time, respondent was employed as a Correctional Officer by the Department. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.

2. In filing the application, respondent claimed that his "physical ability" was not "100%" after he was assaulted by an inmate. Respondent also wrote that his psychological state would "jeopardize the safety of [his] co-workers" and the "facility."

3. On November 14, 2011, CalPERS notified respondent that his application for industrial disability retirement was approved. His retirement was effective on November 1, 2011. The letter stated that respondent was found to be substantially incapacitated from the performance of his usual duties as a Correctional Officer for the Department, based upon his psychological conditions. Respondent was informed that he may be reexamined periodically to determine his qualification for reinstatement if he was under the minimum age for service retirement. Respondent was 39 years old at the time of his retirement. He was under the minimum age for service retirement.

4. On November 26, 2013, CalPERS notified respondent that it would conduct a reexamination of his disability retirement. Part of the reexamination included an independent medical evaluation (IME) performed by Andrea Bates, M.D., on March 11, 2014.

5. On May 8, 2014, CalPERS notified respondent that based upon a review of "medical reports and other information," CalPERS determined that respondent was no longer substantially incapacitated from performing the job duties of a Correctional Officer for the

Department. Respondent was informed that he would be reinstated to his former position. Respondent was advised of his appeal rights. Respondent filed an appeal and request for hearing by letter dated May 20, 2014.

6. On August 19, 2014, Anthony Suine, Chief, Benefit Services Division, Board of Administration, CalPERS, signed and thereafter filed the Accusation.

FACTUAL FINDINGS

Respondent's Employment History and Work Injury

1. Respondent was hired as a Correctional Officer for the Department in approximately January 2006. Until approximately April 2010, he worked at California State Prison, Sacramento.

2. On or about January 28, 2010, respondent was bit on the right bicep by an inmate. At the time, respondent was wearing a long sleeve shirt. The bite caused a bruise on respondent's bicep. Respondent was treated at the hospital and released. He returned to work on modified duty until approximately March 2010 when he returned to full duty. In approximately April 2010, respondent was taken off work by his treating physician in order to seek treatment to deal with the psychological effects of the assault.

Mental Requirements of a Correctional Officer

3. As a Correctional Officer for the Department respondent must be able to work in both minimum and maximum security institutions for both men and women. The mental requirements of the position include the following:

- Must have mental capacity to be aware/alert in their observations/identification of security risks. Correctional Officers are at risk to a variety of inmate behaviors, including but not limited to aggressive or violent inmates, psychological manipulation or verbal abuse/harassment. Correctional Officers must also have mental capacity for exposure to very unpleasant situations including inmates who have attempted or committed suicide by hanging themselves in their cell or slashing their wrist, or inmates who throw bodily fluids at them.

- Must have the mental capacity to judge an emergency situation, determine the appropriate use of force, and carry out that use of force. Use of force can range from advising an inmate to cease an activity to firing a lethal weapon at an

inmate when another life is threatened with great bodily harm or death.

- Must have the mental ability to recall an incident in order to accurately document the incident in writing.

4. CalPERS received a completed "Physical Requirements of Position/ Occupational Title," form signed by a representative of respondent's employer on December 17, 2013. The physical requirements of the position include, but are not limited to sitting, standing, running, walking, carrying and exposure to extreme temperature. In addition, the Department's representative wrote on the form that a Correctional Officer must be able to perform all of the essential functions of the position, and must be free from any "physical, emotional, or mental condition that might adversely affect the exercise of powers of a peace officer."

Independent Medical Evaluation

5. On March 11, 2014, at the request of CalPERS, Andrea Bates, M.D. conducted an IME of respondent and thereafter prepared a report dated April 1, 2014. Dr. Bates obtained her medical degree in 1990 from the Jefferson Medical College. In 1994, she completed her psychiatric residency at the University of California, Davis Medical Center (UC Davis). She became certified by the American Board of Psychiatry and Neurology in 1998. Dr. Bates operates a private psychiatric practice. She is also an Assistant Clinical Professor in the Department of Psychiatry at U.C. Davis.

6. As part of the IME, Dr. Bates interviewed respondent, obtained a personal and psychiatric history, conducted a mental status examination, and performed psychological testing. Dr. Bates also reviewed respondent's medical records, including those records relating to his psychiatric conditions, the Correctional Officer job description, and his application.

7. During the interview, respondent explained to Dr. Bates the circumstances surrounding his assault by an inmate. He stated that he had an ongoing issue with the inmate who assaulted him. Respondent told his superiors that he was concerned that the inmate would harm him. Respondent felt that his superiors did nothing to protect him from the assault. Respondent explained that on the day of the incident he escorted the inmate. The inmate tried to trip him. Respondent put the inmate on the ground. Respondent pushed his alarm. Officers responded to the alarm and piled on top of respondent and the inmate. Respondent felt a "tingling" on his bicep. The inmate bit him, which left a mark on his bicep. Respondent explained that at the time of the assault, he wanted to break the inmate's neck. Respondent then felt that he could not trust the other officers to protect him. Respondent indicated that he still felt that he could not trust the other officers.

8. Respondent attended physical therapy after the assault. He went back to work after the assault but felt that he was "doubling guessing" himself. He talked to his sergeant and his doctor. They made him realize that a different career would be better for him.

9. Respondent had minimal mental health treatment after the assault. He saw Wayne M. Fulton, Ph.D., a clinical psychologist in May 2010 for a short time. Dr. Fulton evaluated respondent, but did not perform any psychological tests. Respondent also talked to his pastor. Respondent did not take any psychiatric medications.

10. Respondent reported that he had "little mood swings" all his life. He indicated that he enjoyed life, but avoids places with a lot of people. He was also concerned that he may run into the inmate who assaulted him. He stated that in the past year he had been depressed. He was drinking alcohol on a regular basis, but since stopped.

11. Respondent also informed Dr. Bates that he was working in a temporary job doing medical billing, which he enjoyed.

12. Dr. Bates administered several psychological tests, including the Patient-Related Level 1 Cross-Cutting Measure, the Becks' Anxiety Inventory, the Becks' Depression Inventory II, and a Mood Disorder questionnaire. Dr. Bates diagnosed respondent as follows:

Axis I	Anxiety Disorder Not Otherwise Specified, provisional, rule out Mood Disorder Not Otherwise Specified
Axis II	Deferred, rule out Personality Disorder Not Otherwise Specified
Axis III	Status post human bite on arm (years ago)
Axis IV	Occupational Stressors, Social Stressors, Primary Support Stressors
Axis V	75

13. In reviewing respondent's medical records, Dr. Bates found that respondent had been diagnosed in the past with PTSD. Dr. Bates opined that at the time of the IME, respondent "lacked sufficient symptoms to qualify for PTSD diagnosis." Dr. Bates further opined that respondent "demonstrated some anxiety and avoidance of places, but the symptoms did not seem primarily caused by PTSD." She also found that respondent:

> ... did not have pervasive fears that would have been consistent with a mental disorder such as PTSD. Instead, he was troubled with personnel matters, rather than a trauma experienced as would be more characteristic of a person with PTSD. Regarding the assault, he was angry [with] the way the matter was handled

from an administrative perspective, but lacked characteristic PTSD symptoms.

[Respondent] may have had PTSD previously but did not demonstrate the necessary signs and symptoms to meet the diagnosis...

14. Dr. Bates also opined that respondent had some anxiety, but she did not find that his anxiety was at a level that would interfere with his ability to perform his duties as a Correctional Officer. Dr. Bates gave respondent an Axis V Global Assessment of Functioning (GAF) score of 75, which indicated respondent had normal functioning, with some psychiatric symptoms. Dr. Bates testified that respondent's symptoms were not specific to the correctional setting and the symptoms did not prevent him from returning to work as a Correctional Officer.

15. Dr. Bates opined that respondent had rehabilitated himself and that he could perform the essential job functions required of a Correctional Officer. She also opined that he was not substantially incapacitated for the performance of his duties as a Correctional officer due to a psychiatric condition.

Respondent's Evidence

16. Respondent testified at hearing. He did not call any health care providers to testify. He offered a letter from Craig Ottersen, a licensed clinical social worker, and two psychological evaluations, one of which was obtained by the State Compensation Insurance Fund (SCIF) regarding respondent's worker's compensation claim. The letter and reports were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d).

RESPONDENT'S TESTIMONY

17. Respondent testified that after the assault, he continued to work for a short time. He was taken off work by his doctor. He did not feel that he could go back to work as a Correctional Officer because of the setting. Respondent filed a grievance against his sergeant and lieutenant after the assault. As a result, he was concerned for his safety and his life.

18. After respondent's application for industrial disability was approved he took a year to figure out what to do with is life. Eventually, he obtained a job with Health Net in their call center. Respondent testified at the time he was evaluated by Dr. Bates he was functioning "good" because he did not have to worry about inmates.

19. Respondent testified that after he was informed that CalPERS intended to reevaluate his disability retirement and he obtained a copy of Dr. Bates' report he "lost it."

He contacted several psychologists to seek treatment. In May 2014, respondent sought treatment from Mr. Ottersen.

20. Respondent testified that he does not know if he can make the right decisions if he goes back to work as a Correctional Officer with the Department. He is concerned that if he goes back to the prison setting, it could trigger problems.

LETTER FROM CRAIG OTTERSEN

21. In a letter dated May 28, 2015, Mr. Ottersen stated that respondent contacted him in early May 2014 to begin weekly counseling sessions. Since May 14, 2014, respondent had attended 43 sessions. Mr. Ottersen stated that respondent had "post-traumatic stress reactions" related to the inmate assault, including:

> ...distressing memories, emotional numbness, excessive worry about the event, excessive bodily tension, irritability, sleep problems, and becoming overly reactive to stimuli which triggers memory of the original trauma.

22. Mr. Otterson diagnosed respondent with PTSD. Mr. Otterson stated that his treatment goals for respondent were to reduce his "anxiety and stress." He further stated that respondent had not yet recovered from the experience of being physically assaulted.

23. Mr. Otterson did not opine as to whether respondent was substantially incapacitated for the performance of his duties as a Correctional officer due to a psychiatric condition.

REPORT FROM WAYNE FULTON, PH.D

24. On May 17, 2010, respondent was evaluated by Dr. Fulton, based upon a recommendation from respondent's primary care provider. Dr. Fulton evaluated respondent's psychological status and treatment needs. Dr. Fulton reviewed respondent's medical records related to the inmate assault. He also interviewed respondent. Dr. Fulton did not perform any psychological tests. Dr. Fulton diagnosed respondent with "adjustment disorder with mixed anxiety and depressed mood." He recommended that respondent attend six sessions of cognitive-behavior psychotherapy and consider "psychopharmacological medication" if his symptoms continued. Respondent saw Dr. Fulton for several sessions of psychotherapy.

25. Dr. Fulton did not opine as to whether respondent was substantially incapacitated for the performance of his duties as a Correctional officer due to a psychiatric condition.

REPORT FROM LUIGI PICIUCCO, PH.D.

26. The State Compensation Insurance Fund (SCIF) sent respondent to a qualified medical panel psychological evaluation (QME) with Luigi Piciucco, Ph.D, a Clinical and Forensic Psychologist. The evaluation was in response to a worker's compensation claim respondent filed related to the inmate assault. Dr. Piciucco evaluated respondent on March 17, 2011, and issued a report dated March 21, 2011.

27. Dr. Piciucco diagnosed respondent with adjustment disorder with mixed anxiety and depressed mood, and chronic PTSD. Dr. Piciucco's opinion was based, in part on respondent's subjective symptoms and objective psychological testing that was administered. Dr. Piciucco opined that respondent's PTSD was primarily related to two motor vehicle incidents that occurred in 1979 and 1998, rather than the inmate assault.

28. Dr. Piciucco recommended to respondent that he seek additional psychotherapy. Respondent told Dr. Piciucco that he would not participate in any further treatment and would not take psychotropic medication.

29. Dr. Piciucco did not opine as to whether respondent was substantially incapacitated for the performance of his duties as a Correctional officer due to a psychiatric condition.

Discussion

30. CalPERS established that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Officer for the Department. Dr. Bates persuasively testified that respondent lacked sufficient symptoms to qualify for a PTSD diagnosis and that the level of anxiety he experienced did not prevent him from performing the essential functions of a Correctional Officer. She further persuasively opined that respondent is not substantially incapacitated for the performance of his duties as a Correctional Officer due to a psychiatric condition.

31. Although respondent submitted a letter from his treating counselor and psychological reports, some of which indicate respondent was diagnosed with PTSD, these reports and correspondence were not persuasive. None of the authors opined that respondent was substantially incapacitated for the performance of his duties as a Correctional Officer due to a psychiatric condition. Furthermore, findings issued for the purposes of a worker's compensation claim are not evidence that respondent's injuries are substantially incapacitating for the purposes of disability retirement.

Additionally, because the authors of these reports and correspondence were not available at hearing for cross-examination, their opinions were admitted only as administrative hearsay and cannot be relied upon, standing alone, to support any findings as to respondent's psychological conditions. (Gov. Code, § 11513, subd. (d).)

32. When all the evidence is considered, CalPERS submitted sufficient evidence to meet its burden. As a result, CalPERS' request that respondent be involuntarily reinstated from disability retirement is granted.

LEGAL CONCLUSIONS

1. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

> The board ... 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 .... The examination shall be made by a physician or surgeon, appointed by the board.... 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 ... 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.

2. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

> If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

3. Government Code section 20026 defines "disability" and "incapacity for performance of duty," and, in relevant part, provides:

> "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.

4. Findings issued for the purposes of worker's compensation are not evidence that respondent's injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa*, (2004) 120 Cal.App.4th 194, 207; *English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.)

5. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. Furthermore, in *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff's subjective complaints alone, without competent medical evidence to substantiate the complaints, were insufficient to support a finding that he was permanently incapacitated for the performance of his duties.

6. When all the evidence in is considered, CalPERS established that respondent is no longer substantially incapacitated for the performance of his usual duties as Correctional Officer for the Department. Consequently, CalPERS' request that respondent be involuntarily reinstated from disability retirement is granted.

ORDER

Respondent's appeal is DENIED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Joel Marzan from disability retirement is GRANTED.

DATED: June 30, 2015

MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings