

**ATTACHMENT C**  
**RESPONDENT ARGUMENT**



# California Association of Highway Patrolmen

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Ref No. 2011-0818: In the matter of the Application for Reinstatement from Industrial Disability Retirement of Matthew E. Eisenman, Respondent

To the Board of the California Employees' Retirement System:

Please accept this letter from Respondent, Matthew Eisenman as a request that the proposed decision of denial of reinstatement in the above entitled matter be rejected and that the matter be heard before the full board. This request is based on two issues: 1) the Department of California Highway Patrol's ("CHP") filing of an "informal appeal" did not challenge the substantive nature of the reinstatement and it was not filed with good faith/cause; and 2) the reliance of Government Code §1031<sup>1</sup> as evaluation criteria was not proper.

## Background

This matter involves the application for reinstatement from an industrial disability retirement by Matthew Eisenman, to the position of officer with the Department of Highway Patrol. Eisenman applied with CalPERS for and was granted an industrial disability retirement after receiving a diagnosis, *inter alia*, of Post Traumatic Stress Disorder on November 10, 2008. He then sought

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

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reinstatement on December 18, 2009. CalPERS had Eisenman evaluated by Benjamin Kaufman, MD on August 4, 2010. Dr. Kaufman issued his report on August 30, 2010 clearing Eisenman for reinstatement. On September 3, 2010, CalPERS notified Eisenman that he was not incapacitated for duty and he was reinstated to his former position.

### **“Informal Appeal”**

The CHP **did not challenge the substantive medical findings** supporting the reinstatement but on September 21, 2010 filed an “informal appeal” for the purpose of conducting its independent evaluation process. This would include a physical and psychological examination, ostensibly to comply with §1031. The “informal appeal” and evaluation process is not recognized in the CalPERS reinstatement statutes or codes nor in administrative or judicial precedent. In fact it has been rejected.

Jurisdictionally, the question raised is whether this “informal appeal” is well taken because no cause existed to challenge the determination. Then eight months past the period for filing an appeal the CHP relied a report dated May 9, 2011, finding that Eisenman had not met the §1031(f) standard. It then used it as the challenge of the CalPERS’ determination. Hence the information relied upon was not even in existence at the closing of the time for appeal, let alone at the time of the “informal appeal”. (2 California Code of Regulations (“CCR”) §555.1)

Furthermore the §1031(f) standard is not one that is used in the reinstatement evaluation.

### **Inapplicability of §1031(f)**

The proposed decision, at page 26, found that Eisenman was precluded from reinstatement based on the §1031 criteria. A CHP expert, Dr. Danti based her testimony on the §1031 criteria, page 13 paragraph 40. It is also clear the CHP uses that criteria in the evaluation of a mandatory

reinstated employee as addressed in the testimony of Sergeant Norman Carter, page 16 paragraph 55.

This protocol was rejected in *Willie Starnes* (1999) CalPERS Precedential Decision 99-03, which dealt with an application for reinstatement from industrial disability retirement by a sergeant of the CHP. **The Board ruled to bar consideration of §1031(f), finding that it was not applicable.** What was controlling is the Public Employees' Retirement Law which grants sole jurisdiction to CalPERS. Additionally, CalPERS is required to utilize only the test set forth in the Retirement Law and §1031(f) is not within that umbrella. In *Phillips v. County of Fresno* (1990) 225 Cal. App. 3d 1240, 1257-58 the Court reviewed a county retirement issue and rejected the argument advanced by the County that the sheriff could not be compelled to reinstate an employee to active duty as a deputy sheriff unless the employee meets the minimum standards for public officers as set forth in §1031(f). Also see, *Hulings v. State Dept. of Health Care Services* (2008) 159 Cal.App.4th 1114. There Hulings, a peace officer, was reinstated pursuant to §19140.5. Hulings contended that his reinstatement was without conditions. The employer contended that it was compelled to follow the criteria of §1031 as a condition precedent to allow the employee to reinstate. **The court rejected the employer's argument.**

The issue has also been reviewed and ruled on by the State Personnel Board ("SPB"). In that venue it has addressed and rejected the CHP's argument. The SPB's ruling in *R.C.* (2004) SPB #04-03 said in essence that once CalPERS determined an employee (in that case a peace officer) is fit for duty and ordered reinstated an **employer has no discretion to condition an employee's reinstatement because reinstatement is mandatory and unconditional – a disability retirement is a temporary separation and as such there is no loss of permanent civil service status.**

In *R.D.* (1992) SPB #92-05, the SPB held that a correctional officer had a mandatory right to reinstatement upon resolution of his medical condition and the department could not condition his reinstatement upon fulfilling specific conditions or requirements.

### **Summation of CHP's Position**

The CHP's position was stated at the hearing by John Dunn who oversees the CHP's disability reinstatements. The CHP's reinstatement process is initiated upon notification from CalPERS that an applicant has been cleared for reinstatement from disability retirement. CHP then initiates an "informal appeal" to complete their internal process. The "informal appeal" does not challenge the validity of the CalPERS' decision. The internal process consists of a physical performance test, a background investigation a psychological written test and a psychological evaluation. Eisenman was disqualified during the psychological evaluation and this formed the appeal of the reinstatement. Dunn testified that the SPB ordered Eisenman back to work but that decision is being challenged. Dunn understood that a person cleared by CalPERS for re-employment is a mandatory reinstatement, but the **CHP puts conditions on a mandatory reinstatement.**

### **Conclusion**

Both the proposed decision and the CHP rely on §1031 as a reinstatement requirement. That is not in keeping with the state of law. Further the CHP thwarts the CalPERS reinstatement decision by ignoring the mandatory reinstatement requirement and transforming it to a conditional reinstatement. Lastly, the CHP has created a hybrid appeal, the "informal appeal", not for the purposes of challenging medical determinations but using it as a placeholder in case sometime in

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the future it finds a reason to challenge the earlier finding, this is far past the time limit in which to file an appeal.

Respectfully submitted,

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