

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

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

In the Matter of the Application for  
Disability Retirement of:

MARTHA QUINTANA,

and

HAWTHORNE UNIFIED SCHOOL  
DISTRICT,

Respondents.

Agency Case No. 2014-1172

OAH No. 2015031197

**PROPOSED DECISION**

Administrative Law Judge Thomas Y. Lucero heard this matter on September 16, 2015, in Los Angeles, California.

Christopher C. Phillips, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Thomas J. Wicke, Attorney at Law, represented Martha Quintana (respondent).

No appearance was made on behalf of respondent, Hawthorne Unified School District.

After oral and documentary evidence was received, the record was closed and the matter was submitted for decision on September 16, 2015.

**FACTUAL FINDINGS**

1. Diane Alsup, Acting Chief of the Benefits Services Division of CalPERS, filed the statement of issues while acting in her official capacity.

2. At the time she filed her application for disability retirement, respondent had been employed by the Hawthorne Unified School District as a Preschool Teacher of special

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

*October 7 2015*

*Thomas Y. Lucero*

needs children for more than five years. By virtue of her employment, respondent is a "local miscellaneous member" of CalPERS.

3. On March 11, 2014, respondent signed, and later filed, an application for disability retirement (application). She claimed disability on the basis of orthopedic conditions (cervical, back, left upper extremity). In the application, respondent stated that her disability arose on May 2, 2013, when she was suddenly pulled by the arm toward the floor by a student. Respondent indicated that she is unable to lift over 10 pounds, can do no pushing or pulling or work over her head, and can do no repetitive work. In response to a question regarding how the injury affected job performance, respondent wrote, "It has affected [job performance] in many ways for my job was very physical and I would not able to do much of the work that is needed to properly support the students and also keep them safe at school." (Exhibit C.)

4. After review of medical reports submitted by respondent in support of her application, CalPERS determined that respondent was not substantially incapacitated for performance of her duties as a Preschool Teacher with the Hawthorne Unified School District at the time the application was filed.

5. In a letter dated July 14, 2014, CalPERS notified respondent of its determination that she was not substantially incapacitated for the performance of her duties as a Preschool Teacher and that her application was denied.

6. In a letter dated August 1, 2014, respondent timely appealed the denial.

7. On October 31, 2014, CalPERS wrote respondent that additional medical information that she had provided had been forwarded to a physician and, based on his report, the determination that she was not substantially incapacitated for the performance of her duties remained the same. The letter also noted that respondent had sought a hearing on her appeal of the denial.

8. The issue on appeal is whether, on the basis of orthopedic conditions (cervical, back, left upper extremity), respondent is substantially incapacitated for performance of her duties as a special needs Preschool Teacher for the Hawthorne Unified School District.

*Job Description for Preschool Teachers*

9. A. According to respondent's written job description, the essential functions of a Preschool Teacher for the Hawthorne Unified School District include the following:

Utilizes a variety of methodology in teaching and instructing children experiencing a wide range of intellectual, physical, and emotional maturity [¶]  
... [¶]

... [U]ses a variety of behavior modification, reinforcement and behavior shaping strategies in the conduct of behavior management programs [¶] ... [¶]

Performs a variety of housekeeping functions in maintaining the facility in safe, sanitary, and orderly condition [¶] ... [¶]

Conducts a variety of physical activities in the development of gross and fine motor skills [¶] ... [¶]

May assist in cleaning and changing children who have experienced toileting accidents

Performs other related duties as required

B. The physical demands of a Preschool Teacher for the Hawthorne Unified School District include the following:

Persons performing service in this position classification will exert 10 to 20 pounds of force frequently to lift, carry, push, pull or otherwise move objects

This type of work involves sitting, but also involves walking or standing for extended periods

(Exhibit 22.)

*Respondent's Actual Job Duties*

10. Respondent worked with special needs children, approximately eight to 12 per class. The children had disabilities both physical and cognitive, which required that respondent help them in special ways, for both safety reasons and teaching purposes.

A. Some of the students could not walk, so that respondent was required to help them to move about, including by lifting them. Some were not potty-trained, so that respondent was required to change their diapers, which required lifting and pulling. Their weights averaged between 40 and 65 pounds, and some were heavier, as much as 80 pounds. In order to care for them, respondent was daily required to lift children onto the classroom's adult-sized toilets.

B. Children were sometimes physically aggressive, so that respondent was required to intervene. Sometimes this meant holding a child back from another. Sometimes it meant lifting the child to stop aggressive behavior or to remove a child to safety from an aggressor. Respondent was usually the only adult in the classroom, but she could call for support from other school staff. She did so at times in cases of child tantrums or

emergencies. She recalled that on occasion more than one adult was needed to physically restrain a child who was especially upset.

C. Much of the instruction required repetitive physical activity, such as firmly grasping a child's hands in order to direct the child's movements. Respondent was also required to keep the classroom neat and clean, including by lifting boxes, holding supplies and weighing approximately 20 pounds, for storage on overhead shelving.

D. Respondent's testimony regarding her duties was corroborated by a witness, a teaching assistant who has worked with respondent and other teachers of special needs children at Hawthorne Unified School District over the past several years.

### *History of Injuries*

11. Respondent was injured on May 2, 2013 as she grasped the hand of one of her students. He had run away from the classroom the day before, so respondent was holding him firmly in order to prevent a repeat elopement. The student suddenly dropped to the floor. He thus pulled respondent's left arm with force downward, causing her to stagger and nearly fall. For a moment she was unable to see or hear and felt a sort of electrical shock along her left side, into her arm and her upper body. Her head hurt, she had nausea, and she felt numbness in the left arm and upper left side, including in her shoulder and neck.

12. Respondent called for an assistant and left the classroom on the assistant's arrival. School administrators then sent respondent to Concentra Occupational Medical Center. They took x-rays, put her arm in a sling, prescribed pain medication, recommended physical therapy, restricted her activity, and ordered further evaluation. Respondent had two weeks of physical therapy. It was ineffective.

13. Acupuncture was recommended instead of physical therapy, but that too proved ineffective. Next respondent was sent to a chiropractor. That too was ineffective.

14. From May through November 2013, respondent was under the care of Stuart Gold, M.D.C.M., Diplomate American Board of Orthopaedic Surgery. His May 23, 2013 diagnosis was cervical strain/spondylosis, left upper extremity radiculopathy versus brachial plexopathy, and left shoulder impingement/strain. Respondent's medical restrictions were: (i) to lift nothing over five pounds, (ii) to do no overhead work, and (iii) limited use of her left shoulder, arm, and hand. (Exhibits I and 7.)

15. Dr. Gold's May 23, 2013 Complex Comprehensive Orthopedic Consultation reported findings "consistent with either a cervical radiculopathy or a brachial plexopathy superimposed upon a left shoulder strain and impingement." (Exhibit 8.) He noted: "[T]he patient is unable to work in her usual and customary occupation. She will be placed on modified duty with limited use of the left arm and no lifting greater than 5 pounds and no overhead work." (Exhibits I and 8.)

16. In his June 27, 2013 report, Dr. Gold does not indicate a restriction on overhead work. Otherwise, he left previous restrictions in place.

17. In his July 19, 2013 report, Dr. Gold modified a restriction: respondent was to lift no more than 10 pounds. He also noted that physical therapy was scheduled for three weeks. (Exhibit 12.)

18. Dr. Gold referred respondent to Mark R. Glasberg, M.D., a neurologist, who reported his findings on September 3, 2013. Dr. Glasberg's impression was "mild chronic, left C7 radiculopathy." (Exhibits I and 14.)

19. Dr. Gold's November 26, 2013 Orthopedic Final Consultation Primary Treating Physician's Permanent and Stationary Report found that respondent's condition had stabilized, with "persistent pain and discomfort in her neck and left arm with positive MRI [magnetic resonance imaging] and positive EMG [electromyography] study of the left upper extremity." The Jamar Grip Strength test showed weakness in her left hand. The "Impression/Diagnosis" was: (i) cervical spondylosis with left C7 radiculopathy, and (ii) mild secondary left shoulder sprain and impingement. The restrictions were: (i) any overhead activity, (ii) lifting, pushing, or pulling more than 10 pounds with her left arm, and (iii) no repetitive work with the left arm. Dr. Gold noted that epidural steroid injections had been recommended but declined. (Exhibits I and 19.)

20. On June 3, 2014, as indicated in Exhibit I, Clive M. Segil, M.D., F.A.C.S., F.R.C.S., Diplomate American Board of Orthopaedic Surgery, conducted an independent medical examination (IME) of respondent on behalf of CalPERS.

A. Dr. Segil performed a number of tests. He performed a neurological examination of the upper limbs. He examined the cervical spine and found tenderness of the left supraspinatus tendon and trapezius muscle. His examination of the left shoulder indicated tenderness over the posterior aspect. Left shoulder motion was found to be normal. He examined the right shoulder. Right shoulder motion was found to be normal. His examination of the upper back indicated some tenderness in the mid-thoracic area. In examining the left chest wall, he found some slight tenderness of the anterior aspect of the left chest wall at the level of the fourth and fifth ribs. He found tenderness over the volar aspect of the left forearm over both the radius and ulna. He found normal motion of the left wrist. His examination of the left hand found no abnormality.

B. Dr. Segil did not perform the Jamar Grip Strength test. He thus did not obtain measurements of the grip strength of respondent's hands, to determine, for instance, whether the strength of the left hand was weaker than the right. He did not perform Spurling's test, which is commonly used to test patients with symptoms of cervical radiculopathy.

C. Dr. Segil's diagnosis was sprain of the neck, upper back, left shoulder, left wrist, left arm, and left hand, as well as contusion of the left side of the chest. In the discussion portion of his report, Dr. Segil stated his belief "that there are . . . [no] specific job duties that the member is unable to perform because of her physical or mental condition."

The belief was based not only on the examination, but on the doctor's statement that he "reviewed the physical requirements of a pre-school teacher in great detail." Dr. Segil concluded: "In my professional opinion the member is not substantially incapacitated for performance of . . . [her] usual duties." (Exhibit I.)

21. On June 11, 2014, as indicated in Exhibits J and 20, respondent was evaluated by Antoine Roberts, M.D., a Board Certified Orthopaedic Surgeon and Qualified Medical Evaluator.

A. Respondent told Dr. Roberts she had constant pain, especially in her neck, and that the pain's level of intensity was eight out of 10. She had less intense pain in the left side of her head, she had headaches, and she had pain and numbness in the left upper back and shoulder and the left arm and hand. She told him she had depression, anxiety, and sexual problems, and could not lift anything more than five pounds, whereas before her injury she could lift 100 pounds.

B. Dr. Roberts conducted a number of tests. Three tests of the cervical spine were positive: compression, traction, and Spurling's. Dr. Roberts administered the Jamar Grip Strength test to respondent, which showed weakness in her left hand. Dr. Roberts's objective findings were: "decreased range of motion cervical spine in all planes," "weakness left shoulder girdle and deltoid muscle," and "left-sided cervical radiculopathy."

C. The diagnosis was: "[c]ervical strain," "[s]prain, left shoulder," and "[c]omplex regional pain syndrome, left upper extremities."

D. Dr. Roberts' restrictions were: "no lifting greater than 20 pounds, no forceful pushing and pulling, no forceful gripping and grasping."

22. On September 22, 2014, Dr. Segil wrote CalPERS that he had reviewed Dr. Roberts's evaluation of respondent and all of the opinions in his IME report remained exactly the same. (Exhibit J.)

23. On April 11, 2014, Dr. Gold submitted to CalPERS a Physician's Report on Disability. The diagnosis and objective findings were: left side mild chronic radiculopathy, cervical strain at C5, C6, and C7, brachial plexopathy, shoulder strain, and impingement. He found that respondent was substantially incapacitated from performance of the usual duties of her position at Hawthorne Unified School District. He stated her permanent restrictions were: no lifting over 10 to five pounds and no overhead work. (Exhibit K.)

24. On a date not specified some months after her injury, respondent met administrators at Hawthorne Unified School District regarding whether she might return to work with accommodation for her disability, but they advised her there was no suitable alternative position available and they could not make a reasonable accommodation. She has not worked since the injury.

25. Dr. Segil testified at the administrative hearing.

A. He emphasized the difference between evaluations for Workers' Compensation purposes, such as Dr. Gold and Dr. Rogers performed, and one regarding disability retirement, such as he performed. They were evaluating whether respondent might return to work. He was evaluating whether she was incapable of returning to work.

B. Dr. Segil was uncertain why his report did not discuss certain tests, like the Jamar Grip Strength test, which the other doctors administered to respondent. He thought it might be that he had administered the tests and omitted them because the findings were normal. He stated on cross-examination that on any given work day he evaluates dozens of patients for CalPERS and has examined several hundred since his one-time examination of respondent at the June 3, 2014 IME. Dr. Segil testified that he remembers respondent's examination because, having seen her at hearing, he was reminded of her face and the examination.

C. Dr. Segil opined that there are no objective findings of disability. He stated that all diagnoses, his own and those of the other physicians, are based on respondent's subjective complaints only. Dr. Segil believes that the few objective findings of any kind, those based on the MRI and EMG, are indicative of degenerative changes normal for a person of respondent's age and not indicative of disability.

26. On balance, the evidence established that respondent is incapacitated for the performance of her duties as a Special Needs Preschool Teacher.

### LEGAL CONCLUSIONS

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 disability retirement. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. Government Code section 21150, subdivision (a) provides in pertinent part:

A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age . . . .

3. Government Code section 20026, states, 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.

4. "Incapacity for performance of duty" means "the substantial inability of the applicant to perform his usual duties," as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876;

*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) The increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of disability. (*Ibid.*, 77 Cal.App.3d at 862-863.)

5. In determining eligibility for disability retirement, the applicant's actual and usual duties must be the criteria against which any impairment is judged. Generalized job descriptions and physical standards are not controlling. *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 860-861.

6. Dr. Segil's testimony that he remembered his examination of respondent was not credible. His statement that there are no objective findings of disability was likewise not credible, in light of the objective findings reported by the other doctors, as indicated in Findings 21B and 23.

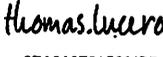
7. In determining that respondent was not incapacitated for performance of duty, Dr. Segil did not take into account respondent's actual duties. As indicated in Finding 20C, he relied upon a generalized list of duties for preschool teachers. The generalized list does not include key duties of respondent as a preschool teacher of special needs children. Among such duties were: (i) daily lifting children whose weights averaged between 40 and 65 pounds, but could be more, as indicated in Finding 10A; (ii) restraining children or modifying their behavior by physical intervention, as indicated in Finding 10B; (iii) firmly grasping children's hands, to prevent elopement or their running away from the classroom, and to enforce learning by one-on-one contact, as indicated in Findings 10C and 11; and (iv) handling boxes of supplies, including placing them in overhead shelves. In her injured condition, respondent is able to fulfill none of these duties.

8. Respondent met her burden of showing that at the time of her application for disability retirement, on the basis of orthopedic conditions (cervical, back, left upper extremity), she was substantially incapacitated for performance of her duties as a special needs Preschool Teacher with the Hawthorne Unified School District.

#### ORDER

The appeal of the denial of the application of respondent, Martha Quintana, for disability retirement is granted.

Dated: October 5, 2015

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THOMAS Y. LUCERO  
Administrative Law Judge  
Office of Administrative Hearings