ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Involuntary Reinstatement from Disability Retirement of: MARCOS RIVERA, Respondent, and DEPARTMENT OF CORRECTIONS AND REHABILITATION, CALIFORNIA INSTITUTION FOR MEN, Respondent.	Case No. 2013-0159 OAH No. 2013050668

PROPOSED DECISION

Beth Faber Jacobs, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 30, 2014, March 9, 2015, and September 30, 2015, in Riverside, California.

Rory J. Coffey, Senior Staff Counsel, represented complainant Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California.

Respondent Marcos Rivera represented himself and was present.

Rosalind Rivas, Return to Work Coordinator, and Debra Holling, Human Resources Representative, California Department of Corrections and Rehabilitation, California Institution for Men, appeared on the first two days of hearing on behalf of respondent Department of Corrections. The department made no other appearances.

The matter was submitted on September 30, 2015.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED Oct. 29, 2015
C. Bodily

ISSUE

Has Mr. Rivera, who was granted an industrial disability retirement on the basis of a psychiatric stress condition in 2008, recovered from this condition so that he is no longer substantially incapacitated from performing the usual and customary duties of a correctional officer?

FACTUAL FINDINGS

Jurisdictional Matters

1. Effective August 17, 2008, the California Public Employees' Retirement System (CalPERS) approved Mr. Rivera's application for industrial disability retirement on the basis that he had a disabling psychiatric, stress-related condition. Respondent was 36 years old.

2. Respondent is now 43 years old. The minimum age for voluntary service retirement applicable to members of respondent's classification is 50 years of age. (Gov. Code, § 21060.)

3. CalPERS may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service to undergo a medical examination. (Gov. Code, § 21192.) In 2012, CalPERS required Mr. Rivera to undergo a medical examination.

After the examination, CalPERS notified Mr. Rivera that it concluded he was no longer disabled or incapacitated from the performance of his duties as a correctional officer. CalPERS requested that Mr. Rivera be reinstated to his former usual job duties as a correctional officer with the department.

4. Mr. Rivera filed a timely appeal from CalPERS's decision.

5. On January 6, 2014, complainant signed the accusation to discontinue Mr. Rivera's retirement and require that he be reinstated to his former position as a correctional officer. The accusation and other jurisdictional documents were served on Mr. Rivera and the department. Mr. Rivera filed a notice of defense, and this hearing followed.

The Initial Determination that Mr. Rivera was Eligible for Disability Retirement

6. Respondent California Department of Corrections and Rehabilitation hired Mr. Rivera as a correctional officer in July 2000, when he was 28 years old. By reason of his employment, Mr. Rivera was a state safety member of CalPERS.

7. As a correctional officer at California Institution for Men (CIM), Mr. Rivera's duties required him to "maintain the peace" at the prison and monitor large areas of the prison to ensure inmate safety and prevent escapes. When he began his employment, Mr. Rivera had no history of psychiatric problems. Early in his correctional officer career, Mr. Rivera suffered orthopedic injuries, but the injuries were not permanently disabling. He had no problems with his supervisors or history of discipline. However, Mr. Rivera began to experience anxiety and fear from events that occurred on a daily basis at the prison, as summarized by Perry Maloff, M.D., in his report dated December 6, 2012:

> [Mr. Rivera] was part of a team that kept count of the inmates to ensure no one had escaped. He was involved in numerous takedowns on nearly a daily basis and subject to horrifying events, prison riots, and was working light duty in the mailroom [following one of his orthopedic injuries] when one correctional officer was killed in the line of duty. He had been subject on numerous occasions to shots fired from the gun tower to break up fights. This was nearly always nonlethal fire but very frightening and effective. Many rounds landed near him on many occasions and he was witness to many inmates who were, in fact, struck by nonlethal rounds "to excellent effect" according to Mr. Rivera who noted that those inmates were significantly bruised and went down quickly. During this period of time, the patient reported that he became excessively anxious, hypervigilant, and nervous. He knew that showing that fear would be the last straw and so [he] maintained an air of confidence, though he attempted to place himself, whenever possible, in the safest environments at work. During the last several years when he began having heightened feelings of anxiety and nervousness he made sure that he was stationed in the safest locations possible. Frequently he would find work in the library or in other positions where he would have no contact with inmates, though this was not possible to do on a full-time basis.
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> . . . . In 2005 there was a frightening riot. The inmates were locked in a single large area and were busting the doors down to get out. They succeeded in rushing out, though shots fired stopped them from overwhelming the prison.

8. Mr. Rivera became frightened about going to work. Whenever he was alone with an inmate or without the presence of another officer, he was fearful. He started calling in sick. He stopped working in October 2005 and saw a counselor through the employee assistance program (EAP.)

9. In January 2006, when the allotted EAP sessions concluded, Mr. Rivera began treating with Ray Barnett, Ph.D., a licensed psychologist. Mr. Rivera's anxiety continued to grow. He was frightened of going to work. Three to four times a week he had insomnia and nightmares about being caught in a CIM inmate riot and not being able to escape. He became sad and depressed. He gained weight. He had periods of intermittent crying. He developed headaches. In his report dated January 24, 2006, Dr. Barnett diagnosed Mr. Rivera with "major depressive disorder, single episode, with anxiety." He noted that Mr. Rivera's fear of inmates became reinforced during two riots that occurred while he was on duty. Dr. Barnett recommended that Mr. Rivera obtain psychotherapy and "psychiatric intervention" in the form of medication, and he referred him to a psychiatrist, Robert Gordon, M.D.

10. Dr. Barnett and Dr. Gordon both recommended that Mr. Rivera try psychiatric medications to determine if the medications would alleviate his anxiety or depression. Mr. Rivera elected not to take medication and appeared to improve somewhat with psychotherapy alone. He returned to work on May 1, 2006. The following month, while he was working in CIM's east facility with psychiatrically disturbed inmates, an inmate grabbed Mr. Rivera by the wrist and assaulted him. Other officers had to control the inmate. The incident caused Mr. Rivera renewed fear and anxiety, which further increased the following month when Mr. Rivera's partner was inadvertently stuck with a contraband needle while Mr. Rivera and his partner were searching an inmate's cell. Dr. Barnett found Mr. Rivera's reaction to be "his second episode of a major depressive disorder." He added:

> I had encouraged him to accept medications when he was first seen but symptoms began to remit before they were necessary. Again he will require medicine; he is experiencing more dread at this time of [sic] the workplace than he did when initially seen."

11. In July 2006, Mr. Rivera was again placed off work. He tried to resume working but called in sick, at least once a week, because of his anxiety and stress. On November 16, 2006, Dr. Barnett concluded that Mr. Rivera's condition "had reached a permanent and stationary plateau." He reported that Mr. Rivera remained "apprehensive around inmates" and "symptomatic" but "refused all antianxiety and antidepressant medicine so there was little that could be done to reduce symptoms." As a result, Dr. Barnett concluded that "there was little psychologically that can be done [as long as Mr. Rivera] continued to refuse medications."

12. Over the next year, Mr. Rivera repeatedly attempted to return to work but his anxiety continued, and he was seldom able to work a full week. Also, he continued to have pain from an ankle injury he incurred on the job. By 2007, Dr. Barnett reported that respondent "is clearly frightened of inmates and is not capable of performing his duties" and that he was "not able to function in a supervisory role to inmates." Dr. Barnett continued to encourage Mr. Rivera to try psychiatric medications, and Mr. Rivera continued to reject medication.

13. Mr. Rivera made another attempt to return to work in 2008. He was "markedly anxious." As Mr. Rivera got closer to his return-to-work date, his insomnia worsened. On October 8, 2008, he tried to drive to CIM to deliver return-to-work forms, but he became so anxious that he could not enter the institution, and he started driving home. Trying his best to overcome his anxiety, he turned around before arriving home and returned to the institution. He was so anxious that he began to shake. Dr. Barnett summarized:

> There have been multiple attempts to send this man back to work. Each has failed. It is clear that he is unable to perform his duties as a correctional officer. An officer cannot fear the very inmates he is there to supervise and over which they have control. Thus, I conclude that Mr. Rivera is substantially incapacitated in performance of his day-to-day duties as a correctional officer, unable to effectively exercise control over them, to defend himself, other officers or inmates in an emergency.

14. On October 24, 2008, Mr. Rivera applied for industrial disability retirement. Mr. Rivera stated he could no longer perform any part of his job due to his stress related illness.

15. Dr. Barnett issued a report, dated February 18, 2009, in which he stated that Mr. Rivera continued to suffer from a "depressed mood, [with] pronounced anxiety associated with work as a correctional officer with significantly less anxiety elsewhere." Dr. Barnett continued to recommend that he get psychiatric treatment, including medication. According to Dr. Barnett, Mr. Rivera "remain[s] uninterested in psychiatric medication."

16. CalPERS requested an independent medical evaluation from Divyakant Kikani, M.D., a board certified psychiatrist. In his report, dated February 24, 2009, Dr. Kikani concluded that Mr. Rivera was substantially incapacitated from performing as a correctional officer because he suffered from "posttraumatic stress disorder, delayed type" and "major depressive disorder."

17. Effective August 17, 2008, CalPERS granted Mr. Rivera's application for disability retirement. He has continued to receive a disability retirement allowance.

The Re-evaluation of Respondent's Disability

18. In 2012 CalPERS referred Mr. Rivera to Perry Maloff, M.D., for an independent medical examination (IME) under Government Code section 21192. The purpose was to determine if Mr. Rivera, who was still under the minimum age for voluntary retirement, remained disabled from performing his usual duties as a correctional officer.

The Evidence from the Hearing on July 30, 2014

19. Dr. Maloff evaluated Mr. Rivera on December 6, 2012. He wrote a report and testified on July 30, 2014, the first day of hearing.

20. Dr. Maloff became licensed as a physician in 1978 and is a Diplomate of the American Board of Psychiatry and Neurology. Approximately 75 percent of his practice is devoted to patient care; approximately 25 percent involves his conducting medical/legal evaluations. Dr. Maloff has served as a qualified medical examiner in workers' compensation matters, an agreed-upon medical examiner, and an independent medical evaluator for local and state agencies and private insurance companies. He is familiar with the usual and customary duties of correctional officers; he has reviewed the job description, conducted evaluations of correctional officers, and has treated "dozens" of correctional officers over the years. As he testified, he "knows they have a particularly stressful job."

21. Before examining Mr. Rivera, Dr. Maloff reviewed Mr. Rivera's medical records, including those from Doctors Barnett and Kikani. He interviewed Mr. Rivera, took a history, conducted a mental status examination, and issued a report dated December 6, 2012.

22. When Mr. Rivera met with Dr. Maloff, Mr. Rivera was successfully employed as a machinist at Schlosser Forge. Mr. Rivera told Dr. Maloff that he planned to return to school to get a degree in business management so he could promote within the company. "He is happy, content, hopeful, looking forward to life," Dr. Maloff wrote. He found Mr. Rivera to be devoted to his wife and four daughters, and concluded that he was working as hard as he could to provide for them. According to Dr. Maloff, Mr. Rivera was friendly, cooperative, and "particularly honest" in his responses.

23. Dr. Maloff disagreed with Dr. Kikani's assessment that Mr. Rivera suffered from post-traumatic stress disorder (PTSD). In Dr. Maloff's opinion, Mr. Rivera's symptoms had not risen to the threshold necessary for that diagnosis. Mr. Rivera was not continually experiencing marked symptoms of anxiety, panic attacks, or dissociative episodes in response to environmental triggers that reminded him of traumatic events at the prison. He was not re-experiencing symptoms that caused problems in his everyday routine. Mr. Rivera did not report hyper-arousal symptoms, feeling on edge, being easily startled, having difficulty sleeping, or having outbursts of anger. Although Mr. Rivera reported that he avoided going to CIM, in Dr. Maloff's opinion, Mr. Rivera's symptoms were not consistent with PTSD. In addition, Dr. Maloff observed that Mr. Rivera's treating psychologist never diagnosed Mr. Rivera with PTSD or provided or recommended treatment for PTSD. Dr. Maloff opined that Mr. Rivera's prior diagnosis was major depressive illness that was now in sustained remission. He surmised that Mr. Rivera's depression was in remission as the result of "no longer working the arduous duties of a correctional officer" or as the "natural progression or decelerations of major depressive illness." In Dr. Maloff's opinion, Mr. Rivera no longer had a psychiatric condition, and he was not disabled from performing the usual and customary duties of a correctional officer.

24. At the conclusion of his testimony on July 30, 2014, Dr. Maloff was excused, and he left the hearing. He was not present when Mr. Rivera testified.

Mr. Rivera's Testimony on July 30, 2014[1]

25. Mr. Rivera testified that when he saw Dr. Maloff in 2012, he was in a "good place." But that changed. In December 2013, Mr. Rivera lost his job as a materials technician, and he has not been able to find work. He gained weight. Many of his symptoms of anxiety returned. With the filing of the accusation, Mr. Rivera was required to visit the prison to turn in paperwork. He began to have nightmares about unsuccessfully trying to escape from CIM. He had difficulty driving to the prison and became so anxiety-filled that he repeatedly turned his car around before eventually gathering the fortitude to enter the prison. When he was inside the warden's office in late 2013, he shook. Feelings of extreme anxiety and panic returned. Mr. Rivera testified that he did not feel he could return to the job of being a correctional officer; in his opinion, his life would be in danger, and he would be placing the lives of innocent people in danger.

26. Although Dr. Barnett had recommended that Mr. Rivera try antidepressants, Mr. Rivera had refused; he heard, on television, that psychiatric medications could have serious side effects. He did not like taking any medications and especially did not want to take psychiatric medications. He shared that his wife and daughters were "everything to him," and stated that if CalPERS required him to return to the institution and it "cost him his life," "so be it."

27. Mr. Rivera explained that he stopped treating with Dr. Barnett in 2009 because he could no longer afford to continue with therapy. When he learned that Dr. Maloff concluded that he was no longer disabled from performing the customary duties of a correctional officer, and when he realized how anxious he was about resuming work as a correctional officer at CIM, Mr. Rivera tried to return for treatment with Dr. Barnett. By then, Dr. Barnett had retired. In February 2013, Mr. Rivera began treatment with Lino Valdivia, Psy.D.

The Department of Corrections

28. Two department representatives were present on the first day of the hearing, but neither testified. When asked if the department planned to present evidence or offer a position in the matter, the representatives stated that the department would not be offering evidence, and the department had no position on the issues raised in this case.

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[1] Because of the procedural issues raised in this case, Mr. Rivera and Dr. Maloff each testified twice: First on July 30, 2014, and next on September 30, 2015.

July 30 Closing Argument, the Reynolds Issue, and the Reopening of the Record

29. Closing argument was held following Mr. Rivera's testimony on July 30, 2014. Complainant's counsel raised a new issue. He argued that, despite the return of Mr. Rivera's symptoms of anxiety, a finding should be made that he was no longer incapacitated from performing his usual duties as a correctional officer because of his continued refusal to take psychiatric medications that could alleviate his symptoms. Counsel argued that the administrative law judge was bound by the ruling in *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208. In *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, 211, the Court of Appeal affirmed the CalPERS determination that a firefighter was not permanently disabled from performing his usual and customary duties because he unreasonably refused to submit to knee surgery that would have given him a 98 percent chance of full recovery. Complainant's counsel argued that, even if Mr. Rivera was still suffering from a psychiatric diagnosis, his refusal to take psychiatric medications to alleviate his condition was unreasonable, and under *Reynolds,* he should be found to be no longer eligible for a disability retirement allowance and reinstated to his former correctional officer position.

30. The record remained open for the parties to brief the issue. Only complainant filed a brief. The matter was submitted on August 8, 2014.

31. On September 3, 2014, the administrative law judge issued an order reopening the record and advising the parties that consideration of the *Reynolds* decision required additional evidence to be taken before the administrative law judge could determine if the *Reynolds* decision applied to psychiatric conditions. The administrative law judge listed questions to be answered by complainant's expert and any other expert medical professionals either party intended to call, and set a trial setting conference for an additional hearing date. Following the trial setting conference, the hearing was continued to March 9, 2015.

The Next Scheduled Hearing Day – March 9, 2015

32. The parties appeared for the continued hearing on March 9, 2015, and CalPERS's expert, Perry Maloff, M.D., was present and ready to testify. CalPERS's counsel indicated that he had requested that Mr. Rivera be re-evaluated by Dr. Maloff but Mr. Rivera had refused. Mr. Rivera had not been aware of the provisions of Government Code section 21175, which permits CalPERS to cancel a retiree's disability retirement allowance if the retiree is under the age of voluntary retirement and the retiree refuses to submit to a medical examination for more than a year. Following further discussion, Mr. Rivera agreed to be re-evaluated by Dr. Maloff, and the parties agreed to continue the hearing to permit Dr. Maloff to re-evaluate Mr. Rivera.

Evidence from the Hearing on September 30, 2015

DR. MALOFF

33. Dr. Maloff re-evaluated Mr. Rivera on April 7, 2015. He wrote a report the same day that addressed the questions posed in the administrative law judge's September 3, 2014, order and summarized his findings following his re-evaluation of Mr. Rivera.

34. Dr. Maloff testified on September 30, 2015. He explained that much had changed for Mr. Rivera between his first and second evaluations with Dr. Maloff. Mr. Rivera lost his job at Schlosser Forge when the company downsized, and he had not found new employment. Mr. Rivera had returned to the prison twice in 2013 to meet with the CIM warden and to complete documents related to this case. When he went into CIM in March 2013, he experienced palpitations, shortness of breath, sweating, and extreme anxiety. When he next returned to the institution administrative offices in late 2013 to complete additional documents, he had difficulty concentrating and felt like something terrible was going to happen. He told Dr. Maloff that these symptoms lasted five to ten minutes.

35. During his April 2015 evaluation, Mr. Rivera told Dr. Maloff that he felt pressured to return as a correctional officer and that he wanted to work, but did not believe he could return to being a correctional officer because of his intense fears and anxiety that were again "confirmed" when he went to the institution in 2013. He told Dr. Maloff that he was attending truck driving school but was concerned about being away from his family for two to three weeks at a time, which would be standard during the first year of being a truck driver.

36. During the April 2015 re-evaluation, Mr. Rivera described his typical day to Dr. Maloff: He got up each morning and took care of his personal hygiene. He tried to exercise but found it took "too much effort." He searched for work, did chores, helped prepare dinner, ate with his family, and helped his children with their homework. He and his wife experienced a role change; she started attending college for career advancement, and he was at home with the children.

37. Mr. Rivera reported to Dr. Maloff that he did not have difficulty going to the grocery store and did not have anxiety in crowds. He drove on the freeway without difficulty. Watching violence on television (including hearing sirens or police cars) did not trigger anxiety or panic attacks. He denied feeling "depressed, useless, hopeless, or that life is not worth living." He told Dr. Maloff that he would not take any psychotropic medications for any reason. He said that it did not matter if it was an antidepressant or an anti-anxiety medication; he was against taking medications unless his life was in jeopardy.

38. Mr. Rivera also told Dr. Maloff that he had been receiving psychotherapy from Lino Valdivia, Psy.D., twice a month since 2013. He told Dr. Maloff that he had not discussed the issue of taking medications with Dr. Valdivia and Dr. Valdivia had not

recommended them. Respondent conveyed that seeing Dr. Valdivia had been helpful for him.

Mr. Rivera asked Dr. Maloff if he could help him obtain a position at another institution (instead of CIM), or another position working for the state.

39. Dr. Maloff's expert opinion did not change following his 2015 evaluation of Mr. Rivera. He still opined that Mr. Rivera did not suffer from a disability that rendered him incapable or substantially incapacitated from performing his prior duties as a correctional officer.

40. During the September 2015 hearing, Dr. Maloff reviewed Dr. Valdivia's report, dated February 11, 2013, which had been filed in Mr. Rivera's workers' compensation case. According to Dr. Valdivia's report, when he met with Mr. Rivera in February 2013, Mr. Rivera was employed as a machinist but reported anxiety whenever thinking about returning to work as a correctional officer. Dr. Valdivia conducted psychological tests that indicated Mr. Rivera suffered from a severe depressive disorder. He found that Mr. Rivera was capable of working "in his current job" (as a machinist) but "strongly recommended" that Mr. Rivera receive 12 individual cognitive behavioral therapy sessions to help him stabilize his emotions.

41. Dr. Maloff observed that Dr. Valdivia's report did not address whether Dr. Valdivia felt Mr. Rivera could return to work as a correctional officer. Nothing in the report changed Dr. Maloff's opinion that Mr. Rivera was not incapacitated from performing the usual and customary duties of a correctional officer.

42. Dr. Maloff explained his opinion further: Although he found that Mr. Rivera had previously suffered from depression, in his opinion, Mr. Rivera was no longer depressed. He considered Mr. Rivera to be relatively "asymptomatic." Mr. Rivera worries about returning to work at the prison, but his worry is not a psychiatric condition. According to Dr. Maloff, Mr. Rivera has "anticipatory anxiety," something Dr. Maloff called a "phrase" and "not a diagnosis."

43. Dr. Maloff also opined that Mr. Rivera has no psychopathology that requires reversing and no diagnosis for which prescription medication is appropriate. However, if Mr. Rivera returns to being a correctional officer, and his anxiety or depression returns causing him difficulty in performing his duties, he could benefit from a combination of medication and behavioral therapy. Dr. Maloff considered it "unfortunate" that Mr. Rivera was not open to the benefits of taking medication, because a combination of medication and psychotherapy could have worked together to help him. According to Dr. Maloff, if Mr. Rivera returns to work and became anxious, he might be a candidate for a benzodiazepine, an anti-anxiety medication that takes effect in minutes. If depression returns, treatment with a combination of therapy and anti-depressant pharmaceuticals may be warranted. Anti-depressants take longer to become effective; they take from four to six weeks to reach a therapeutic dose after the correct drug is determined, the dose is titrated, and potential side

effects are monitored. Dr. Maloff opined, however, that regardless of whether there is treatment that may be valuable for Mr. Rivera in the future, Mr. Rivera has no diagnosis at this time that renders him incapable of returning to his customary and usual duties of a correctional officer.

MR. RIVERA'S TESTIMONY

44. Mr. Rivera also testified on September 30, 2015. He appeared to be stronger emotionally than he was when he testified in July 2014. He was proud to say he had been hired as a truck driver in June 2015. He emphasized that he is a man of integrity and wants to provide for his family. "I feel good; I feel great," he said. Mr. Rivera testified that he was trying to be open to the idea of medication if he needs it in the future. He had not seen Dr. Valdivia in three months because of his work schedule. He shared a concern that if his disability retirement was terminated and he was required to return to his prior employment as a correctional officer, he would need to return to the corrections academy in Sacramento. This would require that he be away from his family for 16 weeks, a prospect that caused him concern; his family is his greatest source of comfort, and he will miss them if he attends the academy.

45. Mr. Rivera had many questions about the future and what would happen if he was required to return to CIM: Could he be assigned to another institution so he will not have the same memories of CIM? When he attended the academy the first time, he was 27 years old; now he is older, 43 years old. Will he be given psychiatric help if he has problems adjusting to the academy or to the institution upon his return? What doctor would he see? Could he get treatment from Dr. Maloff?

46. Mr. Rivera worked diligently to overcome his anxiety and depression. He showed sincerity in his efforts to work, take care of his family, and prepare for the possibility that he would be required to return to work as a correctional officer.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. CalPERS has the burden of establishing, by competent medical opinion, that Mr. Rivera is no longer substantially incapacitated from performing the usual and customary duties as a correctional officer.

2. The standard of proof by which complainant must meet its burden is preponderance of the evidence. (Evid. Code, § 115.)

Minimum Standards for Peace Officers

3. Government Code section 1031 contains a list of minimum standards for peace officers. The standards include a requirement that the peace officer be "free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer." A peace officer's emotional or mental condition is subject to an evaluation by a physician or a psychologist who satisfies certain criteria outlined by the California Commission on Peace Officer Standards and Training (POST).

Relevant Industrial Disability Retirement Statutes

4. Under Government Code section 21151, subdivision (a), "[a]ny patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . . regardless of age or amount of service."

5. The terms "disability" and "incapacity for performance of duty" are defined in Government Code section 20026. Under this statute, these terms "mean disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion."

6. Evidence of the employee's permanent incapacity must be based on competent medical evidence. (Gov. Code, § 31720.3.)

7. Under Government Code section 21192, CalPERS may require a disability retirement allowance recipient who is under the minimum age for voluntary retirement for service to undergo a medical examination. (Gov. Code, § 21192.) Under the provision:

> The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. 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.

Purpose of the Public Employees' Retirement Law

8. The Public Employees' Retirement Law (PERL), enacted in 1945, established a retirement system for employees of the state and participating local public agencies. PERL was enacted to effect economy and efficiency in the public service by providing a means

whereby employees who, because of age or infirmity, may be replaced by "more capable" employees without hardship or prejudice. (*Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 107-108.)

Incapacitated for the Performance of Duty

9. Being "incapacitated for the performance of duty" means the "substantial inability of the applicant to perform his usual and customary duties." (*Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 875-876.) An employee who is not substantially incapacitated is not entitled to disability retirement.

Evaluation

10. After having traumatic experiences at CIM, Mr. Rivera suffered from a psychiatrically disabling condition that incapacitated him from performing his customary and usual duties as correctional officer. He filed an application for disability retirement; the application was granted; and he has been receiving a disability retirement allowance since 2009.

11. Mr. Rivera's psychological reactions were genuine. Whether his disabling condition was best characterized as depression, anxiety, or post-traumatic stress disorder, he had a disabling psychiatric condition when he was found eligible for disability retirement.

12. The weight of the evidence established that Mr. Rivera's disabling condition may have been alleviated more quickly by treatment that combined psychotherapy and medication. However, Mr. Rivera, who has never taken psychiatric medications, refused to take them.

13. Based on the evidence presented during the first day of hearing in July 2014, it appeared that Mr. Rivera continued to suffer from a disabling psychiatric condition. During closing argument, on July 30, 2014, complainant's counsel argued, for the first time, that under *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, 211, Mr. Rivera's refusal to take psychiatric medications was unreasonable and justified a finding that his disability retirement allowance should end because medication could have alleviated his disability. The administrative law judge concluded there was insufficient evidence to rule on the argument and ordered the taking of additional evidence. The process took many months.

14. In the intervening months, Mr. Rivera continued with psychotherapy, took courses, and found new employment as a truck driver. He now "feels good." Although Mr. Rivera has anticipatory anxiety at the prospect of returning to work as a correctional officer, his anticipatory anxiety is not a permanently disabling condition, and he is not suffering from any psychiatric condition that renders him incapacitated from his usual and customary duties as a correctional officer. As a result, he is no longer eligible for disability retirement on the basis of a psychiatric condition.

15. Based on the foregoing, the *Reynolds* issue has resolved and is no longer applicable. Mr. Rivera no longer suffers from a disabling psychiatric condition that substantially incapacitates him from performing the customary and usual duties of a correctional officer. And because he is not suffering from an incapacitating psychiatric condition that can be alleviated by taking psychiatric medications, this decision does not need to reach, and does not reach, the issue of whether *Reynolds* extends or applies to individuals with psychiatric illnesses.

16. Based on competent medical opinion, it is appropriate to end Mr. Rivera's disability retirement allowance and reinstate him to his former position as a correctional officer.

17. Mr. Rivera reasonably questioned whether he would have a better likelihood of successfully returning to correctional work without anxiety (or the same level of anxiety he previously experienced) if he was assigned to another institution. CalPERS has no jurisdiction over Mr. Rivera's assignment upon return to work. He is encouraged to discuss this with the Department of Corrections. Although CalPERS does not have the jurisdiction to order it, it is hoped that the department will seriously consider assigning Mr. Rivera to another institution so as to maximize the likelihood of his success as a correctional officer upon his return to work.

ORDER

1. CalPERS's determination that Marcos Rivera is no longer disabled or substantially incapacitated from performance of his duties as a correctional officer is affirmed.

2. CalPERS's request that Marcos Rivera be reinstated to his former usual job duties as a Correctional Officer with the Department of Corrections and Rehabilitation is granted.

DATED: October 28, 2015

Beth Faber Jacobs

BETH FABER JACOBS
Administrative Law Judge
Office of Administrative Hearings