

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:

JOHN T. DECKER,

Respondent,

and

CALIFORNIA STATE COUNCIL ON
DEVELOPMENTAL DISABILITIES,

Respondent.

Case No. 2014-1096

OAH No. 2014120598

PROPOSED DECISION

This matter was heard Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, on August 19, 2015, in San Bernardino, California and on October 7, 2015, in Riverside, California.

Rory J. Coffey, Senior Staff Counsel, represented California Public Employees' Retirement System, State of California (CalPERS).

Natalie Bocanegra, State Counsel on Developmental Disabilities represented respondent California State Council on Developmental Disabilities (State Council).

John T. Decker, respondent, represented himself.

The matter was submitted on October 7, 2015.

ISSUE

Was Mr. Decker permanently incapacitated from substantially performing his duties as a Community Program Specialist I based upon a psychiatric condition when his application for disability retirement was filed?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Nov. 6, 2015

C. Bodily

FACTUAL FINDINGS

Procedural Background

1. State Council hired Mr. Decker in early 1998 as a Community Program Specialist I (CPS I).
2. On July 3, 2013, State Council placed Mr. Decker on paid administrative leave after Mr. Decker made comments to, or about, his supervisor that the State Council interpreted to be threatening.
3. On August 22, 2013, Christopher R. Thompson, M.D., performed a psychiatric evaluation of Mr. Decker. In a report dated September 2, 2013, Dr. Thompson opined that "Mr. Decker is not currently capable of performing the essential functions of his job as a [CPS I] for the [State Council] because of a psychiatric disorder(s) and/or psychiatric symptoms." Dr. Thompson opined that Mr. Decker's prognosis was "guarded." Because of his concern that the release Mr. Decker signed limited his ability to provide certain information, Dr. Thompson did not provide his diagnosis of Mr. Decker's condition.
4. In September 2013, State Council filed a Disability Retirement Election Application on behalf of Mr. Decker. Mr. Decker did not sign the application or request a disability retirement. The application contained only Mr. Decker's contact information; stated that his last day on the State Council's payroll was September 23, 2013; stated that his retirement effective date was September 24, 2013; and was signed by Roberta Newton, Interim Executive Director of State Council. The State Council did not identify the disability it claimed Mr. Decker had or how the asserted disability affected his job performance.
5. CalPERS referred Mr. Decker to Lawrence H. Warick, M.D., Ph.D., for a disability retirement evaluation. On July 3, 2014, Dr. Warick performed a "complete psychiatric disability evaluation" of Mr. Decker. Dr. Warick found that Mr. Decker was not substantially incapacitated from performing his usual job duties because of a psychological condition.
6. By letter dated August 11, 2014, CalPERS advised Mr. Decker and State Council that Mr. Decker's application for disability retirement was denied. CalPERS determined that Mr. Decker was "not substantially incapacitated from the performance of [his] job duties as a Community Program Specialist I with [State Council]."
7. On or about September 10, 2014, State Council appealed CalPERS's denial of Mr. Decker's application for disability retirement. Mr. Decker did not file an appeal.
8. On December 2, 2015, Anthony Suine, Chief, Benefit Services Division of CalPERS signed a Statement of Issues naming Mr. Decker and State Council as respondents. CalPERS defined the issue for the administrative hearing as "whether at the time of the application, on the basis of a psychological condition, respondent Decker is permanently

disabled or substantially incapacitated from the performance of his duties as a [CPS I] for respondent [State Council].”

Job Duties and Description of a Community Program Specialist

9. The State Council is an independent state agency that supports the goals of federal and state laws to enable the developmentally disabled to “achieve self-determination, independence, productivity, and community integration and inclusion.” One of the functions of the State Council is to monitor and assess services vendors provide to developmentally disabled consumers. A CPS I assists with or conducts Quality Assessment (QA) surveys of consumers and vendors; obtains and manages confidential consumer information; recruits, evaluates, supervises and monitors volunteers who conduct interviews with consumers; assigns consumers to be interviewed; prepares and submits reports and data; identifies and reports abuse, neglect and violations of consumers rights; consults and trains individuals with developmental disabilities, family members and service providers to assist in advancing the state and federal goals; and participates in community committees and agencies. A CPS I has interactions with regional center staff, service providers, individuals with developmental disabilities, family and community members, and the general public. One of the necessary skills of a CPS I is the ability to “communicate effectively, both orally and in writing Good interpersonal skills are critical to success.” Mr. Decker signed a Duty Statement on April 6, 2010, confirming his understanding of these duties.

10. On February 16, 2010, Mr. Decker signed a document entitled “Employee Duty Expectations.” This document was applicable to all staff working for State Council. The Employee Duty Expectations stated that all employees were expected to “conduct themselves in a professional manner at all times.” It also provided that State Council has “a Zero Tolerance Policy for employees using threatening language or exhibiting threatening behavior in the workplace, which may result in an adverse action/formal discipline against the employee.” The Employee Duty Expectations further provided that full time employees were expected to work five days a week and eight hours per day unless a different schedule was approved by the Executive Director and/or others. CPS I employees were required to prepare a weekly schedule each Monday morning for the work week. The weekly schedule was to include “date, location of work for each day, destination if working outside of the office including the expected time of departure and arrival.”

One of Mr. Decker’s primary tasks was to interview/survey developmentally disabled individuals who lived in the community to determine whether they were satisfied with the services provided to them by independent contractor vendors. Mr. Decker interviewed consumers who obtained services from the Inland and Kern Regional Centers. The interviews were most often conducted in the consumer’s home. During an interview, Mr. Decker was expected to explain the survey he was conducting to the consumer. Because the consumer was vulnerable and the survey asked for personal information, Mr. Decker was required to do his best to make the consumer feel comfortable. Mr. Decker entered the data obtained from the surveys and interviews into the State Council computer system, ODESA.

Respondent's Work History

11. Mr. Decker was hired by State Council, Area Board No. 12, in early 1998 as a CPS I. No evidence of job performance issues prior to 2008 was offered. He remained a CPS I until he was placed on administrative leave on July 3, 2013.

WORK PERFORMANCE 2008 TO 2012

12. On July 28, 2008, Mr. Decker requested that he be permitted to work on a flexible work hours schedule so that he could schedule appointments on Saturdays. Russell Rankin,¹ the temporary lead staff,² advised Mr. Decker that his work schedule required him to work five days a week for eight hours a day and that Mr. Rankin was not in a position to change his work schedule at that time. Mr. Rankin offered to discuss the issue further in a meeting scheduled for September 9, 2008.

On August 14, 2008, Mr. Decker informed Mr. Rankin that he had scheduled an appointment for an interview for Saturday, August 16, 2008; he advised Mr. Rankin that he planned to take the following Monday off to compensate for working on Saturday. By return email, Mr. Rankin advised Mr. Decker that he had not authorized Mr. Decker to work a flexible schedule and that he must change the appointment he scheduled for a Saturday.

Mr. Decker responded to the email and disputed some non-essential aspects of the email.

13. In February 2009, Mr. Rankin sent an email to Mr. Decker addressing, among other things, an allegation that Mr. Decker did not have quality assessment records of his work for 6 months and suggesting ways to recover and keep track of his work. Mr. Decker responded by challenging Mr. Rankin's statement he did not have the referenced records. He also expressed that he was "offended" by Mr. Rankin's reminder that it was his responsibility to keep track of his work. He stated "If you want to make accusations against me or hurl insults I suggest you do it in person and with my Union Rep. present."

14. In 2010, Vickie Smith³ became State Council, Area Board No. 12's, Executive Director. Ms. Smith testified that Mr. Decker had a rough start when she became Executive Director and he did not improve. She believed he did not want to fulfill his employment obligations. She assigned tasks to him that he either did not complete or did not complete properly. At one point, Mr. Decker announced to Ms. Smith that "You are not my boss." Ms. Smith advised him, "Yes, I am." Ms. Smith heard Mr. Decker and another staff member

¹ Mr. Rankin testified at the hearing.

² Mr. Rankin became the Executive Director, Area Board No. 12, in or around 2008 to 2009.

³ Ms. Smith testified at the hearing.

arguing about job duties. One staff member became so upset at Mr. Decker's comments in a staff meeting that the staff member left the meeting.

15. On one occasion, Ms. Smith was moving furniture to provide access for disabled individuals who would be coming to the office to learn workplace skills. According to Ms. Smith, Mr. Decker said if State Council brought in volunteers or interns he would "kick them." Mr. Decker later denied making this statement.

16. On September 28, 2010, Mr. Decker sent an email to Ms. Smith, suggesting that she discussed his job duties and responsibilities openly in a staff meeting in violation of his right to privacy. He stated, "I will work harder to in the future to lower my expectations of privacy so I don't become frustrated and angry at staff meetings." Ms. Smith responded by telling Mr. Decker that the discussion was general and not about his individual job duty statement.

17. In a counseling letter dated December 8, 2010, Ms. Smith summarized a meeting she had with Mr. Decker on December 6, 2010. Although Ms. Smith and Mr. Decker were able to resolve the issues discussed in the meeting, Ms. Smith stated that Mr. Decker's "tone and manner were unprofessional and inappropriate." Ms. Smith advised Mr. Decker that he was not to use such tone with her or his co-workers.

18. On July 6, 2011, Mr. Decker emailed Ms. Smith and advised her that he had an eye injury or twitching in his eye. He said he felt as if he had "dust or something had gotten into [his] eye and was irritating it." He stated that co-workers noticed his eye twitching and one co-worker suggested it was "stress-related." He said he believed his eye problem was work-related. Ms. Smith and Mr. Decker drafted and filed a workers' compensation claim based on Mr. Decker's concern. The claim form stated "right eye started twitching, also eyelid. Eye/eyelid continues to twitch with pain on side of head & neck." Mr. Decker was referred to a workers' compensation health clinic to examine his eye.

Documents from the health clinic note that Mr. Decker also reported he was suffering from stress, unable to handle the workload and had a "confrontational relationship with boss." Mr. Decker attributed his eye twitching and pain in his head and neck to work-related stress.

After his first visit to the health clinic, Mr. Decker asked Ms. Smith about seeing a mental health professional. He was referred to a personnel analyst at State Council.

Mr. Decker had complaints about the delay at the health clinic but returned to work on July 11, 2011, with no limitations. When he entered his workplace, Mr. Decker complained to a co-worker that he was wrongfully diagnosed with having dust in his eye and blamed Ms. Smith for the diagnosis. He claimed he did not say he had dust in his eye when he reported the injury. He told the co-worker that all the problems he was having were Ms. Smith's doing, and he twice stated that "she will pay for this."

Ms. Smith issued a Formal Reprimand to Mr. Decker dated July 20, 2011, based upon his threatening comments.

19. On November 16, 2011, Ms. Smith, Mr. Decker, and a union representative met to discuss problems Mr. Decker was having “recently in meeting your job requirements.” On November 30, 2011, Ms. Smith issued Mr. Decker a Corrective Action Memorandum. The memorandum summarized a letter of reprimand dated December 8, 2010, that addressed tasks that Mr. Decker had not completed and the November 16, 2011, meeting which was described as concerning Mr. Decker’s lack of productivity, instances of insubordination, and absence without leave.

20. On February 23, 2012, Ms. Smith issued a written Informal Reprimand to Mr. Decker. In the Informal Reprimand, Ms. Smith asserted that Mr. Decker had not completed several work assignments that he was required to complete and determined that his behavior was “insubordinate and willfully disobedient.” He was directed to “immediately fulfill the essential functions of [his] job . . .” and provided specific tasks he was required to complete. He was advised that further failure to perform or engagement in misconduct may subject him to additional discipline.

WORK PERFORMANCE 2013

21. On May 29, 2013, Ms. Smith emailed Mr. Decker requesting that he provide her with the hard copies of surveys received by the office. She asked that the hard copies be “accessible to the staff at our office at all times.” Mr. Decker responded and advised Ms. Smith that he did not keep completed surveys. He stated, “Once answers are transferred from completed surveys to ODESA, the paper survey goes into the trash. Undeliverable/returned surveys go into the trash as well.”

By return email Ms. Smith stated that surveys were to be kept and not thrown away. She asked Mr. Decker, “Why you would think this was ok?” She requested he provide her with any directive or instruction he received that supported his decision to throw hard copies of surveys in the trash. Mr. Decker wrote that Mr. Rankin had told him to throw away paper surveys “to save office space.” Mr. Decker advised that he would save the surveys in the future. In a responsive email, Ms. Smith observed that, in the years she supervised Mr. Decker, surveys had not been thrown away until a project was completed, and she expressed a concern that she was “not sure what would make you think that things had changed.” She stated that, because the surveys were thrown away, the information input into the State Council’s system could not be verified, and the office may be required to start the project over.

Mr. Rankin testified at the hearing that he never told Mr. Decker to throw away hard copies of surveys. He said that supervising Mr. Decker was a challenge and time consuming and that Mr. Decker seemed unable to do what he was supposed to do for the job.

22. On June 3, 2013, Ms. Smith had a morning meeting with Mr. Decker to discuss his failure to adequately perform his job duties. Mr. Decker became agitated, disrespectful and raised his voice during the meeting. Shortly after the meeting concluded, Ms. Smith left the State Council building.

After his meeting with Ms. Smith, Mr. Decker telephoned the State Council's Sacramento office; he spoke to Thomas Johnson,⁴ a general clerical administrative support staff member. Mr. Decker identified himself and told Mr. Johnson that he was working in a hostile work environment and that Ms. Smith threatened him. He asked to speak with Roberta Newton, State Council's Acting Executive Director, to get permission to leave the office because he felt he was in danger.

The California Highway Patrol was notified of Mr. Decker's telephone call to Ms. Newton.

While she was still out of the building, Ms. Smith received a telephone call from the Sacramento office advising her not to enter the Area Board No. 12 offices because Mr. Decker was in there alone, and he had made a complaint against her. She was advised that California Highway Patrol officers were on their way and to wait for them.

California Highway Patrol officers reported to the San Bernardino office where Mr. Decker remained. Mr. Decker told the officers that Ms. Smith asked him to remove a pair of scissors from his desk and that Ms. Smith had talked about shooting guns with other employees. Mr. Decker said he felt uncomfortable and unsafe and was concerned that Ms. Smith would do something to cause him harm. Mr. Decker clarified that Ms. Smith did not actually threaten him, but that he perceived a threat from her. Ms. Smith advised the officers that she asked Mr. Decker to remove the scissors because he did not need to use scissors in his job and other employees reported being uncomfortable with Mr. Decker having scissors. The officers determined that no crimes were committed at the State Council office and left.

23. Ms. Smith formed the opinion that Mr. Decker created an unsafe work environment due to verbal confrontations and threats. She believed that he had a substantial incapacity to perform the essential functions of his job and that his incapacity was demonstrated by his poor job performance.

24. On June 4, 2013, Ruby Villanueva⁵ was assigned as Mr. Decker's supervisor. Ms. Villanueva was the lead staff over the Quality Assessment project. She had been Mr. Decker's supervisor in 2012 when Mr. Decker was telecommuting.

25. On June 10, 2013, Ms. Villanueva provided Mr. Decker with instructions for 22 interviews that were to take place on June 11 and 12 in Bakersfield. Ms. Villanueva

⁴ Mr. Johnson testified at the hearing.

⁵ Ms. Villanueva testified at the hearing.

noted that Mr. Decker had received all of the items necessary to complete the interviews, including a netbook and a cell phone. He was instructed to set up email on the phone or use the netbook to check email. He was told to check his email at least every half hour and to email her by 8:15 a.m. with his planned activities for the day.

On that same day, Mr. Decker emailed Ms. Villanueva and told her he was experiencing stomach pains and was on his way to his doctor. Mr. Decker's physician put him on medical leave; he was to return to work on June 13th.

26. In an undated email, Ms. Villanueva instructed Mr. Decker, "Effective Friday June 21, 2013, please also send me an email with actual activities (excluding phone calls, as your phone log is to reflect all calls you made/attempted) completed for the day. This email should be sent to me by COB each business day." (Emphasis in original.)

Mr. Decker responded that he did not receive emails when he was in the field and noted that he had reported the "damaged/malfunctioning BlackBerry sent to me" He stated further that "The level of supervision you're requesting is excessive and harassing. I'm offended by your use of the phrase 'actual activities' when referring to the work assignments I perform." He requested "immediate placement in a State of California office, or the procurement of a State-paid worksite and equipment to use." In a return email, Ms. Villanueva explained that she wanted the daily information from him because "unexpected things can arise to interrupt or add to . . . planned activities."

As a result of Mr. Decker's request, and because it was difficult to monitor Mr. Decker's job performance when he was working from his home, he was instructed to report to the Area Board 12 office in San Bernardino the following Monday, June 24th.

27. Although Mr. Decker had keys to the State Council office when he worked there previously, he turned in his office keys when he began telecommuting. When he returned to work at the San Bernardino office, he was not re-issued keys because his hours of work did not require him to have keys to enter the building. Ms. Villanueva testified that Mr. Decker accused her of race discrimination because, according to him, white people were given keys to the building.

28. On July 2, 2013, Gerald Rucker,⁶ an independent contractor/consultant who provided human resource services to State Council, met with Mr. Decker and a union representative to discuss Mr. Decker's claim that Ms. Smith threatened him. Mr. Rucker found Mr. Decker to be cooperative and responsive. Mr. Decker told Mr. Rucker that 95 percent of the time he was talking to Ms. Smith, she made statements to him that made him feel unsafe and fear bodily harm. He told Mr. Rucker that he called the Sacramento office and told "Tom" that Ms. Smith was having suicidal ideations and was paranoid. He denied saying that Ms. Smith wanted to "kill" him.

⁶ Mr. Rucker testified by telephone at the hearing.

During the course of his conversation with Mr. Rucker, Mr. Decker spontaneously stated that a workers' compensation doctor had told his attorney that he was "permanently and totally disabled" due to stress and that he believed the diagnosis was correct. Based on this statement, Mr. Rucker advised State Counsel to obtain a fitness for duty examination. He prepared a report of his interview with Mr. Decker and had no further involvement.

29. On July 3, 2013, Mr. Decker was placed on paid administrative leave. He was advised that he was assigned to his home between 8:00 a.m. and 12:00 p.m. and from 12:30 p.m. to 4:30 p.m. and was required to be available by telephone during those hours.

Expert Evaluations

FITNESS FOR DUTY EXAMINATION AND REPORT

30. Based upon Mr. Decker's comments to Mr. Rucker, Ms. Newton asked Mr. Decker to submit to a fitness for duty examination. She requested that the examination be conducted by Dr. Christopher R. Thompson, M.D.⁷ She asked Dr. Thompson to render an opinion on 1) Mr. Decker's general prognosis; 2) whether his asserted physical or mental condition interferes with his ability to perform his job duties; 3) whether he was able to perform the essential functions of a CPS I with or without reasonable accommodations; 4) if Mr. Decker could not perform the essential functions of his job, when could Mr. Decker reasonably be able to perform his job duties; 5) if Mr. Decker was unable to perform the essential functions his job, were there other duties he was capable of performing; and 6) whether Mr. Decker was unfit for duty due to a medical or psychiatric disability.

31. Dr. Thompson received his medical degree in 1999 from University of North Carolina School of Medicine. He completed a General Psychiatry Residency at the UCLA Neuropsychiatric Institute and Hospital from 1999 to 2003. He was a Fellow of forensic psychiatry at the UC Davis Department of Psychiatry from 2003 to 2004 and a Fellow of child and adolescent psychiatry at the UCLA Neuropsychiatric Institute and Hospital from 2004 to 2006. He has served as a Clinical Instructor and Assistant Clinical Professor of Psychiatry at UCLA, David Geffen School of Medicine since 2006. He became Board Certified in psychiatry in 2004, forensic psychiatry in 2005, child and adolescent psychiatry in 2006 and addictive medicine in 2009. He has performed approximately 15 to 20 fitness for duty examinations and has been hired by attorneys for both employers and employees. He was qualified to conduct a fitness for duty examination of Mr. Decker.

32. Dr. Thompson received documents from State Council, including the CPS I Duty Statement; the Employee Duty Expectations; and various emails and written disciplinary and employment-related documents concerning Mr. Decker. He also conducted telephone interviews with Ms. Smith, Ms. Villanueva, and one of Mr. Decker's co-workers. One of the documents he received contained an expanded version of the June 3, 2013, meeting between Ms. Smith and Mr. Decker. In that document it was reported that Ms.

⁷ Dr. Thompson testified at the hearing.

Smith was reviewing the job duties of a CPS I and told Mr. Decker she believed the duty statement accurately reflected the job duties. Mr. Decker was reported to have slouched in his seat and said, "Whatever, just keep reading." Mr. Decker was evasive in response to Ms. Smith's questions regarding where he would stay when he was in Bakersfield for work. When he eventually stated he would stay with a brother and sister in the area, Ms. Smith repeated, "So you will be staying with family?" Mr. Decker reportedly, in a rude manner, chastised Ms. Smith by saying "Didn't I just say that?" He later said, "I just told you that I will be staying with family. Do you not hear me?" Ms. Smith asked Mr. Decker about a report she had received to the effect that Mr. Decker was trying to learn Ms. Smith's home address. He denied doing so and stated, "You could stay here until you're a 99-year-old lady and I wouldn't care. Your opinion means nothing to me and this job means nothing to me." When Ms. Smith told Mr. Decker he could have time off to become more stable at work and be successful, Mr. Decker reportedly become more agitated and said, "I come here because you pay me. You stop paying me then I stop coming here."

33. On August 22, 2013, Dr. Thompson performed a fitness for duty evaluation of Mr. Decker. He advised Mr. Decker of the general purpose of a fitness for duty examination and that any statements Mr. Decker made to Dr. Thompson would not necessarily be confidential. Dr. Thompson advised Mr. Decker that he would be providing State Council a report of the examination and his findings. He further advised Mr. Decker that the examination did not establish a doctor-patient relationship between himself and Mr. Decker. Mr. Decker, in turn, provided Dr. Thompson with a form entitled "Medical Information Release Authorization" he said he obtained from his union. The form states, in pertinent part:

This release allows you to disclose whether there are any functional limitations regarding my ability to perform the essential functions of the work of my position. However, you are expressly prohibited from disclosing any diagnoses, medical causes, or prescribed medications related to me. You are expressly prohibited from disclosing or providing any additional medical information beyond which is necessary to respond to the inquiry stated above.

No party to the Statement of Issues produced a signed copy of the release. Nonetheless, Dr. Thompson testified that, because of the language in the release, he did not include a diagnosis in his written report to State Council. At the hearing, Dr. Thompson's testimony regarding a specific diagnosis of Mr. Decker was placed under a protective order.

34. Dr. Thompson spent 3.75 hours speaking to Mr. Decker and evaluating him. He stated that he performed a full psychiatric evaluation of Mr. Decker, including family, social, educational, military, relationship, civil and criminal medical, psychiatric histories, and reports of events leading to the fitness for duty evaluation, but because of the limited release presented by Mr. Decker, he did not include the information he obtained relating to these aspects of the evaluation in his report. Dr. Thompson was not asked about these

aspects of his evaluation at the hearing. Dr. Thompson did not conduct any diagnostic tests. Dr. Thompson noted in his report that Mr. Decker's speech was of normal rate, rhythm and volume. Mr. Decker described his mood as "good" but said he had stress related to finances, work and his daughter's health. "He did not appear sad or anxious and laughed numerous times during the evaluation. He exhibited a normal range of facial expressions and emotions." Dr. Thompson found that Mr. Decker's "thinking was generally clear, coherent, and easy to understand, though he tended to be over-inclusive in his response to questions." Mr. Decker "did not report being suspicious or paranoid" but said he felt his supervisor criticized his work more than others. Dr. Thompson found that Mr. Decker's "insight and judgment were difficult to determine."

35. Dr. Thompson stated that, in a forensic evaluation, an examiner cannot assume the person being evaluated is truthful. Because of that, he found the comments made in his telephone interviews with Ms. Smith and Ms. Villanueva to be "significant." In particular, he noted that Mr. Decker was described as "always giving off a hostile vibe," a struggle to supervise, "surly, abrasive and caustic," and unable to show empathy for others. He was said to have problems with others in the workplace and to always blame others for his problems.

36. Dr. Thompson evaluated Mr. Decker using the DSM IV-TR.⁸ He determined that, under that manual, Mr. Decker did not display sufficient signs or symptoms to have a diagnosis on Axis I.⁹ He also determined that, although he saw signs of a disorder that could have otherwise supported an Axis II diagnosis,¹⁰ Mr. Decker did not satisfy the minimum number of criteria required to make that diagnosis.

Dr. Thompson found that the symptoms Mr. Decker displayed impacted his interpersonal relations in the workplace. He stated that Mr. Decker feels he is special and lacks empathy for others. His exploitation of others, with the resulting lack of positive relationships with coworkers and supervisors has the greatest impact on Mr. Decker's inability to succeed in the workplace and perform the essential functions of his job. This inability to maintain positive relationships could extend to consumers and vendors Mr. Decker was required to interact with in his position as a CPS I.

Based upon his review of documents, telephone conversations with individuals who worked with Mr. Decker, and his interview of Mr. Decker, Dr. Thompson opined that Mr. Decker was not able to perform the essential functions of his job and that his prognosis was guarded. He did not believe that Mr. Decker would be able to perform the essential functions of his job in the near future because he did not recognize that he had problems with

⁸ The DSM IV-TR was updated in 2014 to the DSM-5. No testimony was offered if using the current version of DSM would change Dr. Thompson's opinions.

⁹ Using this diagnostic manual, an Axis I diagnosis is for major medical psychiatry disorders.

¹⁰ An Axis II diagnosis is for personality disorders and/or intellectual disabilities.

interpersonal relationships and the manner in which he dealt with people. He believed Mr. Decker could benefit from psychotherapy. He found Mr. Decker to be “unfit for duty” due to a disability caused by a psychiatric disorder(s) and/or psychiatric symptoms.” Dr. Thompson was not able to determine if Mr. Decker was capable of performing other duties or could work in other positions at State Council.

Dr. Thompson agreed that being a “difficult” employee from an employer’s perspective does not, alone, necessarily make an employee disabled from performing his or her job duties.

INDEPENDENT PSYCHIATRIC EVALUATION

37. After receiving State Council’s application for disability retirement on behalf of Mr. Decker, CalPERS asked Dr. Lawrence H. Warick, M.D., Ph.D.,¹¹ to perform an independent psychiatric disability evaluation of Mr. Decker. CalPERS asked Dr. Warick to render an opinion on 1) were there were any job duties Mr. Decker was unable to perform due to a medical or psychiatric condition; 2) was Mr. Decker substantially incapacitated from performing his usual duties; 3) if Mr. Decker was incapacitated, was the incapacity permanent or temporary; 4) did Mr. Decker cooperate in the examination; 5) was Mr. Decker able to handle financial affairs and enter into legally binding contracts; and 6) was Mr. Decker competent to endorse checks, understanding the nature and consequence of the endorsement.

38. Dr. Warick received his medical degree in 1960 from Albert Einstein College of Medicine. He completed a two-year rotating internship in Los Angeles County General Hospital in 1961; a two-year residency in neurology at USC School of Medicine and Los Angeles County General Hospital in 1962; and a three-year residency in psychiatry at USC School of Medicine and Los Angeles County General Hospital in 1965. He was a Clinical Associate at the Southern California Psychoanalytic Institute from 1973 to 1980 and received a Ph.D. from that program in 1980. Dr. Warick is a Diplomate of the American Board of Psychiatry and Neurology and became board certified in psychiatry in 1970.

Dr. Warick has performed many independent psychiatric evaluations. He has done these for CalPERS for the last three years and performs one to two evaluations per month. He has determined a CalPERS member to be not disabled in approximately 60 percent of the evaluations he has done and has found the member to be disabled in approximately 40 percent of the evaluations. CalPERS did not ask him to reach a particular conclusion about Mr. Decker. Dr. Warick was qualified to conduct an independent psychiatric evaluation of Mr. Decker.

39. Dr. Warick received documents that he reviewed prior to meeting with Mr. Decker. The documents included the disability retirement election application; the CPS I Duty Statement; and Dr. Thompson’s report that quoted various emails and written

¹¹ Dr. Warick testified at the hearing

disciplinary documents concerning Mr. Decker. Dr. Warick was not provided the personnel records quoted by Dr. Thompson, which he testified would have been helpful to have.

When he testified at the hearing, Dr. Warick had an independent recollection of Mr. Decker. He recalled Mr. Decker presented as a forceful individual. Dr. Warick advised Mr. Decker that the psychiatric examination was to determine only whether Mr. Decker was disabled. He told Mr. Decker that he would not treat Mr. Decker and that the examination did not establish a doctor-patient relationship between himself and Mr. Decker. He further told Mr. Decker that any information he gave Dr. Warick would not be confidential and could be included in a report Dr. Warick would prepare and provide to CalPERS.

Dr. Warick had Mr. Decker complete an 18 page patient questionnaire before he spoke to him. After Mr. Decker completed the questionnaire, Dr. Warick performed a mental status examination and took Mr. Decker's history, which included past medical, personal, civil and criminal, educational, occupational, and social histories. He then administered the Millon Clinical Multiaxial Inventory - III (MCMI III).¹² He spent "two face-to-face psychiatric hours (a psychiatric hour being 45 minutes)" with Mr. Decker.

40. Mr. Decker told Dr. Warick that for the first seven years of his employment with State Council he was a project coordinator in a facility for individuals with intellectual and psychiatric disabilities. He was then moved to the quality assessment section and worked on life quality survey projects. Mr. Decker indicated that, up to that point, he had received very good job performance evaluations and had never been threatened with termination. Mr. Decker told Dr. Warick that, in 2013, he was asked to take over an additional workload, but he did not receive a promotion or additional compensation for doing so. He claimed he had been doing "out of class work" since 2008 without additional compensation or advancement.

41. Mr. Decker denied any violent or discourteous treatment of co-workers or supervisors, including Ms. Smith. He told Dr. Warick that State Council was playing a "dirty trick" by trying to have him declared disabled so they could let him go and not have to pay him his full compensation.

Mr. Decker is divorced with three children. However, three years after their divorce, Mr. Decker's ex-wife moved back home and they live together. Mr. Decker reported that he enjoys a close relationship with his ex-wife and his sister.

Dr. Warick described Mr. Decker as "friendly and cooperative, somewhat controlling and verbose." He found that Mr. Decker was "very articulate and expressed himself well." Mr. Decker "did not show any overt signs of clinical depression" and his "affect was

¹² The MCMI-III is a psychological test in which the person evaluated responds to 175 questions. The responses are analyzed by a computer program. A full report of the computer analyzed responses is provided to the examiner. Dr. Warick uses the MCMI-III to confirm or dispute his clinical findings.

appropriate at all times” during the examination. Dr. Warick determined that Mr. Decker’s “social judgment was grossly intact.” He stated that Mr. Decker “is actively involved with his family, going to concerts, going to the movies and out to dinner, and volunteering at the VA Hospital. He is living a perfectly normal life.”

Dr. Warick reported that the MCMI-III confirmed his

clinical impression that there is no Axis I diagnosis from a psychiatric point of view. On Axis II again it confirms my clinical impression of a narcissistic, histrionic personality disorder. This confirms my impression that [Mr. Decker] did not sustain a psychiatric disorder as a result of his employment and it was more occupational problems due to certain personality traits for which he does not take responsibility.

42. Dr. Warick determined that Mr. Decker was capable of performing all of his duties, was not substantially incapacitated, and was capable of handling financial affairs, entering into legally binding contracts and endorsing checks. He found that Mr. Decker did not meet the criteria for a CalPERS disability retirement. He testified that the Axis II diagnosis of a personality disorder may indicate problems in adapting, but it is not disabling.

John Decker's Testimony

43. Mr. Decker chose not to testify at the hearing and he was not called as a witness.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In this matter, State Council placed Mr. Decker on administrative leave from his position as a CPS I and filed an employer-originated application for disability retirement. CalPERS denied the application and State Council appealed. Mr. Decker disputes that he has a disability and claims he is fit for duty. Under these circumstances, State Council had the burden of establishing by a preponderance of the competent medical opinion that Mr. Decker was substantially incapacitated from performing the usual and customary duties of a CPS I due to a psychiatric condition when State Council applied for an involuntary retirement. (See, Precedential Decision, *In the Matter of the Application for Reinstatement from Industrial Disability Retirement*, OAH No. L-199906537 (*Starnes*) and cases cited therein.)

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Relevant Industrial Disability Retirement Statutes

2. The Public Employees' Retirement Law (PERL) governs disability retirement and reinstatements and grants sole jurisdiction to CalPERS to make such determinations. Government Code sections 20026, 20125, 21150, 21154, 21156, 21190, 21192 and 21193.

3. Government Code section 20026 provides:

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

4. Government Code section 21152 provides:

Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

[¶] . . . [¶]

(d) The member or any person in his or her behalf.

5. Government Code section 21153 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

6. Government Code section 21154 provides, in part:

The application shall be made only (a) while the member is in state service On receipt of an application for disability retirement of a member . . . the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty.

7. Government Code section 21156 provides:

If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his . . . duties and is eligible to retire for disability, the board shall immediately retire him . . . for disability

Purpose of the Public Employees' Retirement Law

8. The 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 become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees. (*Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 107-108.)

Incapacitated for the Performance of Duty

9. "Incapacitated for the performance of duty" within the meaning of the Government Code means the substantial inability of the employee to perform his usual duties. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) An employee who is not substantially incapacitated is not entitled to disability retirement. (*Id.*, at pp. 875-877 [fish and game warden unable to lift heavy objects could otherwise carry out normal duties].)

Evaluation

10. Mr. Decker has been employed with State Council for almost 18 years. No evidence was presented that Mr. Decker received less than satisfactory job performance evaluations during his tenure at State Council. No evidence was presented that Mr. Decker had workplace performance or relationship-based issues before 2008. Mr. Decker claimed he was required to perform the job duties outside of his class but without additional compensation since 2008. Difficulties with Mr. Decker and concerns about job performance escalated in 2010 until he was placed on administrative leave on July 3, 2013. It is noted that Mr. Decker was placed on administrative leave not because he acted in a violent manner or threatened violence but after he reported he felt threatened by Ms. Smith.

11. The issue to be determined in this matter is not whether Mr. Decker was an exemplary or difficult employee but whether, because of a psychological condition, he was permanently disabled or substantially incapacitated from the performance of his duties as a CPS I. The determination must be based on competent medical opinion.

12. Drs. Thompson and Warick are well educated, trained and experienced in the field of psychiatry. They are both qualified to give an expert opinion of Mr. Decker's psychological condition and, if any disorders are identified, their potential impact upon Mr. Decker's workplace environment. Dr. Thompson evaluated Mr. Decker under a fitness for duty standard and Dr. Warick evaluated Mr. Decker under CalPERS' disability retirement standards. Nonetheless, Drs. Thompson and Warick arrived at very similar opinions of Mr. Decker's psychological condition, except that Dr. Thompson opined that Mr. Decker was disabled from performing his job duties as a result and Dr. Warick opined he was not. To reach his opinion, Dr. Thompson relied upon his review of records, his face-to-face evaluation of Mr. Decker, and his interview of three individuals who worked with Mr. Decker. To reach his opinion, Dr. Warick reviewed records, conducted a face-to-face evaluation of Mr. Decker, and administered a psychological test that confirmed his clinical impressions derived from his evaluation of Mr. Decker. Of the two physicians, Dr. Warick was more familiar with CalPERS's criteria for disability retirements.

13. It is determined that Dr. Warick's opinion that Mr. Decker's is not permanently disabled or substantially incapacitated from the performance of his duties as a CPS I as a result of a psychological condition carries more weight than Dr. Thompson's. At most, the evidence presented at hearing demonstrated that Mr. Decker was dissatisfied with certain aspects of his job, he was a challenging employee to supervise, he had less than satisfactory interpersonal relationships with one or more supervisors, and he was not performing up to the expectations of his supervisors. Although, as testified to by Dr. Warick, Mr. Decker may have some personality traits that make his interactions with others more difficult, those personality traits do not render him permanently disabled or substantially incapacitated from the performance of his duties under the PERL statutes and regulations governing involuntary disability retirement. State Council failed to demonstrate by a preponderance of the evidence, including competent medical evidence, that Mr. Decker is psychologically incapacitated from the performance of his duties as a CPS I.

Conclusion

14. A preponderance of the competent medical evidence and other available information established that Mr. Decker was not incapacitated from the performance of the customary and usual duties required of State Council CPS I because of a psychological condition.

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ORDER

The California State Council on Developmental Disabilities's appeal of CalPERS's determination that John T. Decker was not eligible for a disability retirement based on a psychological condition is denied.

DATED: November 5, 2015


SUSAN J. BOYLE
Administrative Law Judge
Office of Administrative Hearings