

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

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

In the Matter of the Accusation Seeking  
Reinstatement from Industrial Disability  
Retirement of:

VINCENT C. MILLER,

Respondent,

and

CALIFORNIA CORRECTIONAL  
CENTER, SUSANVILLE CALIFORNIA  
DEPARTMENT OF CORRECTIONS AND  
REHABILITATION,

Respondent.

Case No. 2014-0387

OAH No. 2015020824

**PROPOSED DECISION**

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California on December 1, 2015.

Preet Kaur, Staff Attorney, represented the California Public Employees' Retirement System, (CalPERS), State of California.

There was no appearance by or on behalf of Vincent C. Miller.

Respondent California Department of Corrections and Rehabilitation (CDCR), California Correctional Center-Susanville, did not appear.

Evidence was received and the matter was submitted on December 1, 2015.

**PROCEDURAL AND JURISDICTIONAL FINDINGS**

1. At all times relevant to this Decision, respondent Vincent C. Miller (respondent Miller) was employed by respondent CDCR, as a Correctional Officer (CO),

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM

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*[Signature]*

assigned to the California Correctional Center, Susanville (CCC Susanville), Susanville, California.

2. Respondent was and is at all times relevant to this Decision a safety member of CalPERS by virtue of his employment with CDCR.

3. Respondent Miller applied for industrial disability retirement from CalPERS on November 20, 2009. CalPERS approved the application after receiving medical information and reviewing the report of a psychiatric Independent Medical Examination (IME) from Dr. Clegg. Respondent Miller was officially retired for disability on August 9, 2010, but effective November 1, 2009. CalPERS determined that respondent was substantially incapacitated from the performance of his duties as a CO with CDCR at CCC Susanville due to his psychiatric condition (major depressive disorder, personality disorder).

4. Respondent wrote a rather sparse description of his disability and limitations in his 2009 application to CalPERS for disability retirement. Respondent wrote that he was disabled because he had "severe depression, anxiety and anger." He provided no additional information about when and how his disability occurred, his limitations or preclusions due to his condition, or how his condition has affected his ability to perform his job duties.

5. Respondent was notified in writing by CalPERS on August 19, 2013, that CalPERS was reviewing his continuing eligibility for disability retirement as part of its periodic re-examination of persons receiving a disability retirement from CalPERS. CalPERS reviewed respondent's disability retirement status under the purview of Government Code section 21060. Respondent's case was selected for CalPERS' review because respondent was beneath the minimum age for voluntary service retirement applicable to safety members when he was retired for disability.

6. Respondent was asked to provide information from his current and former treating physicians, a written statement regarding his current condition and report whether he was working, and, if so, the details of any employment. Respondent was also notified that he would be scheduled for an Independent Medical Examination (IME) at a date in the future. Respondent evidently submitted some unspecified medical records and other documentation in response to the CalPERS request.

7. Respondent's submission of medical records and other information was furnished to Andrea R. Bates, M.D., a Board certified psychiatrist retained by CalPERS. A representative of the CalPERS Benefits Services Division asked Dr. Bates to perform a psychiatric IME to determine whether respondent was still substantially incapacitated due to any claimed disabling psychiatric condition or personality disorder.

8. Dr. Bates performed her psychiatric IME on November 21, 2013, in Chico, California. Dr. Bates submitted a December 6, 2013 written report of her findings and conclusions to the CalPERS Benefit Services Division staff for evaluation and review.

9. CalPERS' Benefit Services staff re-reviewed the medical and other reports submitted by applicant, as well as Dr. Bates' December 6, 2013 IME findings and conclusions. CalPERS notified respondent Miller in writing of the results of its reevaluation and review of his qualifications for disability retirement on January 6, 2014. CalPERS advised respondent in writing that CalPERS determined that respondent Miller was no longer substantially incapacitated from performing the job duties of a CO for the CDCR-CCC-Susanville due to his claimed disabling conditions. The notice also advised respondent Miller that in accordance with Government Code section 21192, he was being reinstated to his former position, and that respondent had a right to appeal the determination.

10. Respondent timely appealed the CalPERS determination on February 3, 2014. Respondent requested a "board hearing" on the grounds that he is not mentally capable of returning to any kind of work. He advised CalPERS that the doctors he had seen in the past have moved away, and he has not been able to locate them or obtain his records. He was attempting to obtain an evaluation from Lassen Mental Health, but he was uncertain when he might be able to obtain an appointment, or whether they would take him as a patient.

11. Diane Alsup, Interim Chief, Benefits Services Division of CalPERS, made the allegations contained in the Accusation in her official capacity and caused it to be filed on January 30, 2015. Applicant timely requested a hearing on the Accusation. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

#### **FAILURES TO APPEAR-DEFAULTS**

12. Notices of the date, time and place of the evidentiary hearing were duly given to respondents Miller and CDCR in accordance with the provisions of Government Code section 11505 and 11509. No appearance was made by or on behalf of respondent Miller or the CDCR. The matter proceeded as a default by both respondents, pursuant to the provisions of Government Code section 11520.

### **FACTUAL FINDINGS**

#### **ESSENTIAL FUNCTIONS OF THE POSITION**

1. Exhibit 11 contains a CDCR form entitled "Division of Adult Institutions, Correctional Officer, Essential Functions (Essential Functions)." The Essential Functions requirements apply to all CO positions in CDCR adult facilities, regardless of location. The Essential Functions document was reviewed and signed by respondent's representative and representatives of CDCR and its Office of Personnel Services on August 28 and 29, 2008.

2. Most of the Essential Functions required of the incumbent CO are physical. However, there are some requirements in the essential functions that are primarily mental/emotional, such as:

- Must have mental capacity to be aware/alert in their observation/identification of security risks. Correctional officers are at risk to a variety of inmate behavior including but not limited to aggressive or violent inmates, psychological manipulation, or verbal abuse/harassment. Correctional officers must also have a mental capacity for exposure to very unpleasant situations, including inmates who have attempted or committed suicide by hanging themselves in their cells or slashing their wrists or inmates who throw bodily fluids at them;
- Must have the mental capacity to judge an emergency situation, determine the appropriate use of force, and carry out that use of force. Use of force can range from advising an inmate to cease some activity to firing a lethal weapon at an inmate when another life is threatened with great bodily harm or death;
- Must have the mental ability to recall an incident in order to accurately document the incident in writing.

3. Dr. Bates had read and considered the Essential Functions statement when she interviewed and assessed respondent during her IME. She used those Essential Functions as the basis against which she assessed and formed her opinion whether applicant had the capacity to substantially perform the requirements of a CO for CDCR at the time of her examination.

## WORK HISTORY

4. Respondent was hired by CDCR as a CO in approximately 1996. He last worked in 2008. He has between 11 and 12 years of full-time service. He was 39 years old at the time of Dr. Bates' IME, well below the minimum eligibility age for retirement. All of applicant's work for CDCR as a CO was at CCC-Susanville.

5. Applicant worked generally supervising inmates at the main facility (there are two CDCR institutions at the Susanville location.) Inmate populations ranged between 6,000 to 10,000 inmates while respondent worked there. Respondent told Dr. Bates (below) that he did not have much trouble with the inmates, but his supervisors were another matter. He complained of harassment and a hostile work environment that led to his belief that he could not continue to go to work in that environment. He described a snowballing effect of many conflicts over a lengthy period of time that led him to "break down" into a disabling depression and great anxiety every time he thought about returning to "that environment."

## DR. BATES' IME FINDINGS AND CONCLUSIONS

6. Dr. Bates conducted a clinical interview, including inquiry into respondent's past medical and mental health history, his description of his job duties and activities, work history and his explanation of the circumstances that led to his mental health breakdown that led to his 2007 application for disability retirement. She also performed a mental status examination and reviewed a number of medical and hospital reports submitted to her that reported respondent's previous treatment for depression and anxiety, including two in-patient psychiatric hospitalizations. Those medical reports included Dr. Clegg's 2010 psychiatric IME (below). She asked about current and past medications, social history, personal habits, prior injuries and surgeries, work status, and personal circumstances. She also noted respondent's present complaints and concerns. Her clinical assessment took place largely as she interacted with respondent during her clinical interview.

7. Dr. Bates concluded that respondent had an episode of severe disabling depression and anxiety that came about gradually, the product of the building up of work pressures, and continuing conflicts with and harassment by supervisors. Respondent told her there was a time that he "just could not go back" into that work environment. He sought mental health treatment and was tried on a variety of heavy psychotropic medications and anxiolytics. He reported to Dr. Bates that the medications made him feel like he was unable to function in any environment. The combination of depression, anxiety and the medications "messed me up," and caused nearly every aspect of his life to deteriorate. He told Dr. Bates he lost his wife, his job, and his home. He told Dr. Bates that especially the effects of the medications made him feel like he had no control of anything in his life, rendering him unable to function. He reported either being unable to sleep or sleeping constantly.

8. Respondent told Dr. Bates that he began to recover after he was retired for disability. He slowly quit taking the medications, and told Dr. Bates that he gradually began to feel better and function more effectively when he was finally off medications altogether. He told Dr. Bates he takes no medications now.

9. Respondent also reported to Dr. Bates that he stopped all mental health treatments in about 2009. He described what made him feel better was a combination of getting off the medications and not having to deal with the work environment. He told Dr. Bates that the fear and anxiety of returning to that work environment made him physically ill, and that there was "just no way," that he could return to dealing with the staff and the supervisors at the prison. He acknowledged that of the three supervisors that troubled him, one was deceased, one was ill and only one still worked at the prison.

10. Respondent also told Dr. Bates about mistakes that were made with his employment status that compounded his depression and anxiety and increased the difficulty of continuing to work. He described his present status as okay, with occasional mild depression that comes for a day or so and then leaves. He is an active outdoorsman with interests in archery and fishing, and is very involved in caring for and raising his son. He told Dr. Bates that he does not like being in crowds, and still has a great deal of difficulty

concentrating. He is not employed and has not been since he quit working for CDCR-CCC in 2008. He commented that he has been doing fine being left alone, and expressed some resentment that “they,” referring to the CDCR, were reinvestigating [referring to this process of which the IME was a part] even though the disability retirement allowance he has been receiving for the past three or four years was “a crappy little amount.”

11. Dr. Bates commented that the records she reviewed contained reports that respondent had two voluntary commitments to inpatient psychiatric care for significant periods of time, a 21-day stay where respondent told Dr. Bates he was diagnosed with bipolar disorder, and a later week-long stay. Dr. Bates asked respondent about these psychiatric hospitalizations. The reason for both admissions were concerns about respondent’s reported suicidal thoughts. Before the first hospitalization, respondent had been on and off work for about three months due to depression and anxiety. When he was released from the hospital, he told Dr. Bates he convinced his doctor to release him back to work. He returned to work for a month or so. He fared poorly and got into several verbal confrontations with staff and supervisors, and found himself having problems with his stomach and shaking. He concluded that he could not “do it anymore,” and went back to the psychiatric hospital for the second stay. He did not return to work after the second psychiatric hospitalization. Respondent told Dr. Bates in the clinical interview that he was not serious about committing suicide, and that part of the reason he sought psychiatric hospitalization was to “get away from everything.”

12. Dr. Bates’ mental status examination of respondent yielded no evidence of serious or acute cognitive impairment. She found that respondent demonstrated a normal affect, and did not appear to be psychiatrically apparent. She rated his general level of functioning as in the 70s, which is in the low normal range of adjustment.

13. Dr. Bates diagnosed respondent on Axis I as suffering from Major Depressive Disorder, Single Episode, Full Remission. She diagnosed on Axis II that respondent is possessed of a history of Narcissistic Personality Disorder with Passive Aggressive Personality Traits. On Axis III, she found a history of shoulder, back and knee troubles. On Axis IV, she concluded that respondent was experiencing social stressors, and primary support stressors, largely because of his lack of income and employment. On Axis V, she found respondent’s general adjustment and functioning to be in the low normal range.

14. Dr. Bates reviewed and commented on the 2010 psychiatric IME report by Dr. Clegg. Dr. Bates was critical of certain opinions expressed by Dr. Clegg, as well as his conclusion that respondent was substantially incapacitated due to his personality disorder. She quoted Dr. Clegg’s conclusion, “He is uninterested in returning to work, so with his personality disorder he will make sure he cannot return,” as not supportive of a viable psychiatric opinion that respondent is substantially incapacitated. She pointed out that Dr. Clegg failed to identify any specific job duty respondent was unable to perform due to his personality disorder or mental condition. She concluded that Dr. Clegg’s reasoning did not support his conclusion because there was no evidence in his report that respondent met the legal requirement of substantial incapacity. Dr. Bates pointed out that even though

respondent may be prone to have trouble in receiving and responding to supervision from superiors, that trouble was not disabling or severe, and that his propensity to have difficulty being supervised is "under his volitional control." Dr. Bates' explanation was quite persuasive.

15. Dr. Bates opined in her testimony that respondent's major depression and anxiety were episodic and are "fully resolved," meaning he has made a full recovery from a once temporarily disabling condition. She noted he has developed decent coping skills, such as hobbies, and that his interpersonal problems have stabilized. He demonstrated the capacity for good functioning day-to-day in her clinical interview, and that he did not demonstrate any evidence of serious mental illness or impairment as he had in the past. Dr. Bates' concluded that respondent is not presently substantially incapacitated due to a personality disorder or previous problems with depression and anxiety since she could not identify any Essential Functions or job duties he is presently unable to perform. Dr. Bates' opinions and conclusions were well supported and persuasive.

#### ANALYSIS OF THE MEDICAL EVIDENCE OF INCPACITY

16. There is no medical evidence in this record that supports a conclusion that respondent continues to be substantially incapacitated from the performance of his usual and customary duties as a CO for CDCR. The medical evidence submitted in support of claimed continuing disability on the basis of respondent's psychiatric condition supports only a conclusion that respondent experienced a period of temporary total disability that was recognized by the previous grant of disability retirement, but no longer exists. The period of temporary total disability does not equate to substantial incapacity, which requires evidence of a permanent and sustained substantially incapacitating disability. There is no current persuasive medical evidence of continuing disability.

17. Respondent has made a reasonable recovery. He struggles with a personality disorder that tends to result in conflicts with supervisors, and an enduring dissatisfaction with a previous work environment that produces anxiety when he thinks of returning to work at CCC-Susanville. Intense dissatisfaction and even revulsion at one's work environment does not equate to substantial incapacity. The medical evidence supports only a conclusion that respondent had a serious breakdown at work, he recovered, and does not want to return. Respondent is no longer substantially incapacitated, and is capable of returning to work if he so desired.

#### LEGAL CONCLUSIONS

##### BURDEN OF PROOF

1. "As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion

by a preponderance of the evidence.”<sup>1</sup> CalPERS has the burden of proving that respondent is no longer substantially incapacitated from the performance of his usual and customary duties in order to remove him from disability retirement.

2. “‘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.”<sup>2</sup>

3. “If the medical examination and other available information show to the satisfaction of the board ... that the member is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability....”<sup>3</sup>

4. “We hold that to be ‘incapacitated for the performance of duty’ within section 21022 means the substantial inability of the applicant to perform his usual duties.”<sup>4</sup> *Mansperger* continues to be the definitive statement of California courts to date regarding the meaning of the language of section 21156 “incapacitated for the performance of duty,” in the context of an application for a disability retirement.

5. In applying the *Mansperger* standard, it has been held that the fact that a person has a limiting and painful physical condition, or an emotionally troubling psychological condition that limits, but does not preclude, the person’s ability to perform his or her usual duties; or makes performing the usual and customary duties of one’s occupation more difficult or unpleasant physically or mentally does not necessarily constitute a substantial incapacity for the purposes of a disability retirement.<sup>5</sup> The fact that the physical or psychological condition may preclude the applicant from performing some but not all usual and customary job duties does not necessarily mean the applicant is substantially incapacitated within the meaning of *Mansperger* and section 21156.<sup>6</sup>

6. As set forth in the Factual Findings, CalPERS carried its burden of proof to prove by a preponderance of the evidence that respondent is no longer substantially incapacitated for the performance of his usual and customary duties as a CO with the CDCR. The medical evidence does not support a claim of continuing substantial incapacity on the basis of respondent’s psychiatric or mental health condition. There is no medical evidence of continuing substantial psychiatric incapacity. As set forth in the Factual Findings, respondent sustained a period of total temporary disability that was acknowledged and covered during his period of disability retirement. Respondent has recovered.

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<sup>1</sup> *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051.

<sup>2</sup> Government Code section 20026, in pertinent part.

<sup>3</sup> Government Code section 21156, in pertinent part.

<sup>4</sup> *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App. 3d 873, 876.

<sup>5</sup> *Hosford v. Board of Administration* (1978) 77 Cal.App. 3d 854, 861-863.

<sup>6</sup> *Id.*

7. There is no competent medical evidence that respondent continues to be substantially incapacitated, within the *Mansperger* standard, as a result of his psychiatric condition. There is no medical evidence that respondent suffers from a psychiatric condition or disorder that prevents him from substantially performing his usual and customary duties as a CO with the CDCR. Therefore, respondent's appeal must be denied, and CalPERS's previous grant of a disability retirement to respondent must be reversed.

#### ORDER

The Accusation is SUSTAINED. The appeal of Vincent C. Miller of the CalPERS determination that he is no longer medically eligible for a disability retirement is DENIED. The determination of the CalPERS Benefits Division that applicant is no longer substantially incapacitated from the performance of his duties is AFFIRMED. Respondent's status as retired for disability is TERMINATED. Respondent shall forthwith be returned to work as a Correctional Officer with the California Department of Corrections and Rehabilitation-CCC-Susanville.

DATED: December 29, 2015



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STEPHEN J. SMITH  
Administrative Law Judge  
Office of Administrative Hearings