

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

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for  
Disability Retirement of:

Patricia Louise O'Keefe-Minjarez, and  
Newport-Mesa Unified School District,

Respondents.

Case No. 2015-0342

OAH No. 2015070501

**PROPOSED DECISION**

This matter was heard by Glynda B. Gomez, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 9, 2016, in Los Angeles.

Preet Kaur, Senior Staff Counsel, represented Petitioner.

Patricia Louise O'Keefe-Minjarez was present and represented herself. No appearance was made on or behalf of the Newport-Mesa Unified School District.

The record was closed and the matter was submitted for decision following the hearing on March 9, 2016.

**FACTUAL FINDINGS**

*Parties and Jurisdiction*

1. Petitioner California Public Employees' Retirement System (CalPERS) filed the Statement of Issues in its official capacity.
2. Patricia Louise O'Keefe-Minjarez (Respondent) was employed by Respondent Newport-Mesa Unified School District (District). By virtue of her employment, Respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for retirement.

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3. On or about November 1, 2013, Respondent signed and submitted a Disability Retirement Election Application (application) to CalPERS. The claimed disability was Post Traumatic Stress Disorder (PTSD), Agoraphobia and Depression. Respondent asserted that as a result of her disability she was unable to leave home unless medicated or with a family member because of flashbacks, anxiety attacks, nightmares, and difficulty completing tasks. Respondent asserts that her disability is as a result of an incident on her job when she was a first responder to a child bludgeoning another child. Respondent wrote in her application that she has "not been able to work since 10-11-12, cannot concentrate, crying, anxiety attacks, and fear of crowds, unknown."

4. CalPERS obtained or received medical and psychiatric reports concerning Respondent's medical and psychiatric conditions from competent medical professionals. After review of these reports, CalPERS determined that Respondent was not permanently disabled or incapacitated from performance of her duties as an instructional assistant at the time she filed her application for disability retirement.

5. Respondent was notified of CalPERS' determination and was advised of her appeal rights by letter dated November 25, 2014. Respondent timely filed an appeal by letter dated December 15, 2014, in which she requested a hearing. All jurisdictional requirements have been met.

### *Background*

6. Respondent worked as an instructional assistant in the special education program of Newport Mesa School District for five years. On September 20, 2012, she was one of several instructional assistants supervising a group of special education preschool students. Outside of the view of the adults, one of the students attacked another student with a small shovel causing head trauma and a loss of blood to the victim. The victim was a non-verbal special education preschool student. Respondent was the first on the scene to find the two children. At the time, the victim was unconscious, on her back and bleeding. The other child stood over her with a raised shovel. Respondent and a colleague sought medical assistance for the victim. The victim was taken to the hospital, received medical treatment and survived her injuries.

7. On October 10, 2012, Respondent was summoned to a meeting in which administrators tried to ascertain how the two children came to be alone and out of the line of vision of the adults. At the meeting, the administrators made reference to possible discipline against Respondent and legal action against the school district as a result of the incident. Respondent

became anxious and experienced chest pain after the meeting. October 10, 2012, was Respondent's last day of work.

8. According to the duty statement for her position as an instructional assistant, Respondent was to perform some of the same activities as the teacher, such as administering informal grading and scoring classroom and homework assignments, support teachers in serving students, and teach others to teach or assist students. According to the duty statement, specific roles of the instructional assistant include assisting, monitoring and supervising students during instruction, activities, recess, bus duty and field trips, escorting students as needed and providing small group and follow up instruction. Additionally, instructional assistants are required to assist teachers in preparation of teacher-designated material, clerical tasks and operation audio-visual equipment. In addition to the above duties, assistants for students with moderate to severe disabilities may be called upon to perform the following duties helping with body care needs (e.g., toileting and diapering), assisting with eating skills and manners, and manual activities including preparing and serving foods, dishwashing, and housekeeping.

#### *Undercover Surveillance*

9. On April 4, 2013, April 5, 2013, April 6, 2013, May 25, 2013, and May 27, 2013 and May 31, 2013, Carlos Fuentes, an investigator employed by Regency, a CalPERS contractor, conducted an undercover surveillance of Respondent. Mr. Fuentes worked as a military intelligence officer for 30 years and is a licensed private investigator. During the observation, there were some days that Respondent never left the house. However, on April 4, 2013, Respondent left her home alone, drove to the nearby Stater Brothers grocery store by herself, purchased groceries and loaded them into her car. She then drove to the CVS pharmacy, purchased a prescription, and then drove home in her vehicle. On April 5, 2013, Respondent again left home alone, drove by herself to a Denny's restaurant, and had lunch with some friends/former colleagues. Respondent did not leave her home on April 6, 2013. On May 25, 2013, Respondent left home alone, drove to the United Smoke Shop and the Liquor Warehouse. At the Liquor Warehouse, she purchased snacks and alcoholic beverages, then returned to her home. Mr. Fuentes did not observe Respondent leave her home on May 27, 2013. However, on May 31, 2013, Mr. Fuentes observed Respondent drive herself to the CVS Pharmacy and enter the pharmacy. Respondent later crossed the street to the Stater Brothers grocery store, purchased groceries, and drove herself home. Mr. Fuentes prepared a report of his surveillance of Respondent. (Exhibit 12)

### *Independent Medical Evaluation*

10. Dr. Lawrence H. Warick, MD, PH.d was retained by CalPERS to conduct an independent medical evaluation (IME) of Respondent. Dr. Warick graduated from the Albert Einstein College of Medicine in New York in 1960. He is a Diplomate of the American Board of Psychiatry and Neurology. Dr. Warick received Board certification in Psychiatry in 1970. Dr. Warick completed residencies in Neurology and Psychiatry at the USC School of Medicine, Los Angeles County General Hospital, during the period of 1961 to 1965. Dr. Warrick is an Associate Clinical Professor at the University of California, Los Angeles Medical School and a Qualified Medical Examiner.

11. Dr. Warick reviewed medical and psychiatric records from Dr. Renee Albert, Dr. Richard Oswald, Dr. Shallbetter, Dr. Sarabit Sandhu, and Dr. Yasar Elatrozy, the undercover surveillance report (Exhibit B). He also reviewed a surveillance video prepared by Mr. Fuentes (Exhibit 13), a recorded statement from a school nurse concerning the incident with the students, a prior worker's compensation claim, and a 53-page report prepared by Regency investigators. The Regency investigative report contained photographs and statements pertaining to the incident at the school. The report was not offered as evidence in the administrative hearing. CalPERS also provided Dr. Warick with a copy of a letter dated February 15, 2014 from Respondent wherein she complained about Dr. Warick's testing and behavior.

12. Dr. Warick did not testify at hearing, his IME report dated October 24, 2014 was admitted pursuant to a stipulation by the parties. Dr. Warick took an oral history, conducted a mental status examination, reviewed records, administered the Milion Clinical Multiaxial Inventory III (MCMI-III), which is a rating scale used to assess emotion discomfort and social difficulty and the Structured Inventory of Malingered Symptomatology (SIMS) to assess whether Respondent exaggerated her disability. Based upon his examination of Respondent and review of pertinent medical records, Dr. Warick diagnosed Respondent as follows:

Axis I --Major Depressive Disorder, nonindustrial; Possible Malingering, Generalized Anxiety Disorder, nonindustrial;

Axis II -- Prominent histrionic, dependent masochistic features;

Axis III--ITP, migraine, gallbladder surgery, increased cholesterol, C-section, menopause, skull fracture, left knee injury and surgery and splenectomy;

Axis IV--Problems with primary support group, occupational problems

Axis V -- GAF=65 and Whole Person Impairment= 8%. (Exhibit 7)

13. Dr. Warick was dismissive of Respondent's prior diagnosis of PTSD based upon the fact that Respondent did not see the victim receive her injuries. He minimized the fact that Respondent discovered the bloody and unresponsive victim, sought medical attention for her, and was later reprimanded for her role in the incident. Dr. Warick expressed concern about what appeared to him to be an exaggeration of symptoms. Dr. Warick diagnosed Respondent with Major Depressive Disorder, non-industrial, Possible Malingering and Generalized Anxiety Disorder, non-industrial. Dr. Warick opined that Respondent did not have classic symptoms of post-traumatic stress. Instead, he attributed her emotional issues to a history of family illness and death, prior work injury and stress, previous abusive marriage and an alleged sexual assault by a physician. Dr. Warick also opined that his review of the surveillance video revealed that Respondent was able to leave her home, drive her automobile, shop and socialize which is inconsistent with her diagnosis of agoraphobia and inconsistent with her statement on her application. Dr. Warick also evaluated Respondent's disabilities and their impact on her ability to perform her job duties as an instructional assistant. In his analysis, Dr. Warick concludes that Respondent should be able to perform all of the duties of her job as an instructional assistant and is not substantially incapacitated from performing her usual duties. (Exhibit 7)

*Evidence Presented by Respondent*

14. Respondent testified at hearing. Respondent appeared noticeably anxious throughout the hearing, but was coherent and credible in her testimony. Respondent testified that she believed she could not continue working as an instructional assistant after the stress she felt from being a first responder to an incident in which one child bludgeoned another child. Respondent discovered the victim's injuries while another student was in the midst of his attack upon the victim. According to Respondent, the perpetrator had a small shovel raised above the victim and was preparing to strike her again with the shovel. Respondent has anxiety about strangers or unfamiliar places and trouble sleeping. Respondent is under the care of a psychiatrist and takes several medications to address her symptoms. The medications make her drowsy and usually unable to drive. With respect to the surveillance report, Respondent testified that she shopped at her neighborhood grocery store and pharmacy which were familiar to her and met with some friends for lunch at the suggestion of her medical providers who encouraged her to get out of the house and resume some of her prior activities. Respondent does not believe that she could perform her previous duties. She becomes anxious around unfamiliar people and places, schools, school buses, unfamiliar children and violence depicted on television.

15. Respondent presented a March 25, 2014 letter from Clinical Psychologist Renee Alpert wherein Dr. Alpert diagnosed Respondent with PTSD, Major Depressive Disorder and Panic Disorder. (Exhibit B) Dr. Alpert did not testify at the administrative hearing, but her letter was admitted pursuant to a stipulation by the parties. Dr. Alpert described Respondent as having "severe to extreme anxiety levels with intrusive, recurrent recollections, thoughts, images, nightmares and flashbacks of the trauma, physiological and emotional reactivity to stimuli associated with the trauma, hypervigilance, difficulty falling and staying asleep, difficulty functioning and doing things without interference from these disabling conditions." Dr. Alpert attributes Respondent's disability to the September 20, 2012 incident. Dr. Alpert's diagnosis was based upon clinical observation, treatment of Respondent for the period of January 22, 2013 to May of 2014, and administration of the Burns Anxiety Inventory and use of the Burns Depression Checklist. Dr. Alpert wrote that Respondent "would not be able to sustain focused concentration for extended periods of time. She would not be able to handle stressors normal to the work environment. Her adaptive capacities have been compromised. She would not be able to handle stressors related to dealing with coworkers or supervisors." Dr. Alpert opined that Respondent was totally disabled and unable to work. Respondent last treated with Dr. Alpert more than nine months ago.

16. Dr. Maurice Ghattas also wrote a letter dated October 2013 in which he supported Dr. Alpert's opinion that Respondent "should be placed on permanent disability." Dr. Ghattas diagnosed Respondent with Idiopathic Thrombo Cytopenia Purpua (ITP) which he described as a low platelet autoimmune blood disease and a precursor to Lupus. According to Dr. Ghattas, the disease is triggered by stress. Dr. Ghattas asserted that Respondent "has been traumatized on many levels, at her workplace thirteen months ago." Dr. Ghattas expressed concern that the stress of Respondent's workplace might trigger a relapse of her ITP or cause the onset of Lupus. He recommended that Respondent be placed on permanent psychological and medical disability. Dr. Ghattas did not testify at the administrative hearing. His letter was admitted pursuant to a stipulation by the parties.

17. Dr. Sarbjit S. Sandhu, M.D., a psychiatrist and neurologist, also wrote a letter dated March 19, 2014, concerning Respondent's condition. Dr. Sandhu diagnosed Respondent with PTSD and Social Anxiety Disorder, Severe. He opined that Respondent is permanently disabled by her PTSD and anxiety. Dr. Sandhu began treating Respondent in September of 2012. According to Dr. Sandhu, Respondent's symptoms "markededly worsened" since September of 2013 when she was sexually assaulted by her physician. Dr. Sandhu noted that despite aggressive changes and heavy dosing with different psychotropic medications, Respondent continued to do poorly.

According to Dr. Sandhu's letter, Respondent "has been afraid to sleep, has nausea, migraines, shakes constantly, and has multiple episodes of panic attacks". Dr. Sandhu wrote that Respondent has severe anxiety and memory problems as well as the impaired cognition and "cannot drive anymore and it is her sister who has now become her primary caregiver that has to driver her everywhere." He also writes "there is significant agoraphobia as well, she cannot bring herself to leave the house unless someone is with her. The social anxiety has impacted her ability to deal with people even at a basic level, she is very avoidant of any interactions and has been more and more reclusive." Dr. Sandhu did not testify at the administrative hearing. His letter was admitted into evidence pursuant to a stipulation of the parties.

18. Dr. Ghattas, Dr. Alpert and Dr. Sandhu wrote their letters before the undercover surveillance was performed and there was no indication in the evidence that Dr. Ghattas, Dr. Alpert or Dr. Sandhu knew of the undercover surveillance report or video. It is clear from Dr. Sandhu's letter that he was under the impression that Respondent was incapable of driving herself anywhere and did not leave home alone. These doctors primarily relied upon the information that Respondent gave them in making their conclusions.

19. There was no indication in the letters written by Dr. Ghattas, Dr. Alpert or Dr. Sandhu that any of them had ever reviewed Respondent's job duty statement to determine which specific job duties she was unable to perform.

20. Respondent was awarded Social Security Disability on April 6, 2014. She began receiving payments on April 14, 2014. The Social Security Disability date was determined as October 11, 2012, the day after Respondent's last day at work.

## LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

2. The following provisions of the Government Code were alleged in the Statement of Issues as being relevant to Respondent's request for a disability retirement:

A. Section 20026, which provides in part:

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

B. Section 21150, which provides that “[a]ny member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age . . . .”

C. Section 21152, which provides in part:

“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.

[¶] . . . [¶]

“(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

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

D. Section 21154, which 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 . . . .”

E. Section 21156, which provides in part:

“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 . . . .”

3. An applicant does not qualify for a disability retirement when he/she can perform customary duties, even though doing so may sometimes be difficult or painful. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873.)

4. Cause was not established to grant Respondent's application for a disability retirement, in that it was not established that she is permanently disabled or incapacitated from performance of her duties as an instructional assistant on the basis of a psychiatric condition (Agoraphobia, Anxiety, PTSD or Depression). While Respondent has been diagnosed with such conditions, the evidence did not establish that those conditions permanently disabled or incapacitated Respondent from performing her duties. (Factual Findings 1-20.)

5. Dr. Warick, retained by Petitioner, offered a credible and persuasive opinion that Respondent is not disabled from performing duties as an instructional assistant due to her psychiatric conditions. Dr. Warick's opinion was bolstered by the undercover surveillance report which showed Respondent shopping, driving, and meeting friends for lunch although she had asserted in her application that she was unable to leave home unaccompanied. Dr. Alpert's letter, provided by Respondent, though much briefer than Dr. Warick's report, was thorough and informative about Respondent's symptoms. Dr. Ghattas' letter concerning the potential effect of stress on Respondent's autoimmune disease was also thorough and instructive. However, Respondent did not base her application on the presence or exacerbation of an autoimmune disease. Dr. Sandhu was clearly under the impression that Respondent was incapable of leaving her home without assistance and incapable of driving. His letter indicated that Respondent's symptoms were exacerbated in September of 2013 by a sexual assault. Dr. Alpert, Dr. Ghattas and Dr. Sandhu were not privy to the undercover surveillance or video and did not analyze Respondent's disability in relation to her ability to perform the specific functions of her job. On balance, Dr. Warick's report was more persuasive than the letters from Dr. Alpert, Dr. Ghattas and Dr. Sandhu on the issue of whether Respondent's conditions resulted in permanent disability and incapacity from performing her usual job duties.

6. As an applicant for disability retirement benefits, Respondent has the burden of rebutting the evidence presented by the Petitioner and of proving that she is permanently incapacitated from performing the duties of an instructional assistant. Although it is clear from the record that

Respondent was emotionally distraught after discovering the injured child, the circumstances of the injury, and coping with the school district's administrative response to the situation, the preponderance of the evidence does not establish that Respondent suffers from a condition which prevents her from performing her duties as an instructional assistant. While Respondent's traumatic experience at the school and the administrative response may have made being an instructional assistant more difficult or uncomfortable than before, more than that is necessary to qualify for a disability retirement. The fact that Respondent has received social security disability insurance benefits does not establish that she is permanently incapacitated either, in that it was not established in this case why those benefits were given to her and, in any event, the standard of eligibility for those benefits was not proven to be similar to the standard of eligibility applicable in this case.

#### ORDER

Respondent Patricia Louise O'Keefe-Minjarez's application for a disability retirement dated November 1, 2013, is denied.

DATED: April 8, 2016

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**GLYNDA B. GOMEZ**  
Administrative Law Judge  
Office of Administrative Hearings