

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

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues  
Against:

SANDRA K. MCPHERSON,

Respondent,

and

LOS ANGELES COUNTY OFFICE OF  
EDUCATION,

Respondent.

Case No. 2015-0290

OAH No. 2015000908

**PROPOSED DECISION**

The hearing in the above-captioned matter took place on May 26, 2016, at Los Angeles, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Christopher Phillips, Senior Staff Attorney, California Public Employees' Retirement System (PERS). Respondent Sandra K. McPherson (Respondent) did not appear; neither did the other respondent in the case, the Los Angeles County Office of Education (LACOE).

At the hearing it was established that the Notice of Hearing was served on Respondent and LACOE by mail and electronic mail on December 23, 2015, at the address Respondent had used in her application for disability.<sup>1</sup>

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<sup>1</sup> Official notice is taken of the Notice of Assigned Hearing Dates, found in the OAH file. It was served on the parties on October 28, 2015. It informed them of the hearing date and location. The Notice of Assigned Hearing Dates was sent to the address Respondent used in her disability application, and that the document was not returned to OAH by the post office. While that notice from OAH does not provide a substitute for the Notice of Hearing, (Cal. Code Regs., tit. 1, § 1018, subd. (c)), it provides some notice to Respondent, which would have been corroborated by the formal Notice of Hearing served by Complainant approximately two months later.

Documentary evidence was received from Complainant, and brief testimony from a physician who had examined Respondent. The case is deemed submitted for decision as of May 26, 2016. The ALJ hereby makes the following Proposed Decision.

## STATEMENT OF THE CASE AND ISSUE PRESENTED

Respondent seeks disability retirement from PERS. Respondent was employed by LACOE as a para-educator. In February 2014, Respondent submitted a disability retirement application (Application) to PERS. The application stated she could not do her job because of “fibromyalgia, osteoarthritis bilat (sic) knees, carpal tunnel, ulnar nerve.” (Ex. 3, p. 2.) After reviewing medical evidence and having two doctors examine Respondent, PERS denied her application, asserting she is not disabled within the meaning of the statutes and cases that govern disability retirement claims for PERS. The decision by PERS denying disability retirement is upheld.

## FACTUAL FINDINGS

### *The Parties and Jurisdiction*

1. Complainant Anthony Suine filed the Statement of Issues in the above-captioned matter while acting in his official capacity as Chief of the Benefits Services Division of PERS.
2. Respondent was previously employed by LACOE as a para-educator. She is a local miscellaneous member of PERS within the meaning of Government Code section 21150.<sup>2</sup>
3. On February 5, 2014, Respondent’s Application was received by PERS. Respondent retired from service on June 10, 2014 and has been receiving service retirement allowance since that time.
4. (A) The application stated that Respondent was disabled because of orthopedic and rheumatologic conditions, the former problems stemming from osteoarthritis, problems in her knees, carpal tunnel, and ulnar nerve. The rheumatologic condition was asserted as Fibromyalgia.  
  
(B) Respondent stated in the Application that wear and tear of cartilage and overuse of joints and muscles caused her medical problems. Respondent further stated that she could not engage in heavy lifting—over 20 pounds—nor repetitive use of her arms, and

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<sup>2</sup> All statutory references will be to the Government Code unless otherwise noted.

could not grasp or pull. She stated that she could only do “non physical, non repetitive activities.” (Ex. 3, p. 2.)

5. Thereafter, on January 23, 2015, PERS wrote to Respondent, denying the Application. PERS asserted that a review of the medical evidence, including evidence obtained from independent medical exams (IME), led to the determination that Respondent’s conditions were not disabling, and therefore grounds for disability retirement had not been established. The letter set out various alternatives Respondent might pursue, including an appeal of the PERS denial of disability retirement.

6. Respondent wrote to PERS, asserting she was disabled, and was appealing the denial of benefits. That letter was received by PERS on February 13, 2015. This proceeding then ensued. As noted in the preamble, PERS served both Respondents with notice of the hearing in this matter, but neither one appeared. All jurisdictional requirements have been satisfied.

*Respondent’s Usual Duties as a Para-Educator for LACOE*

7. A written description of Respondent’s functions as a para-educator was received in evidence as exhibit 12. Generally, her duties were to instruct pupils individually or in groups, under the supervision of a teacher. The teaching would have prescribed objectives. The activities could include supervision in the schoolyard or on a field trip. Some of the more physical tasks could include lifting children out of wheelchairs, physical care such as toileting, dressing, or bathing. Respondent might have been obligated to obtain meals for the children from the lunch area, and bring them to the students.

8. Respondent filled out a PERS document titled “Physical Requirements of Position/Occupational Title; it was received in evidence as exhibit 13. The document is a type of questionnaire designed to establish physical requirements of the job in question. Many physical tasks were described by Respondent as “never” occurring; this included (but is not limited to) crawling, climbing, twisting, or carrying weights above 50 pounds. Tasks such as standing, running, and walking, as well as carrying weight up to 50 pounds were described as occurring “occasionally up to 3 hours.” (Ex. 13.) None of the tasks was described as frequently occurring.

*The Independent Medical Exams (IME’s)*

9. On October 20, 2014, Steven Silbart, M. D., conducted an IME of Respondent, at the request of PERS. Dr. Silbart has practiced orthopedic medicine for well over 30 years, most of that time in the Los Angeles area. He issued a written report of the IME, found at exhibit 11. As part of his exam process, Dr. Silbart reviewed medical reports for Respondent.

10. Dr. Silbart, who testified at the hearing, made two diagnoses in his report. He diagnosed bilateral carpal tunnel syndrome, right cubital tunnel syndrome secondary to

trauma sustained continuously, industrial. The second diagnosis was seronegative inflammatory arthritis affecting bilateral hands and bilateral knees, non-industrial.

11. Notwithstanding the diagnoses, Dr. Silbert found that there were no specific job duties that Respondent could not perform, and he noted she had performed her typical duties right up until she took service retirement.

12. In December 2014, Respondent was examined by Nazanin Firooz, M.D. Dr. Firooz is board certified in Rheumatology and Internal Medicine. Dr. Firooz also reviewed Respondent's medical records.

13. (A) Dr. Firooz concluded that Respondent did not suffer from rheumatoid arthritis. She did diagnose Fibromyalgia. However, she noted that it did not appear to be severe as of the time of the exam, and that it did not constitute a major disability for Respondent.

(B) Dr. Firooz noted that Respondent took Nortriptyline, which brought relief from the pain caused by the Fibromyalgia, but that Respondent did not take the drug consistently. Dr. Firooz also stated that she believed a course of exercise would further improve the condition. Respondent acknowledged that when she took her Nortriptyline, she was able to engage in her usual activities.

(C) Dr. Firooz concluded that Respondent was not substantially disabled from performing her regular duties.

## LEGAL CONCLUSIONS

1. Respondent is a local miscellaneous member of PERS within the meaning of section 21150, and is credited with sufficient service to retire. She is thereby qualified for disability retirement upon the appropriate showing. Further, PERS has jurisdiction to determine whether Respondent is entitled to such disability retirement. This conclusion is based on section 21150 and Factual Findings 1 through 6.

2. A person seeking disability retirement bears the burden of establishing the right to that benefit. (Evid. Code, § 500; *Lindsay v. County of San Diego Ret. Bd.* (1964) 231 Cal.App.2d 156, 160-61.) The standard of proof is preponderance of the evidence. (Evid. Code, § 115.)

3. A disability, within the meaning of the Public Employees Retirement Law, is a condition that is permanent or of extended and uncertain duration, as determined by the Board on the basis of competent medical opinion. (§ 20026.)

4. Whether a person is incapacitated or disabled must be judged based upon an examination of the regular and customary duties assigned to that person. (*Mansperger v.*

*Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 876.) The applicant must establish that he is substantially unable to perform her usual duties. (*Mansperger, supra*, 6 Cal.App.3d at 876; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) The cases hold that written job descriptions alone do not control the analysis of what a member's usual job duties are; other evidence may be examined as well. (*Hosford, supra*, 77 Cal.App.3d at 861-862.) Here the only available evidence comes from documents, as Respondent did not appear and provide other information.

5. Two qualified physicians concluded, after examining Respondent, that she is not disabled from the usual duties of a para-educator at LACOE. There is no reason to doubt the credibility of either physician, and especially that of Dr. Silbert, given his years of experience. Without positive medical evidence and opinion in her favor, Respondent cannot carry her burden of proving she is substantially disabled and eligible for retirement disability. Her claim for disability retirement must therefore be denied.

#### ORDER

The appeal of Respondent Sandra K. McPherson is denied, and she shall not receive disability retirement benefits from PERS.

June 8, 2016

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*Joseph D. Montoya*  
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Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings