ATTACHMENT A

PETITION FOR RECONSIDERATION

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BEFORE THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM

STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION FOR REINSTATEMENT FROM INDUSTRIAL DISABILITY RETIREMENT OF **KERRI A. HAWKINS,** Respondent, **and** **DEPARTMENT OF CALIFORNIA HIGHWAY PATROL,** Respondent.	Case No. 9109 OAH No. 2010020578 **RESPONDENT DEPARTMENT OF CALIFORNIA HIGHWAY PATROL'S PETITION FOR RECONSIDERATION AND REQUEST FOR STAY; DECLARATION OF STEPHEN A. MESI** **HEARING:** Date: January 4-5 & 26, 2011 Location: OAH Los Angeles Administrative Law Judge Amy Lahr **REMAND HEARING:** Date: May 12-14, 2015 Location: OAH Los Angeles Administrative Law Judge Matthew Goldsby

Pursuant to Government Code section 11521, Respondent Department of California Highway Patrol (CHP) respectfully submits the following Petition for Reconsideration and Stay of the July 23, 2015 Proposed Decision.[1]

[1] For the sake of brevity, Respondent incorporates herein the legal arguments it previously made in this case and which were presented in its two Closing Briefs, particularly the applicability of Government Code section 1031 (continued...)

INTRODUCTION

This matter was heard by Administrative Law Judge (ALJ) Matthew Goldsby on remand from the Board of Administration (Board) of the California Public Employees' Retirement System (CalPERS), who apparently issued a proposed decision on July 23, 2015. Respondent CHP was never served with a copy of the proposed decision and only learned of it through informal discussions with counsel for Appellant Kerri Hawkins (Hawkins) and legal staff at CalPERS. It is presently unclear whether the proposed decision has been adopted. Nevertheless, the decision has never been formally served on Respondent CHP pursuant to Government Code section 11518 and there has been no notice to Respondent CHP of the time limits for petitioning for reconsideration as required under Government Code sections 11517.

CHP requests that the Board reconsider ALJ Matthew Goldsby's Proposed Decision and, if necessary, stay the statutory expiration of reconsideration to allow further evaluation.

PROCEDURAL HISTORY

This matter initially came before the Office of Administrative Hearings (OAH) on July 30, 2010, January 4-5, 2011, and January 26, 2011. Administrative Law Judge Amy Lahr presided over the hearing and submitted a Proposed Decision to the CalPERS Board on or about April 19, 2011. Judge Lahr granted the CHP's appeal and determined that Hawkins did not meet her burden of establishing that she was presently capable of performing the usual job duties of a CHP sergeant. Copies of the Proposed Decision, granting the CHP's appeal and denying Hawkins reinstatement, were timely served on attorneys for Hawkins and the CHP (Gov. Code, § 11517, subd. (c)(1).) The Board timely considered the Proposed Decision in its June 15, 2011 meeting (Agenda Item 25a) and elected to reject the proposed decision and refer the case to the ALJ, to take additional evidence. (Gov. Code, § 11517, subd. (c)(2)(D).) On or about November 6, 2013, the Board remanded the matter for the purpose of taking additional evidence. The remand hearing took place before ALJ Matthew Goldsby on May 12, 2015.

(...continued)
to these proceedings. Copies of the briefs are attached as Attachments 1 and 2 and incorporated herein.

At the remand hearing, CalPERS and Hawkins presented no additional direct evidence. The only additional direct evidence admitted at the hearing was the testimony of CHP expert Dr. Michael Carroll. CalPERS offered Exhibit 55, a report by Dr. Lawrence Albers, which was admitted solely as administrative hearsay.

Because the sole purpose of the remand hearing had been to allow CalPERS the opportunity to provide additional evidence of Hawkins' ability to do her job as a CHP sergeant, and because neither CalPERS nor Hawkins provided any such direct evidence on this issue, there was no additional evidence to alter the Proposed Decision of ALJ Lahr. The report by Dr. Albers, which came in solely as administrative hearsay, could not have been used to supplement medical evidence that did not otherwise exist. Thus, there was no competent, direct evidence in the record that Hawkins is no longer substantially incapacitated.

Nonetheless, ALJ Goldsby apparently issued a Proposed Decision on July 23, 2015 denying CHP's appeal. (Mesi Decl., Ex. 1.) Government Code section 11518 requires: "Copies of the decision shall be delivered to the parties personally or sent to them by registered mail." However, CHP only learned of the July 23, 2015 decision through informal inquiries with Hawkins' counsel and CalPERS Legal, which emailed a copy of the decision to counsel for CHP on March 10, 2015. (Mesi Decl. ¶¶ 4 &5.)

A review of the online CalPERS Board Agendas from August 17, 2015 through March 16, 2016 reveals that the Proposed Decision has not been acted upon or considered. (Mesi Decl., ¶ 6.) Government Code section 11521, subdivision (a) provides, in relevant part:

> The agency shall notify a petitioner of the time limits for petitioning for reconsideration. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to a respondent, or on the date set by the agency itself if the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay or not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a reconsideration filed to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition.

Although the CHP has yet to be properly served with a copy of the Proposed Decision, it

submits the current Petition and Request for Stay in an abundance of caution to preserve its appeal rights.

CONCLUSION

Based on the foregoing, the CHP respectfully requests that the Board reconsider the July 23, 2015 Proposed Decision. If necessary, the CHP requests that the Board grant a stay of the expiration of the time for reconsideration.

Dated: April 11, 2016

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
KENNETH C. JONES
Supervising Deputy Attorney General

STEPHEN A. MESI
Deputy Attorney General
Attorneys for Respondent Department of California Highway Patrol

DECLARATION OF STEPHEN A. MESI

I, Stephen Mesi, hereby declare:

1. I am an attorney duly licensed to practice law in the state of California, and a Deputy Attorney General in the California Department of Justice, Office of the Attorney General, attorneys for Respondent California Highway Patrol (CHP) in this matter. I have personal knowledge of the matters stated herein, except those matters stated on information and belief. If called as a witness I would competently testify to the following.

2. I took over handling of this matter on January 22, 2016. It had previously been handled by Simerdip Khangura of my office.

3. Following evidentiary hearing on remand, the matter was submitted to ALJ Bruce Goldsby for decision on or before June 26, 2015. As of January 22, 2016, when I assumed responsibility for the matter, neither my office nor Anthony Santana, the attorney for Respondent Hawkins, had received a copy of a Proposed Decision.

4. On or about February 12, 2016, during informal discussions with Mr. Santana in connection with the pending State Personnel Board appeal, I learned that a Proposed Decision had been issued by ALJ Goldsby on July 23, 2015.

5. On or about On March 10, 2015, received an email from staff at CalPERS Legal attaching the July 23, 2015 Proposed Decision by ALJ Goldsby. A copy of the July 23, 2015 Proposed Decision is attached is Exhibit 1. A copy of the March 10, 2016 email from CalPERS Legal is attached as Exhibit 2.

6. I have checked the online Agendas for the Board from July 2015 through present. This matter does not appear on any of the Agendas.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 1, 2016 at Los Angeles, California.

Stephen Mesi, Declarant

EXHIBIT 1

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

In the Matter of the Application for Reinstatement from Industrial Disability Retirement of: KERRI A. HAWKINS, Respondent, and DEPARTMENT OF CALIFORNIA HIGHWAY PATROL, Respondent.	Case No. 9109 OAH No. 2010020578

PROPOSED DECISION

Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings (OAH), heard this matter on May 12, 2015, in Los Angeles, California (Remand Hearing).

Rory J. Coffey, Senior Staff Attorney, represented petitioner Mary Lynn Fisher, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Sierdip Khangura, Deputy Attorney General, represented respondent Department of California Highway Patrol (CHP).

Anthony M. Santana, Staff Attorney with the California Association of Highway Patrolmen, represented respondent Kerri A. Hawkins (respondent Hawkins), who was present throughout the hearing.

This matter was originally heard by Administrative Law Judge Amy C. Lahr who issued a Proposed Decision on April 14, 2011. The Board of Administration (Board) decided not to adopt the Proposed Decision and to remand the case to the administrative law judge for the taking of additional evidence. (See Factual Finding 2.) Oral and documentary evidence was received at the Remand Hearing.

The record was held open to June 26, 2015, to allow the parties to file any factual stipulations by May 22, 2015, and to file closing briefs.

All parties timely filed stipulations to certain facts; the stipulations were collectively marked for identification as Exhibit 57.

All parties timely filed closing briefs. CalPERS's brief was marked for identification as Exhibit 58. Respondent Hawkins's brief was marked for identification as Exhibit 59. Respondent CHP's brief was marked for identification as Exhibit 60.

The matter was submitted for decision on June 26, 2015. The administrative law judge makes the following factual findings based on the stipulations of the parties, all documents admitted into evidence,[1] testimony from the Remand Hearing, and the transcripts of proceedings held July 30, 2010, and January 4, 5, and 26, 2011 (see Factual Finding 2).

FACTUAL FINDINGS

1. Petitioner filed the Statement of Issues in her official capacity. The statement of issues defines the primary issue in the case as follows: "This appeal is limited to the issue of whether respondent Hawkins is presently capable of performing the usual job duties of a CHP sergeant." (Ex. 1.)

2. This matter was initially heard and submitted for decision on March 15, 2011, and Administrative Law Judge Amy C. Lahr issued a Proposed Decision on April 14, 2011. On June 15, 2011, the Board decided not to adopt the Proposed Decision and to remand the matter to the administrative law judge for the taking of additional evidence. On November 6, 2013, the Board remanded the matter to OAH. On March 10, 2014, OAH issued a Notice of Remand and Order Thereon.

3. Respondent Hawkins was employed by CHP since 1987. She began as a state traffic officer, and was promoted to sergeant in March 1997. She worked as a sergeant until May 28, 2003. By virtue of her employment, respondent Hawkins is a state safety patrol member of CalPERS.

4. The State Personnel Board (SPB) defined the position of sergeant in a document entitled "Sergeant, California Highway Patrol" (Job Description).. Pursuant to the Job Description, respondent Hawkins was responsible for the following duties, among others, as a CHP sergeant: conducting accident investigations, including fatalities; monitoring and

[1] Original documents for Exhibits 1-50 were unavailable at the Remand Hearing. Counsel for CHP furnished a binder and the parties stipulated that the binder contained a true and complete set of unmarked copies of all exhibits offered by all parties in the prior hearing, including all documents that were admitted into evidence. The copies of exhibits were re-marked for identification purposes, in accordance with the exhibit list furnished by counsel.

supervising subordinates in the field; directing and evaluating officer-involved shootings; engaging in law enforcement; and acting as incident commander and dispute mediator.

5. Exercising sound judgment in carrying out the duties of a sergeant is critical to the position because the safety of the motoring public and the officer could be in jeopardy at any time. It is important that a CHP sergeant be mentally and emotionally fit for the job because of the danger involved, in part because they carry firearms. In addition, a CHP sergeant's daily tasks involve driving a vehicle during law enforcement and being mentally sharp enough to assess dangerous situations.

6. Respondent Hawkins most recently worked with the Multidisciplinary Accident Investigation Team (MAIT). Respondent Hawkins was selected as a MAIT Supervisor in 1998. In that capacity, she supervised a team that was required to respond to all significant fatal accidents, accidents involving shootings by officers, and spills of hazardous materials. The MAIT team received about 80 to 100 calls per year, although not every call required their response to an accident scene. There were approximately four to five accidents per month that required the MAIT team's response, and in addition, respondent Hawkins had an active caseload of approximately 20 to 30 open matters per month. Respondent Hawkins was required to respond personally to all of the significant fatal accidents, shootings, and hazardous material spills. At the scene, she assigned team members to different tasks, and she also personally conducted investigation work. In the course of this work, respondent Hawkins witnessed many traumatic scenes of death and major injury, and it was sometimes necessary for her to work extended hours without proper rest or meals. In short, the high intensity, massive caseload, combined with the disturbing content of the work, was stressful.

7. Beginning shortly after her assignment to MAIT, respondent Hawkins began to suffer generalized anxiety, sleep disorders, and stress. In 1998, the year she was assigned, she began seeing a licensed clinical therapist for the treatment of the initial stages of depression. She consulted with her regular physician and was prescribed antidepressants and sleep medications. In April 2000, she was involved in a work-related automobile accident in which her vehicle was damaged beyond repair and her passenger suffered a back injury. Respondent Hawkins suffered only minor physical injury, but the incident aggravated her symptoms of depression and anxiety. In December 2000, respondent Hawkins fainted due to internal bleeding and and was hospitalized. She was diagnosed with gastritis and an upper gastrointestinal bleed.

8. On March 9, 2001, respondent Hawkins filed a Claim for Workers Compensation Benefits based on injuries caused by the "cumulative trauma from repeated exposure to critical incident scenes." (Ex. 32.) Respondent Hawkins claimed that her injuries included Post-Traumatic Stress Disorder (PTSD), gastrointestinal bleeding, gastritis, anxiety, sleeplessness, and nausea. Respondent Hawkins was off work for several months.

9. On January 6, 2003, respondent Hawkins was evaluated by psychiatrist, Thomas Curtis, M.D. (Dr. Curtis). After interviewing respondent Hawkins, reviewing historical data, conducting a mental status examination, and considering psychological test results, Dr. Curtis

diagnosed respondent Hawkins with PTSD with anxiety. He concluded that respondent Hawkins was "temporarily partially disabled on an emotional basis while continuing to work in her regular job" and that she was "in need of emotional treatment." (Ex. 49.)

10. Thereafter, respondent Hawkins sought treatment from psychologist Lawrence Blum, Ph.D. (Dr. Blum). Dr. Blum diagnosed respondent Hawkins with PTSD. He certified that respondent Hawkins was temporarily totally disabled and CHP removed respondent Hawkins from active duty on May 28, 2003.

11. On October 16, 2003, respondent Hawkins filed an application for industrial disability retirement. She stated in her application that her disability was attributed to gastrointestinal bleeding, headaches, PTSD, and depression.

12. On April 27, 2004, respondent Hawkins was examined by Katalin Bassett, M.D. (Dr. Bassett). After conducting psychological and cognitive testing, interviewing respondent Hawkins, reviewing historical data, and conducting a mental status examination, Dr. Bassett diagnosed respondent Hawkins with PTSD and gastrointestinal disorders. Dr. Bassett concurred with Dr. Blum's assessment that respondent Hawkins was temporarily totally disabled on May 28, 2003. Dr. Bassett reported to CalPERS: "Because all the work as a peace officer inherently involves dealing with scenes that would evoke post-traumatic memories, it is not possible for [respondent Hawkins] to return to modified work as a peace officer, without serious risk of an exacerbation of her current mental and physical disorders." (Ex. 47.)

13. On August 11, 2004, CalPERS approved respondent Hawkins's application for industrial disability retirement benefits and she was removed from active duty.

14. On October 14, 2004, respondent Hawkins was examined again by Dr. Bassett. Dr. Bassett reported to CalPERS that respondent Hawkins was "unable to work around accidents and witness bloody crime scenes. She probably would develop significant gastrointestinal symptoms and an exacerbation of her [PTSD] if she was to return to her original job as a [CHP sergeant]." (Ex. 54.)

15. From approximately 2004 through 2007, respondent Hawkins lived in Kauai, Hawaii. In 2005, she began work for the Kauai Police Department performing background checks. During this period, her gastrointestinal bleeding and migraine headaches decreased.

16. Respondent Hawkins moved back to Los Angeles in 2007. By April 2007, respondent Hawkins was asymptomatic of PTSD.

17. On April 5, 2007, respondent Hawkins applied to CalPERS for reinstatement from her industrial disability retirement (Application). (Ex. 5.) Respondent Hawkins testified

that she felt capable of performing duties regarding investigating fatalities, officer shootings, and all other duties associated with the CHP sergeant position.[2]

18. The CHP has established written procedures for reinstatement, set forth in Chapter 3 of its Highway Patrol Manual 10.3. The policy mandates that "an employee who applies for reinstatement and is no longer incapacitated for duty in the position held when retired for disability, or in a position in the same classification, shall be reinstated, at his/her option." (Ex. 25.) An applicant must successfully complete a psychological evaluation prior to reinstatement.

19. CalPERS retained William Goldsmith, M.D. (Dr. Goldsmith), to perform a psychiatric evaluation of respondent Hawkins. Dr. Goldsmith examined and interviewed respondent Hawkins on November 26, 2007. He reviewed historical data and medical records, and conducted a mental status examination. In his Independent Medical Evaluation Report (IME Report), Dr. Goldsmith reported to CalPERS that, in his opinion, respondent Hawkins was "motivated and competent to return to her former position for the California Highway Patrol." (Ex. 13.)

20. CalPERS approved respondent Hawkins for reinstatement from retirement as a sergeant with CHP. On January 25, 2008, CalPERS notified CHP and respondent Hawkins of its determination. (Ex. 7.)

21. On February 8, 2008, CHP delivered to CalPERS a memorandum entitled "INFORMAL APPEAL OF REINSTATEMENT," notifying CalPERS that "the testing process and background investigation may not be completed within 30 days. We will advise you of our position regarding [respondent Hawkins's] reinstatement after the testing and background review process has been completed." (Ex. 8.)

22. On June 10, 2008, at the request of SPB, respondent Hawkins was evaluated by David Steinberger, Ph.D. (Dr. Steinberger). Dr. Steinberger reported: "Although [respondent Hawkins] presents favorably, her level of former incapacitation is sufficiently severe so as to demand a longer period of stability than is currently the case. There are concerns that re-exposure to traumatic stimuli might well trigger recurrence of her former issues. Adequate assurance that [respondent Hawkins] will rebound to a level of productive, premorbid functioning cannot be ascertained at this point." (Ex. 39.) Dr. Steinberger noted: "[Respondent Hawkins] grew 'sick' over a several-year period wherein she felt '(like) I had the stomach flu and was tired all the time.' By December 2000, [respondent Hawkins] 'collapsed' and was diagnosed with a GI bleed." (Ex. 39.) Dr. Steinberger found that respondent Hawkins did not

[2] The Application gave rise to the issue as to whether respondent Hawkins was presently capable of performing the duties of a CHP sergeant. The following findings are based on direct evidence relevant to the issue and administrative hearsay that explains or supplements respondent Hawkins's testimony that she was presently able to work. (Gov. Code, § 11513, subd. (d).)

meet the psychological qualifications required by Government Code section 1031, subdivision (f).[3]

23. Based on Dr. Steinberger's report, SPB determined that respondent Hawkins had not passed the psychological screening for reinstatement. SPB informed CHP and respondent Hawkins that the reason for its decision was that respondent Hawkins had "insufficient stress tolerance for the position sought." (Ex. 40.) CHP notified respondent Hawkins that she could not be appointed to her former peace officer position according to Government Code section 1031, subdivision (f).

24. On June 27, 2008, respondent Hawkins appealed SPB's decision. She asserted her opinion and belief that the action was "unjustified and not reflective of my ability and suitability to perform my previous employment." (Ex. 42.)

25. On January 12, 2009, SPB held a hearing on respondent Hawkins's appeal. On April 17, 2009, SPB denied respondent Hawkins's appeal, based on the high potential for reoccurrence of PTSD, and the relatively short time that she had been medication-free.

26. On July 7, 2009, Dr. Goldsmith supplemented his IME Report after reviewing additional reports and records. Dr. Goldsmith ratified the conclusions and recommendations made in his IME Report.

27. CalPERS designated Dr. Goldsmith as an expert witness. He is a board-certified psychiatrist who has been practicing for approximately 45 years. In the past 10 years, Dr. Goldsmith has performed approximately 20 to 30 disability retirement examinations for CalPERS. In February 2010, Dr. Goldsmith was terminated from Kaiser Permanente because he "recycled" medication, i.e., if one patient did not use a sample, Dr. Goldsmith would give the unused sample to another patient. Although Kaiser Permanente warned him to stop this practice, he continued to do so, which led to the termination of his employment. As of January 2011, Dr. Goldsmith had never been disciplined by the California Medical Board. Dr. Goldsmith's testimony ratified the findings and conclusions in his reports. In his opinion, respondent Hawkins did not meet the diagnostic criteria for PTSD, she was competent to return to her former position with CHP, her condition has improved since 2003, and cognitive behavioral therapy is very effective to control the effects of traumatic stimuli.

28. CHP designated Dr. Steinberger as an expert witness. Dr. Steinberger is a psychologist licensed in California since 1979 and employed by SPB since 1998. As a psychologist for SPB, Dr. Steinberger is involved in screening applicants for law enforcement positions with the state. To date, he has performed approximately 5,000 interviews and reports in that capacity.

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[3] Each class of public officers or employees declared by law to be peace officers shall be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer. (Gov. Code, § 1031, subd. (f).)

29. Dr. Steinberger explained that Government Code section 1031 is critical to his psychological evaluations because it offers guidelines as to how to perform the evaluations; it forms the basis of his work to determine whether the candidate possesses a psychological condition or problem that could interfere with their work as a law enforcement officer. Dr. Steinberger also relies upon the Peace Officer Psychological Screening Dimensions, which provides direct guidance for candidate evaluations and also form the basis for disqualification. Unlike Dr. Goldsmith, Dr. Steinberger used the aforementioned dimensions when he evaluated respondent Hawkins. He applied the same components that are used for new candidates. Based on the evaluation process, Dr. Steinberger recommended against reinstating Respondent Hawkins. He opined that Respondent Hawkins has chronic PTSD, which means that the PTSD can go into periods of remission or latency, but it is not cured and the individual is vulnerable to recurrences. He reasoned that respondent Hawkins does not currently have any symptoms because she is not in the situation that caused the PTSD. Dr. Steinberger was concerned that the tasks required by the position she applied for will re-trigger PTSD. He opined that to put respondent Hawkins back into the same situation seems risky, and he recommended against it. His concerns are not time-limited; i.e., more time will not necessarily cure these problems. When asked after what time period respondent Hawkins could return to work, Dr. Steinberger did not know, because there is no research to show whether a person can go back to the circumstances that caused the trauma, and react appropriately.

30. Respondent Hawkins is currently employed as a private investigator by Steve Lawson Investigations, doing car theft investigations. Her job duties include investigative work, interviewing people, and completing and submitting reports. In addition, respondent Hawkins is enrolled in two educational programs: a crime analysis certification program at California State University, Fullerton, and an online program for Informatics (data mining), through Foothill College in Silicon Valley.

31. After the Board chose not to adopt the Proposed Decision dated April 14, 2011 and before OAH issued the Notice of Remand and Order thereon, Lawrence Albers, M.D. (Dr. Albers) examined respondent Hawkins at the request of CalPERS. On March 12, 2012, Dr. Albers issued an Independent Medical Evaluation, which supplemented Dr. Goldsmith's opinion in certain respects. Dr. Albers examined respondent Hawkins, reviewed historical data, conducted a mental status examination, and reviewed medical records. Dr. Albers diagnosed respondent Hawkins with PTSD with "no symptoms present at the time." He concluded that respondent Hawkins was not substantially incapacitated for the performance of her duties and that there was no indication that she was unable to perform any specific job duties.

32. CHP designated Matthew Carroll, M.D. (Dr. Carroll) as an expert witness. Dr. Carroll is a Board Certified Forensic Psychiatrist with specialized knowledge in civil and criminal cases involving psychiatric issues. He reviewed respondent Hawkins's medical records, the statement of job duties, and the various reports made by other medical professionals who examined respondent Hawkins. Dr. Carroll testified about his specialized knowledge of PTSD. In Dr. Carroll's opinion, PTSD cannot be cured, but can become asymptomatic with treatment and the avoidance of the stressful conditions that caused the trauma in the first place. Dr. Carroll did not perform an examination of respondent Hawkins

because he expected that she would make a favorable presentation in her current condition. Dr. Carroll agreed with Dr. Steinberger that a period of stability does not indicate a cure of PTSD. Dr. Carroll believes that respondent Hawkins was substantially unable to perform her duties as a CHP sergeant because she would likely experience a recurrence of PTSD symptoms.

LEGAL CONCLUSIONS

1. If the Board rejects a proposed decision and refers the case to an administrative law judge for the taking of additional evidence, the administrative law judge shall prepare a revised proposed decision based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing. (Gov. Code, § 11517, subd. (c)(2)(D); Cal. Code Regs., tit. 1, § 1050.)

2. Government Code section 11504 places the burden upon respondents in a hearing initiated by a filing of a statement of issues. Because the statement of issues defines the primary issue as whether respondent Hawkins is presently capable of performing the usual job duties of a CHP sergeant, the burden of producing evidence is on respondent Hawkins because she is the party against whom a finding would be required in the absence of further evidence. (Evid. Code, § 550, subd. (a).) Accordingly, the burden of proof is on respondent Hawkins and the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

3. "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. (Gov. Code, § 20026.) "Incapacitated for the performance of duty" has been interpreted to mean "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.)

4. CalPERS is required to determine, on the basis of a medical examination, whether an applicant for reinstatement is still incapacitated. (Gov. Code, § 21192.) If CalPERS determines that an applicant is no longer incapacitated and the employer offers to reinstate the applicant, the applicant's disability retirement allowance shall be canceled immediately, and the applicant shall become a member of this system. (Gov. Code, § 21193.) If the applicant is determined to be no longer incapacitated for duty in the position held when retired for disability or in a position in the same class, the applicant shall be reinstated, at the applicant's option, to that position. (*Id.*)

5. In this case, CalPERS determined that respondent Hawkins was no longer incapacitated, physically or mentally, for duty as a CHP sergeant at the time of the Application. The determination was made after a medical examination by Dr. Goldsmith and on the basis of his medical opinion. The report of Dr. Albers, received as additional evidence at the Remand Hearing, supplements the direct testimony of Dr. Goldsmith that

respondent Hawkins is presently capable of performing the usual job duties of a CHP sergeant.

6. CHP designated two expert witnesses, Dr. Steinberger and Dr. Carroll, who testified that respondent Hawkins remained incapacitated for duty as a CHP sergeant. Dr. Steinberger and Dr. Carroll both advised against reinstatement based on concerns that a recurrence of PTSD symptoms is likely upon the re-exposure to traumatic stimuli.

7. Although the opinions of the CHP experts conflict with the opinion of Dr. Goldsmith, there was no conflict in the facts that supported all expert opinions. Respondent Hawkins is presently asymptomatic of PTSD; she is no longer suffering from the physical manifestations attributed to PTSD; and there is no evidence that respondent Hawkins is physically impaired from gastrointestinal bleeding, sleeplessness, or migraine headaches. The law does not accord to the expert's opinion the same degree of credence or integrity that it does the data underlying the opinion. (*County of Sacramento v. Workers' Comp. Appeals Bd.* (2013) 215 Cal. App. 4th 785.)

8. Dr. Carroll acknowledged that respondent Hawkins is currently asymptomatic of PTSD and he chose not to examine respondent Hawkins. His stated concern about her reinstatement was that re-exposure to the traumatic stimuli that caused the original diagnosis was likely to cause a recurrence of PTSD symptoms. A disability must prevent respondent Hawkins from performing her customary duties in the present, not at some unspecified future time. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863). Neither Dr. Carroll nor Dr. Steinberger testified as to when and to what extent respondent Hawkins would become disabled in the event of a recurrence.

9. Moreover, the usual duties of a job are not measured by the applicant's last job assignment; instead, the duties are measured in terms of the job classification the applicant held. (*Beckley v. Bd. of Admin. of California Pub. Employees' Ret. Sys.* (2003) 222 Cal. App. 4th 691, 699.) Accordingly, her present capabilities must be measured in terms of the usual duties of a CHP sergeant, which will include investigating fatalities and officer shootings. Reinstatement will not necessarily re-expose respondent Hawkins to the significant fatal accidents, shootings, and hazardous material spills that she was required to handle with her assignment to MAIT.

10. Dr. Steinberger examined respondent Hawkins, but assessed her fitness under the wrong standard by considering Government Code section 1031, subdivision (f). On January 22, 2000, the Board made and adopted a resolution designating as Precedential Decision 99-03 its final decision in *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes*, Case No. 2530; Office of Administrative Hearings No. L-1999060537. In that precedential decision, the Board delineated the standards to be applied in reinstatement cases at Legal Conclusion 4 as follows:

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> The Public Employees' Retirement Law (Retirement Law) 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.
>
> CalPERS is required to utilize only the test forth in the Retirement Law to determine eligibility for disability retirement or for reinstatements from such retirement. Government Code section 1031(f) is not found within the Retirement Law, but in the general provisions of the Government Code governing public officers or employees who perform peace officer duties. Government Code section 1031(f) is an employment statute. It is inconsistent with the Retirement Law and cases interpreting it. The proper standard to be applied is the test set forth in *Mansperger v. Public Employees' Retirement System* (citation omitted) and *Hosford v. Board of Administration* (citation omitted), not the standard set forth in Government Code section 1031(f).

11. CHP adopted a written policy that mandates reinstatement at the retiree's option if the retiree is no longer incapacitated for duty. CalPERS made its determination of eligibility based on a competent medical opinion. Government Code section 20026 does not require that its determination be based on a medical certainty that respondent Hawkins will remain asymptomatic of PTSD. Dr. Goldsmith is qualified to render a competent medical opinion because he is a board-certified psychologist with 45 years of practical experience. The differing expert opinions are insufficient to discredit Dr. Goldsmith's conclusions. The termination of Dr. Goldsmith's employment at Kaiser Permanente was based on facts that reflect an unwillingness to follow instructions, but have no bearing on his competence as an independent medical examiner. The opinions of Dr. Blum and Dr. Bassett were based on evaluations made in 2003 and 2004 and are unreliable to prove respondent Hawkins's present ability to perform the usual duties of a sergeant or her fitness at the time of the Application in April 2007.

12. Accordingly, the preponderance of the evidence proves that respondent Hawkins is presently capable of performing the usual duties of a CHP sergeant. Under the circumstances, reinstatement is mandatory, in spite of medical evidence that a recurrence of PTSD symptoms may be likely if she is exposed to the stressful conditions she experienced as a MAIT supervisor. If respondent Hawkins experiences a recurrence of debilitating conditions, she can either elect to apply for disability retirement as she did before, or CHP can initiate "appropriate personnel action with appropriate remedies and procedures afforded by personnel rules." (*Starnes, supra*, at Legal Conclusion 4, citing *Cansdale v. Board of Administration, Public Employees Retirement System* (1976) 59 Cal.App.3d 656.)

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ORDER

The determination of CalPERS that respondent Hawkins is presently capable of performing the job duties of a CHP sergeant is affirmed. The appeal of CHP is denied.

DATED: July 23, 2015

MATTHEW GOLDSBY
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT 2

Stephen Mesi

From:	Bodily, Christy <Christy.Bodily@calpers.ca.gov>
Sent:	Thursday, March 10, 2016 2:18 PM
To:	Stephen Mesi
Cc:	Coffey, Rory
Subject:	FW: Hawkins - Proposed Decision
Attachments:	PD Hawkins - Denied.pdf
Importance:	High

Hello Mr. Mesi,

I am advised by Celine's assistant, Angel, that you are now assigned to the Kerri Hawkins matter.

Please see the email below and the attached.

If you would like, Mr. Coffey can be reached directly at 916-795-3938

Thank you,

Christy

From: Bodily, Christy
Sent: Thursday, March 10, 2016 1:51 PM
To: simerdip.khangura@doj.ca.gov
Cc: Coffey, Rory
Subject: Hawkins - Proposed Decision
Importance: High

Good afternoon,

Attached to this email is a copy of the Proposed Decision in the Kerri Hawkins matter. There was some confusion in when our office received this proposed decision. Rory Coffey will contact you to discuss it.

Thank you.

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"Courage is being scared to death - but saddling up anyway."- John Wayne

ATTACHMENT 1

CONFORMED COPY

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OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION FOR REINSTATEMENT FROM INDUSTRIAL DISABILITY RETIREMENT OF **KERRI A. HAWKINS,** Respondent, v. **DEPARTMENT OF CALIFORNIA HIGHWAY PATROL,** Respondent.	Case No. 2010020578 **RESPONDENT DEPARTMENT OF CALIFORNIA HIGHWAY PATROL'S CLOSING MEMORANDUM OF POINTS & AUTHORITIES** **HEARING:** **Date: January 4-5 & 26, 2011** **Location: OAH Los Angeles** Administrative Law Judge Amy Lahr

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Respondent Department of California Highway Patrol (CHP) submits the following Closing Memorandum Points and Authorities.[1]

INTRODUCTION[2]

Respondent Kerri Hawkins (Hawkins) is a former CHP sergeant who submitted an application for industrial disability retirement in October 2003. (Exh. 3.) Hawkins was granted disability retirement in August 2004 on the basis of a psychological condition – Post Traumatic Stress Disorder (PTSD). (Exhs. 1 & 4.) In April 2007, Hawkins submitted a Reinstatement from Disability/Industrial Disability Retirement Application to the California Public Employees' Retirement System (CalPERS). (Exh. 5.) Following submission of the reinstatement application, Dr. William Goldsmith, who was retained by CalPERS, conducted a psychiatric evaluation of Hawkins in November 2007. (Exh. 13.) Based upon Dr. Goldsmith's evaluation, CalPERS determined that Hawkins was no longer disabled or substantially incapacitated from the performance of the usual job duties of a CHP sergeant. (Exh. 6.) CalPERS informed the CHP of its decision in January 2008, and the CHP informally appealed the CalPERS decision which is the subject matter of this case before the OAH. (Exhs. 7-8.)

Pursuant to its reinstatement policy, the CHP requires former peace officers who request reinstatement from disability retirement to satisfy the minimum standards mandated by Government Code section 1031, subdivision (f)(1)-(2). (Exh. 25.) Part of the reinstatement process requires former employees to successfully complete a psychological evaluation. (TR-I 176:18-177:25.)

The psychological evaluation is conducted by a SPB-selected psychologist, whose evaluation, findings, and conclusions are reviewed by the SPB's Psychological Screening Unit (PSU) pursuant to SPB regulations, specifically, California Code of Regulations, title 2, sections 172.4 et seq. If the PSU finds the former peace officer psychologically disqualified from

[1] The transcripts from the hearing in chronological order were lodged as Exhibit 51 and will be referenced as TR-I (Day 1), TR-II (Day 2) and TR-III (Day 3).

[2] Without yielding the CHP's position regarding the burden of proof as set forth in its opening brief filed, Government Code section 11504 places the burden on respondents. Here, there are two responding parties: CHP and Hawkins. However, Hawkins did not affirmatively come forward with proof; she relied on CalPERS' evidence, e.g., Dr. Goldsmith.

appointment to a peace officer position, he or she may file an appeal with the SPB. The findings and recommendations of the Appeals Division are reviewed and approved or rejected by the SPB.

In conformance with its policy, the CHP required Hawkins to undergo a psychological evaluation which was conducted by Dr. David Steinberger in June 2008. (Exh. 39.) In short, he did not recommend that Hawkins be reinstated to her former position as a CHP sergeant because of her long history of chronic PTSD. (*Ibid.*) Hawkins' appeal of Dr. Steinberger's recommendation to the PSU was heard on January 12, 2009. The PSU's proposed decision to disqualify Hawkins for the classification she sought and to deny her appeal was adopted by the SPB on April 14, 2009. The SPB's notice denying the appeal was served on April 17, 2009. Hawkins did not challenge the SPB's decision by seeking a writ of mandamus in the superior court within a year. (Exh. 45.)

I. GOVERNMENT CODE SECTION 1031

A. SECTION 1031 APPLIES TO ALL PEACE OFFICERS INCLUDING THOSE SEEKING TO REINSTATE TO THEIR FORMER POSITIONS FOLLOWING RETIREMENT

> Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standards: . . . (f) Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer.

(Gov. Code, § 1031, subd. (f).) "This statute reflects the public's interest in high quality law enforcement personnel." (*County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 798.) Being free from any emotional or mental condition for a peace office is paramount to public safety, as well as the safety of peace officers. This is especially critical because a CHP peace officer carries a firearm and is authorized to use lethal force. (TR-I I 144:17-146:5; 174:8-175:2.)

County of Riverside v. Superior Court is instructive on the application of section 1031 to both peace officers and candidates for peace officer positions. There, the California Supreme Court acknowledged that section 1031, in particular background investigations under subdivision (d), may be applied to new applicants and to existing peace officers seeking transfers to another law enforcement agency or a new position within the same agency. (See *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 798-799; accord *Pitts v. City of Sacramento* (2006) 138 Cal.App.4th 853, 857, fn. 4.)

The Third District Court of Appeal confirmed that section 1031 applied to applicants seeking to become peace officers and to peace officers who have had a gap in service and wish to return to active duty, like Hawkins.[3] (See *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1058-1059.) The *Sager* court further stated:

> [T]he section 1031 standards must also be maintained throughout a peace officer's career. Section 1031 reflects a *minimum* set of standards for allowing a new recruit to become a peace officer and it would be illogical to conclude the Legislature believed those standards disappeared once an officer began working.

(*Id.* at p. 1059, emphasis in original.) In summary, the appellate court held that "the POST standards,[4] which flesh out the section 1031 standards, are 'a matter continuing education[.]' In our view the section 1031 standards are incorporated by law into every peace officer's job description." (*Ibid.*)[5]

Under section 1031, the CHP has an obligation to confirm that Hawkins is qualified to return to active duty despite the decision by PERS that she is no longer incapacitated. The CHP should be afforded an opportunity to inquire about her fitness before reinstating her. (See generally *Pitts, supra,* 138 Cal.App.4th at p. 855.) In *Pitts*, the plaintiff was a peace officer who suffered a shoulder injury and was found by a hearing officer to not be substantially incapacitated from performing her usual and customary duties. Following the hearing officer's decision, the plaintiff sought reinstatement to her former position. But the City of Sacramento insisted that she pass certain tests including a psychological evaluation. The plaintiff refused and argued that she should be reinstated without any conditions. The Court of Appeal disagreed and noted the plaintiff could not demand an unconditional reinstatement to active status as a peace officer. (*Id.*

---

[3] "A public agency must enforce the criteria for peace officers in Government Code section 1031 at the time of hire, prior to a transfer between agencies, and also possibly when an employee changes positions within the same agency. [Citation.] Moreover, peace officers must certify compliance with the criteria that the Commission on Peace Officer Standards and Training promulgates (citations) both as a matter of continuing education and **after a break in active status.**" (*Pitts, supra*, 138 Cal.App.4th at p. 857, fn 4, emphasis added.)

[4] Here, the POST standards were admitted into evidence as Exhibit 31 and testified to by Dr. David Steinberger.

[5] "[S]ection 1031 applied as a matter of law to Sager's fitness, and the POST standards were conceded to be relevant by [Sager's doctor]. In fact, they are incorporated into Sager's job description, and therefore her ability to comply with them forms an important part of her 'usual' duties." (*Sager, supra*, 156 Cal.App.4th at p. 1057, emphasis omitted.)

at pp. 856-857, fn. 4; but see *Hulings v. State Dept. of Health Care Servs.* (2008) 159 Cal.App.4th 1114, 1125 [Section 1031, subdivision (d) which requires background investigations is not applicable to a peace officer mandatorily reinstated to his former position following a rejection during probation from a different peace officer position].)

Yet, CalPERS as well as Hawkins, contend that section 1031 does not apply to a peace officer seeking to reinstate after disability retirement. But that is a flawed and illogical position which is not supported by any case law.

> If [Hawkins'] position is correct, an officer who lost his moral compass would be immune from these standards and only subject to a moral character standards if the applicable job description in that department reiterated that standard as a defined duty of that classification of officers. That absurd result highlights the flaw in [Hawkins'] position.

(*Sager, supra*, 156 Cal.App.4th at p. 1059.)[6]

Hawkins must be required to satisfy the criteria of section 1031, which among other requirements directs that all peace officers be free from any psychological condition that might adversely affect the exercise of peace officer powers. As the Supreme Court held in *County of Riverside*, law enforcement agencies must evaluate whether an officer satisfies the section 1031 provisions even when the officer changes positions within the same agency. Thus, the CHP cannot reinstate Hawkins to her former sergeant position if she has a psychological condition which prevents the proper execution of peace officer duties.

B. EITHER SECTION 1031 TAKES PRECEDENCE OVER GOVERNMENT CODE SECTION 21192, OR SECTION 1031 SHOULD BE HARMONIZED WITH THE PERS STANDARD TO EFFECTUATE THE PUBLIC POLICY THAT ALL PEACE OFFICERS BE FREE OF PSYCHOPATHOLOGY TO ENSURE PUBLIC AND OFFICER SAFETY

Both CalPERS and Hawkins rely upon the decision reached in *Willie Starnes* (2000) PERS Dec. No. 99-03. The *Starnes* decision is inapposite.[7] At the outset, it was decided before the

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[6] Even in *Hulings*, the appellate court reiterated that "the standards set forth in Government Code section 1031 must be maintained throughout a peace officer's career." (*Hulings, supra*, 159 Cal.App.4th at 1125, fn. 3.) The court noted further that a law enforcement agency "retains authority to assure its employees are fit for their positions." (*Id.* at p. 1125; cf. *Richard Coelho* (2004) SPB Dec. No. 04-03.) In *Coelho*, the SPB held that the employing law enforcement agency could not condition the reinstatement of a peace officer upon the completion of a background investigation. The SPB specifically did not address section 1031, subdivision (f)'s requirement that peace officers be mentally and physically fit. (See *id.* at p. 17, fn. 21.)

Supreme Court and Court of Appeal decisions noted above and thus, its precedential value is questionable regarding the applicability of section 1031.

Apart from *Starnes*, there is no case authority precluding the applicability of section 1031, especially subdivision (f), to the process in which a former peace officer seeks reinstatement following disability retirement. In fact, there is no case authority dealing directly with the interplay between section 1031, subdivision (f), and Government Code section 21192. The issue under section 21192 is whether the former employee seeking reinstatement is still incapacitated, physically or mentally, for duty, or substantially incapable for performing the usual duties. And as stated above, the issue under section 1031, subdivision (f), is whether a "peace officer" is free from any mental condition that may adversely affect the exercise of peace officer powers.

First, "in the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (Code Civ. Proc., § 1859.) Here, section 21192 applies to any former public employee, not just peace officers. On the other hand, section 1031 applies specifically to peace officers. In addition, section 1031 is not limited to applicants, but to all peace officers. Thus, section 1031 should control over section 21192, and be applied accordingly.

Alternatively, courts must "construe statutes to reach a reasonable legislatively intended result, and to harmonize competing statutes to effectuate the legislative policy. [They] "'should seek to consider the statutes not as antagonistic laws but as parts of the whole system which must

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(...continued)

[7] The *Starnes* ALJ, in opining that section 1031 does not apply to determining whether a former peace officer should be reinstated from disability retirement, relies upon 6 cases. The cases, except for *Phillips v. County of Fresno* (1990) 225 Cal.App.3d 1240, do not even discuss section 1031. Therefore, they cannot support the ALJ's determination. (See *Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985 ["A decision is authority only for the point actually passed on by the court and directly involved in the case"].) The *Phillips* court touches upon section 1031, yet its discussion is dicta at best. (*Phillips, supra*, 225 Cal.App.3d at p. 1257.) The sole issue in *Phillips* was whether Government Code section 31725 governs the procedures to be followed by the county when the Retirement Board and the employing agency disagree about the peace officer's retirement status. (*Phillips, supra*, 225 Cal.App.3d at p. 1250.) In addition, the *Phillips* court does not address the interplay between sections 1031 and 21192.

be harmonized and effect given to every section [citations]. Accordingly, statutes which are in *pari materia* should be read together and harmonized if possible.'"" (*Johnston v. Sonoma County Agricultural Preservation & Open Space Dist.* (2002) 100 Cal.App.4th 973, 986, internal citations omitted.)

In the abstract, sections 1031 and 21192 seem to be in conflict as one may apply to a person's current functioning as opposed to a person's prospective functioning. If so, the statutory schemes should be harmonized because they touch upon a common issue and effectuate a similar public policy goal that peace officers be fit for duty.[8] Peace officers such as Hawkins must be capable of carrying out their duties without harm to themselves and most important to the public. It is axiomatic that public safety is paramount when persons are authorized to carry firearms and use deadly force when reasonably necessary. Therefore, no peace officer should be reinstated from retirement if there is any reasonable determination that he or she cannot carry out the usual duties of their former peace officer positions whether currently or in the future. This is more than a concern of liability to the employing agency.

Lastly, "literal construction of the statute will not prevail, however, if 'contrary to the legislative intent apparent in the statute.' In addition, we must give the statute a reasonable interpretation, avoiding, if possible, a literal interpretation which will lead to an absurd result." (*Scottsdale Ins. Co. v. State Farm Mut. Auto. Ins. Co.* (2005) 130 Cal.App.4th 890, 898-899, internal citations omitted.) To not apply section 1031 to the reinstatement process for a peace officer who disability retired may lead to absurd results. For example, a peace officer like Hawkins retires due to a mental disability, e.g., depression. Under section 21192, the peace officer must be returned to work if he or she is no longer substantially incapacitated from the usual duties of a peace officer position regardless if the disability is fully resolved. Proof would lie within a mental examination conducted under section 21192.

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[8] When statutes touch upon a common subject, they must be harmonized, both internally and with each other to the extent possible. (See *Barajas v. Oren Realty & Development Co.* (1997) 57 Cal.App.4th 209, 216-217.)

Yet, under that process alone, neither PERS nor the employing agency would have uncovered that the peace officer has physical problems which prevent he or she from carrying out usual peace officer duties, such as running or sitting for more than 10 minutes in a car, because the peace officer would not have been subjected to a physical exam under section 1031, subdivision (f). The absurdity lies in the result that the peace officer would be reinstated under section 21192, but would still be unable to perform his or her job as a peace officer. It is implausible to believe that the Legislature meant for reinstated peace officers to remain idle on the job.

C. HAWKINS IS ESTOPPED FROM ARGUING AGAINST, AND CONSENTED TO, THE APPLICABILITY OF SECTION 1031 TO HER REINSTATEMENT FROM DISABILITY RETIREMENT

"'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.' . . . Consequently, judicial estoppel is especially appropriate where a party has taken inconsistent positions in separate proceedings." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181, citations omitted.) Additionally, the maxim "volenti non fit injuria" is codified under Civil Code section 3515 which states: "He who consents to an act is not wronged by it."

Here, Hawkins agreed to the psychological evaluation authorized under section 1031 when she sought reinstatement. (See Exhs. 35 & 36.) Although Exhibits 35 and 36 refer to cadets, Sergeant Carter testified that the CHP did not consider Hawkins to be a cadet and it understood that she was seeking reinstatement following retirement. (TR-I 184:11-24.) The exhibits are standard forms used by the CHP for both cadets and former officers seeking reinstatement. (TR-I 184:25-186:1.) Hawkins' consent to the application of section 1031 is confirmed by her treating psychologist who prepared a July 2007 report finding her fit for reinstatement under section 1031. (Exh. 20, p.3.)

Further, following the psychological evaluation conducted by Dr. Steinberger, the SPB determined that Hawkins was not qualified for her former peace officer position. (See Exh. 40.) Hawkins appealed that decision, and an administrative hearing was conducted by the SPB in 2009.

The SPB concluded that Hawkins "does not meet the minimum psychological qualification standards for State peace officer employment under Government Code section 1031." (See Exh. 45.) Representing herself at the administrative hearing, Hawkins failed to challenge the applicability of section 1031 to her reinstatement to the CHP. (TR-I 135:23-137:3.) She only contested the finding made by Dr. Steinberger that she was not qualified because of her long history with PTSD. (See Exh. 45, pp. 5-6.)

Now, Hawkins, as a party to this matter, challenges the applicability of section 1031. However she cannot have it both ways. Having consented to the psychological testing under section 1031 and remaining silent in challenging the disqualification decision, Hawkins is judicially estopped from taking an inconsistent position regarding section 1031's relevance to these proceedings. Equally important, CalPERS is in privity with Hawkins due to their common objectives and positions here, and thus, CalPERS should be bound by Hawkins' consent to the application of 1031 to her reinstatement application, Moreover, to prevent an unfair advantage to CalPERS, it should be estopped from asserting that section 1031 is inapplicable because the party, whom it is acting in concert with to defeat the CHP's appeal, took an inconsistent position in a former administrative matter which was decided on the merits and is now final.

II. HAWKINS IS DISQUALIFIED FROM HER FORMER POSITION AS A CHP SERGEANT AND REMAINS SUBSTANTIALLY INCAPACITATED FROM PERFORMING THE USUAL AND CUSTOMARY DUTIES OF THAT POSITION – SHE IS NOT ENTITLED TO REINSTATEMENT

A. IF SECTION 1031 APPLIES, THEN HAWKINS & CALPERS ARE BOUND BY THE 2009 SPB DECISION DISQUALIFYING HER FOR THE CLASSIFICATION OF CHP PEACE OFFICER BECAUSE SHE FAILED TO EXHAUST JUDICIAL REMEDIES

Government Code section 19630 maintains that parties to a SPB proceeding have one year from the time a decision is rendered to seek judicial review. To wit, a party has a judicial remedy to overturn an adverse SPB decision which must be exercised within a one-year time-frame.

> Exhaustion of *judicial* remedies, on the other hand, is necessary to avoid giving binding 'effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action.'

(*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70, citation omitted, emphasis in original.)

Therefore, "unless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions." (*Id.* at p. 65, quoting *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d. 465.)

Here, the PSU recommended that Hawkins be disqualified from holding her former position as a CHP peace officer because of her long history of significant PTSD symptoms which precipitated her disability retirement. (See Exh. 45, p. 6.) The PSU's recommendation was adopted by the SPB and served on Hawkins in April 2009.[9] Hawkins could have challenged the decision through a mandamus proceeding. (See Civ. Proc. Code, § 1094.5.) But she failed to do so. Consequently, the SPB's decision of April 2009 disqualifying her from being a CHP peace officer is final and binding in further civil actions such as this pending matter. Her attempt to unravel the adverse April 2009 decision and its effect through this appeal should be rejected.

With the April 2009 SPB decision final, "issue preclusion by collateral estoppel 'prevents 'relitigation of issues argued and decided in prior proceedings.'"' (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90.) "Traditionally, collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding 'if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].'" (*Id.* at pp. 90-91, citations omitted.)

Here, all three elements are satisfied. First, the issue of whether Hawkins should be reinstated to her former peace officer position was litigated in the SPB appeal and in this proceeding. Second, the SPB's April 2009 decision is final. And third, Hawkins and CalPERS are undoubtedly in privity with each other.[10] They have a "sufficiently close" relationship and a

[9] The CHP requested that this court take judicial notice of the April 2009 SPB decision (see Exh. 45) which was granted, and in addition, the court received it into evidence as an exception to the hearsay rule. (TR 99:13-22.)

[10] "'The concept of privity for the purposes of ... collateral estoppel refers 'to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a

(continued...)

common financial and proprietary interest which is the cancellation of her disability retirement allowance following a return to compensated employment with the CHP.[11] Accordingly, CalPERS is estopped from challenging the prior finding that Hawkins is disqualified from holding her former peace officer position.

B. HAWKINS' CHRONIC PTSD MIGHT ADVERSELY AFFECT HER EXERCISE OF PEACE OFFICER POWERS INCLUDING THE USUAL AND CUSTOMARY DUTIES OF A CHP SERGEANT

The facts underlying the *Sager* case are instructive here. In *Sager*, a deputy sheriff challenged the County's adoption of an administrative law judge's finding that she should be retired due to a mental condition. Plaintiff Sager had a number of issues over the course of her career which raised concerns about her mental status, including threats to a woman she believed was having an affair with her husband, a suicide attempt, complaints about personnel issues, emotional control, anger management and negative relationships with her peers and supervisors. (See, e.g., *Sager, supra*, 156 Cal.App.4th at pp. 1051-1052, 1054.)

> Sager may be able to serve warrants, drive a patrol car and do many of the other tasks listed on her "class specification" job description, as she asserts, but if the evidence shows she is not able to maintain *mental fitness,* that is, control her anger, work with other officers, and make sound judgments, then she is not performing the duties described above *in the proper manner.*

(*Sager, supra*, 156 Cal.App.4th at p. 1059, emphasis in original.)

Hawkins argues that section 1031 applies standards that are prospective and thus, there is no evidence that she cannot presently perform the usual and customary duties of a sergeant. She is wrong on both counts. First, as argued in Section C below, Hawkins is still substantially incapacitated from her duties. Second, the CHP is permitted to rely upon mental health opinions that she is unfit for peace officer duty because of what may happen should she return to duty with PTSD.

(...continued)
relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of the doctrine of collateral estoppel.'" (*Rodgers, supra*, 136 Cal.App.4th at pp. 90-91.)

[11] "A nonparty should reasonably be expected to be bound if he had in reality contested the prior action even if he did not make a formal appearance. Thus, collateral estoppel has been applied against nonparties who had a proprietary or financial interest in and control of, a prior action." (*Lynch v. Glass* (1975) 44 Cal.App.3d 943, 949.)

> The County *should not have to wait until harm occurs* before taking action to have Sager retired due to her mental disability. It is not the appropriate public policy to wait until Sager *actually* shoots the other woman in the courtroom, kills herself on duty, overreacts to a perceived threat or loses her temper in a dangerous situation to conclude that she is mentally unfit for duty.

(*Sager, supra*, 156 Cal.App.4th at p. 1061, emphasis in original.) In reaching that position, the appellate court rejected Sager's argument that actual, rather than potential, harm is required in finding a peace officer mentally incapacitated. The same conclusion must be reached here based upon the evidence presented at the hearing:

- The duties of a CHP sergeant are set forth in Exhibit 29 – the SPB class specification. Hawkins acknowledged that she would be required to fulfill all of those duties if she was reinstated. (TR-I 22:11-25.) Those duties encompass a sergeant's usual and customary duties which include but are not limited to (i) monitoring and supervising subordinates in the field, (ii) direct and evaluate officer involved shootings, (iii) incident commander, (iv) dispute mediator, (v) enforcement and (vi) conduct accident investigations including fatalities. (TR-I 26:13-29:13; 30:4-8; 119:2-23; 131:4-7; 132:1-5.)[12]

- Hawkins admitted that her PTSD was the result of cumulative trauma which occurred over the course of her CHP career before the retirement. (TR-I 34:4-10; 36:11-14; Exhs. 32, 34, 37 & 46.)

- Hawkins admitted that triggers for the stress she experienced included responding to and investigating incidents or accidents involving fatalities. (TR-I 40:6-41:4.)

- In addition to PTSD, Hawkins was diagnosed with depression and took psychotropic medications over the course of several years. (TR-I 44:3-46:5.)

- Hawkins admitted that she provided false information about when she stopped taking Trazadone and Celexa during the SPB psychological evaluation. She attempted to wean herself off of the medications without consulting a physician; she later consulted with Dr. Susan Sleep who is not a psychiatrist. Instead of stopping the medications in 2005 as she initially indicated, she testified at the SPB appeal hearing that she stopped the medications in 2007. (TR-I 46:9-49:17; 51:6-11; 52:8-53:19; Exh. 46.)[13]

- Hawkins admitted to treatment by Jan Watkins, a therapist, from 1998 for about 2 years, but she denied treatment from Ms. Watkins for anger management. However, she admitted to

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[12] Sergeant Holloway who has been a Field sergeant for 7 years testified about the usual and customary duties of CHP sergeant. (See, e.g., TR-I 152:20-24; 155:13-16; 158:18-25; 160:22-25; 162:24-163:15; 164:7-166:2.)

[13] Sergeant Carter testified that the CHP expects that former peace officers seeking reinstatement from retirement to be truthful in completing necessary documents and undergoing evaluations. (TR 175:10-176:12.)

having problems with her temper which she attributed to her work as a CHP sergeant. (TR-I 56:6-57:24; 61:24-62:12; 66:12-67:3; 68:4-19.) Dr. Steinberger testified that Hawkins denied that she had treatment for anger management or treatment from any other provider, except for Dr. Blum, when he interviewed her in 2008. Dr. Steinberger learned later that Hawkins did have anger management treatment from Ms. Watkins. (TR-II 68:10-70:6.) Hawkins later sought treatment from Lawrence Blum, Ph.D. for depression and PTSD from about 2001 through 2004. (TR-I 58:13-22; 72:4-73:7.)

- Dr. Steinberger has performed over 5000 psychological evaluations of persons who were applicants to become peace officers or active/former peace officers. (TR-II 17:24-18:18.) Of those evaluations, Dr. Steinberger has performed approximately 500-1000 psychological evaluations for the CHP. (TR-II 117:5-10.)

- Dr. Steinberger performed a psychological evaluation of Hawkins by reviewing data from psychological tests (MMPI and 16 PF personality test) administered by the SPB and conducting an interview with her. He also reviewed Hawkins' medical records including reports from Drs. Bassett, Blum, Curtis and Goldsmith, and Hawkins' psychological history questionnaire. (TR-II 27:26-28:12; 29:19-24; 30:13-17; 31:17-32:2; 32:5-33:10; 36:12-20; 45:24-47:14.) Based upon the totality of the evaluation of Hawkins, Dr. Steinberger opined that she suffers from PTSD, and has so for over a decade (since 1998). (TR-II 37:10-18; 64:1-65:16.)

- Dr. Steinberger also concluded that Hawkins suffers from chronic PTSD which means that the condition is "ongoing" and "will continue." She is not cured of PTSD (TR-II 49:8-50:10; TR-III 130:8-13), and Dr. Steinberger does not know of any research which suggests there is a cure for PTSD (TR-II 51:11-14; TR-III 130:14-17). Specifically, he is unaware of any research suggesting a cure for PTSD equal to an absence of any concern of trauma reigniting PTSD. (TR-III 129:3-130:23.) He agreed with both Drs. Bassett and Blum which opined that Hawkins could not perform her duties as a CHP sergeant because of PTSD and recommended disability retirement in 2004. (TR-II 86:7-17; 105:8-15.)

- Dr. Steinberger opined that Hawkins should not return to her prior peace officer position with the CHP because on-the-job stress triggered the onset of PTSD. Thus, there is a high risk that the PTSD will recur if Hawkins resumes her CHP sergeant duties (TR-II 78:13-81:7; 130:6-11; 138:4-139:12), and with chronic PTSD, he has concerns about her ability to carry out the usual and customary duties of her prior position (TR-II 89:20-91:24). Dr. Steinberger noted that Hawkins had a history of exhibiting PTSD symptoms after returning to the CHP following periodic medical leaves. (TR-II 83:4-84:6; see also Exh. 48 – Dr. Blum's September 17, 2003 report, p. 2.)

- As to why Hawkins was not experiencing PTSD symptoms currently, Dr. Steinberger opined that she was not in the situation that caused the disorder in the first place (her work for the CHP). (TR-II 100:6-16.) He is also unaware of any treatment for PTSD that would eliminate the disorder completely. (TR-III 310:24-131:2; 131:6-9; 131:17-24.) Further, Dr. Steinberger was unaware of any treatment provided to Hawkins that would eliminate her chronic PTSD. (TR-III 131:3-5.)

- Lastly, Dr. Steinberger's opinions are supported by Dr. Bassett's findings in 2004, including her opinion that due to a peace officer's work, "it is not possible for this woman to return to modified work as a peace officer without serious risk of an exacerbation of her current and mental disorders." (Exh. 47, pp. 17-19.)

Based upon the totality of the medical reports admitted into evidence, excluding the reports of Drs. Goldsmith and Blum (except for Exhibit 48), and Dr. Steinberger's comprehensive testimony about Hawkins' chronic PTSD, Hawkins should not be reinstated to her former peace officer positions. There is a significant risk that she will suffer from PTSD symptoms if she is exposed to the same stimuli that caused the PTSD. Both the CHP and especially the public cannot assume the risk a peace officer will be unable to carry out his or her duties when those duties include the carrying and use of a firearm.

C. CALPERS HAS NOT ESTABLISHED THAT HAWKINS IS ABLE TO PERFORM THE USUAL AND CUSTOMARY DUTIES OF A CHP SERGEANT BASED UPON THE OPINIONS OF DR. GOLDSMITH

Under section 21192, Hawkins may be reinstated to her former position as a CHP sergeant if she is no longer mentally incapacitated. CalPERS attempts to establish that Hawkins is entitled to reinstatement based primarily upon the opinions of Dr. Goldsmith and to a lesser extent, the administrative hearsay opinions of Dr. Blum. The opinions proffered are subject to scrutiny and do not warrant a finding that she is no longer mentally incapacitated for the following reasons:

- Dr. Goldsmith's entire testimony is undermined by his admission that he was fired from Kaiser Permanente for dispensing to patients medications previously prescribed to others in violation of stated instructions from his employer to cease that practice. (TR-III 52:2-54:6.) The basis for his termination calls into question Dr. Goldsmith's competency and ethics as a licensed physician.

- Dr. Goldsmith opined that Hawkins does not have PTSD or is cured of it. Based upon that finding, he concluded that she should be reinstated to her position with the CHP. However, his opinions should be rejected as flawed because:

  1. In comparison to Dr. Steinberger, Dr. Goldsmith has only completed about 12 psychiatric evaluations of peace officers. (TR-III 34:14-35:2; 35:10-17.)
  2. For his evaluation, Dr. Goldsmith did not conduct or order any psychological testing of Hawkins. (TR-III 55:9-15.) He reviewed psychological testing data for the first time about 2-3 months before the hearing in this matter commenced. (TR-III 57:5-19; Exhs. 23-24.)

3. Dr. Goldsmith was unaware that Hawkins underwent anger management counseling, and had sought counseling from Jan Watkins. He admittedly did not ask her about past counseling. (TR-III 36:14-25; 37:17-38:14.)
4. He did not know either when Hawkins first exhibited signs of PTSD or when she was diagnosed with PTSD. When asked if he knew what type of PTSD Hawkins had been diagnosed with, he said no. (TR-III 35:18-36:13.)
5. Dr. Goldsmith was ignorant as to why Hawkins stopped treatment for PTSD. (TR-III 69:11-25.)
6. He conceded that the DSM does not refer to PTSD as curable. (TR-III 63:15-25.) And he did not base his opinion on any particular literature or research. (TR-III 67:17-24.)
7. Dr. Goldsmith agreed with Dr. Blum that Hawkins' PTSD and major depression arose from her job with the CHP. (TR-III 67:5-8.) But he believes Hawkins can be reinstated. Yet, he could not state to a medical certainty that Hawkins' PTSD would not recur if she returned to the CHP. (TR-III 62:20-23; 70:1-10; 71:22-72:1.) He even admitted that exposure to PTSD stimuli could trigger a recurrence of the disorder. (TR-III 68:6-9.) In fact, he stated that Dr. Steinberger's opinion, that re-exposure to traumatic stimuli may trigger a recurrence of PTSD, is reasonable. (TR-III 91:24-93:2; Exh. 14.)
8. He was unsure what psychological exercises Hawkins was taught which would mitigate PTSD from recurring. (TR-III 93:18-94:10.) Dr. Goldsmith could not opine to a medical certainty that any learned psychological exercises eliminated the likelihood of PTSD returning. (TR-III 94:19-95:6.)
9. Dr. Goldsmith could not definitively opine that Hawkins does not have chronic or recurring PTSD as of January 26, 2011. (TR-III 77:9-12.)
10. Lastly and most important, Dr. Goldsmith did not know what are the usual and customary duties of a CHP sergeant. (TR-III 67:14-16.) He also could not recall if Hawkins worked in the MAIT unit. (TR-II 170:18-20.)

- Dr. Goldsmith's initial report of November 2007 (Exh. 13) is at best faulty. First, despite Hawkins taking psychotropic medications for years, the report does not mention Hawkins' use of such medications. (TR III 41:5-8.) Second, according to Dr. Goldsmith, Hawkins failed to disclose that her maternal grandfather was an alcoholic which is a psychiatric disorder. In fact, Hawkins denied all familial psychiatric history when asked by Dr. Goldsmith (TR-III 44:17-45:11; 46:9-12.)

- Dr. Goldsmith agreed that it was ill-advised that Hawkins weaned herself off of psychotropic medications without consulting a physician, and he was unaware of who was Hawkins' health care provider when she ceased taking her medications. He also did not know who Dr. Susan Sleep was. (TR-III 42:8-43:5; 44:11-16.)

Dr. Goldsmith's testimony is replete with shallow observations and tenuous opinions. His opinions are simply not weighty and lack the support necessary to establish that Hawkins is no longer incapacitated from the usual and customary duties of a CHP sergeant. Under the standard

found in section 21192, CalPERS simply cannot prevail with Dr. Goldsmith's deficient view about Hawkins' PTSD and her current mental status.

CONCLUSION

No law enforcement agency should be required to reinstate a former peace officer who has had a long history of a psychiatric disorder such as PTSD, and where there is a significant likelihood that the disorder will return should that peace officer resume duties which caused the disorder in the first place. Thus, public and officer safety dictate the application of section 1031 to the reinstatement process – Hawkins needs to be free of any psychopathology. We should expect no less from our first responders. The CHP has established under the standards of section 1031 or 21192 that Hawkins cannot fulfill the usual and customary duties of a CHP sergeant because of her chronic PTSD. Thus, the CHP requests that the OAH reverse CalPERS' decision to to reinstate Hawkins.

Dated: March 14, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California

MICHAEL E. WHITAKER
Supervising Deputy Attorney General
Attorneys for Respondent Department of California Highway Patrol

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Appeal by Kerri Hawkins (PERS)**
No.: **2010020578**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 15, 2011, I served the attached **Respondent CHP's Closing Brief** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Kerri A. Hawkins

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 15, 2011, at Los Angeles, California.

Yvette Wright
Declarant

Signature

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DECLARATION OF SERVICE BY FACSIMILE AND MAIL

Case Name: **Appeal by Kerri Hawkins (PERS)**

No.: **2010020578**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. My facsimile machine telephone number is (213) 897-1071.

On March 15, 2011 at 8:00 AM., I served the attached **Respondent CHP's Closing Brief** by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2.306. The facsimile machine I used complied with Rule 2.306, and no error was reported by the machine. Pursuant to rule 2.306(h)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. In addition, I placed a true copy thereof enclosed in a sealed envelope with postage thereof fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

John A. Mikita, Senior Staff Counsel
CalPERS
Legal Office
P.O. Box 942707
Sacramento, CA 94229
Fax #: (916) 795-3659

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 15, 2011, at Los Angeles, California.

Yvette Wright
Declarant

Signature

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********** -COMM. JOURNAL ********** DATE MAR-15-11 ***** TIME 07:00 ********

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KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

FAX TRANSMISSION COVER SHEET

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TO:

NAME: John A. Mikita, Senior Staff Counsel

OFFICE: CalPERS

LOCATION: Sacramento

FAX NO.: (916) 795-3659 PHONE NO.: (916) 795-3669

FROM:

NAME: Michael E. Whitaker, Supervising Deputy Attorney General

OFFICE: Employment and Administrative Mandate

LOCATION: Los Angeles

FAX NO.: (213) 897-1071 PHONE NO.: (213) 897-2092

MESSAGE/INSTRUCTIONS

Re: Appeal by Kerri Hawkins (PERS)

Respondent CHP's Closing Brief

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ATTACHMENT 2

In the Matter of the Application for Reinstatement from Industrial Disability Retirement of:
KERRI A. HAWKINS, Respondent and DEPARTMENT OF CALIFORNIA HIGHWAY PATROL, Respondent
Office of Administrative Hearings, Case No. 2010020578

EXHIBITS

Exhibits identified, admitted, and not received into evidence on January 4, 5 & 11, 2011 and May 12, 2015

Exh. No.	Description	Identified	Admitted	Not Received
1.	Statement of Issues dated February 8, 2010	1/26/11	1/26/11	
2.	Notice of Hearing dated March 15, 2010	1/26/11	1/26/11	
3.	Disability Retirement Election Application dated October 16, 2003	1/26/11	1/26/11	
4.	CalPERS Letter to Kerri Hawkins approving industrial disability retirement dated February 3, 2006	1/4/11	1/4/11	
5.	Reinstatement Request from Disability Retirement Application dated April 5, 2007	1/26/11	1/26/11	
6.	CalPERS Letter to Kerri Hawkins approving reinstatement from industrial disability retirement dated January 25, 2008	1/26/11	1/26/11	
7.	CalPERS Letter to CHP Personnel Officer approving Kerri Hawkins for reinstatement from retirement dated January 25, 2008	1/4/11	1/4/11	
8.	CHP Memo to CalPERS informally appealing reinstatement dated February 8, 2008	1/26/11	1/26/11	
9.	CalPERS Letter to CHP re: second request for reinstatement from retirement dated April 30, 2008	1/4/11	1/4/11	
10.	CHP Memo to CalPERS re: denial of reinstatement dated July 17, 2008	1/26/11	1/26/11	
11.	Curriculum Vitae of William Goldsmith, M.D.	1/26/11	1/26/11	
12.	CalPERS Letter to William Goldsmith, M.D. re: examination appointment dated November 9, 2007	1/26/11	1/26/11	
13.	Report of William Goldsmith, M.D. dated November 27, 2007	1/26/11	1/26/11	
14.	Supplemental IME Report of William Goldsmith, M.D. dated July 7, 2009	1/26/11	1/26/11	
15.	CalPERS Discovery Requests to CHP dated March 17, 2010	1/26/11		1/26/11
16.	CalPERS Discovery Requests to Kerri Hawkins dated March 17, 2010	1/26/11		1/26/11
17.	California State Personal Board, Specification, Sergeant, California Highway Patrol (revised 8/7/01)	1/4/11	1/4/11	

Exh. No.	Description	Identified	Admitted	Not Received
18.	CalPERS Physical Requirements of Position/Occupational Title dated January 11, 2005	1/26/11		1/26/11
19.	Memorandum of Points and Authorities in Support of CalPERS' Determination dated July 20, 2010	1/4/11		
20.	Kerri A. Hawkins's Exhibits [Letter to CalPERS dated April 2, 2010; Lawrence Blum, Ph.D. Report dated July 4, 2007; Lawrence Blum, Ph.D. Report dated September 10, 2008]	1/26/11	1/26/11	
21.	Report of William Goldsmith, M.D. dated September 29, 2010	1/26/11	1/26/11	
22.	Report of William Goldsmith, M.D. dated November 10, 2010	1/26/11	1/26/11	
23.	Dr. Blum's Psychological Testing and Report dated February 20, 2008	1/26/11	1/26/11	
24.	Dr. Blum's Psychological Testing and Report dated August 18, 2008	1/26/11	1/26/11	
25.	Reinstatements. Highway Patrol Manual 10.3		1/4/11	
26.	Department-Ordered Fitness-For-Duty Examination and Compensation Insurance Fund-Initiated Medical Examination. Highway Patrol Manual 10.7		1/4/11	
27.	California Highway Patrol Officer 14 Critical Physical Activities. CHP 225 (Rev. 4-10)	1/4/11	1/4/11	
28.	California Highway Patrol Officer Task Statement. CHP 225 (Rev. 6-00)	1/4/11	1/4/11	
29.	California State Personal Board, Specification, Sergeant, California Highway Patrol (revised 12/1/2009)	1/4/11	1/4/11	
30.	Curriculum Vitae of David M. Steinberger, Ph.D.	1/5/11	1/5/11	
31.	California Commission on Peace Officer Standards and Training Peace Officer Psychological Screening Dimensions	1/5/11	1/5/11	
32.	Employee's Claim For Workers' Compensation Benefits dated March 9, 2001	1/4/11	1/4/11	
33.	Medical Information Release Authorization dated March 9, 2001	1/4/11	1/4/11	
34.	Employee Report of Injury dated March 9, 2001	1/4/11	1/4/11	
35.	Psychological Screening Identification Form		1/4/11	

Exh. No.	Description	Identified	Admitted	Not Received
36.	Psychological Written Test Advisement dated February 20, 2008		1/4/11	
37.	Applicant Health Questionnaire dated May 22, 2008		1/4/11	
38.	Request for Area Assignment	1/4/11	1/4/11	
39.	Psychological Evaluation of Kerri Hawkins dated June 12, 2008	1/5/11	1/5/11	
40.	Letter to Kerri Hawkins from the California State Personnel Board dated June 23, 2008		1/4/11	
41.	Memorandum to Sharil Smith, CHP from the California State Personnel Board dated June 23, 2008	1/4/11	1/4/11	
42.	Letter to the California State Personnel Board from Kerri Hawkins dated June 27, 2008		1/4/11	
43.	Letter to Kerri Hawkins from the California Highway Patrol dated July 17, 2008		1/4/11	
44.	Memorandum to CalPERS from the California Highway Patrol dated July 17, 2008		1/4/11	
45.	Decision from Appeal of Psychological Disqualification dated April 17, 2009	1/4/11	1/4/11	
46.	Psychological History Questionnaire dated February 2, 2008	1/4/11	1/4/11	
47.	Report of Katalin Bassett, M.D. dated May 10, 2004	1/5/11; 1/26/11	1/26/11	
48.	Progress Reports (9 pages), Doctor's First Report of Occupational Injury or Illness (2 pages), and September 17, 2003 Report (5 pages) of Lawrence Blum, Ph.D.	1/5/11; 1/26/11	1/26/11	
49.	Report of Thomas A. Curtis, M.D. dated January 10, 2003	1/26/11		
50.	License History of William Goldsmith, M.D.	1/26/11	1/26/11	
51.	Transcripts of Hearings (January 4, 5 and 26, 2011)	1/26/11		
52.	Transcripts of Hearings (January 4, 5 and 26, 2011)	5/12/15		
53.	Curriculum Vitae of Michael Carroll, MD	5/12/15	5/12/15	
54.	Report of Katalin Bassett, M.D. dated May 10, 2004	5/12/15	5/12/15	
55.	Report of Lawrence Albers, M.D. dated March 12, 2012	5/12/15	5/12/15	

DECLARATION OF SERVICE BY E-MAIL and U.S. MAIL

Case Name: **Appeal by Kerri Hawkins (PERS)**
OAH No.: **2010020578**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 26, 2015, I served the attached **RESPONDENT DEPARTMENT OF CALIFORNIA HIGHWAY PATROL'S CLOSING BRIEF AFTER REMAND** by transmitting a true copy ***via electronic mail.*** In addition, I placed a true copy thereof enclosed in a sealed envelope, in the ***internal mail system*** of the Office of the Attorney General, addressed as follows:

Via E-mail: tsantana@thecahp.org **And U.S. Mail** Anthony M. Santana, Legal Counsel California Association of Highway Patrolmen 2030 V Street Sacramento, CA 95818-1730	Attorney for Respondent Kerri Hawkins
Via E-mail: rory_coffey@calpers.ca.gov **And U.S. Mail** Rory Coffey, Senior Staff Counsel California Public Employee's Retirement System - Legal Office P.O. Box 942707 Sacramento, CA 94229-2707	Attorney for CalPERS

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 26, 2015, at Los Angeles, California.

Marsha A. Petty
Declarant

Marsha A. Petty
Signature

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61609438.doc

Marsha Petty

From:	Marsha Petty
Sent:	Friday, June 26, 2015 1:40 PM
To:	LaxFilings@dgs.ca.gov
Cc:	Simerdip Khangura
Subject:	(OAH Case No. 2010020578) - In re Appeal of Kerri A. Hawkins v. CHP - RESPONDENT CHP'S CLOSING BRIEF AFTER REMAND
Attachments:	CHP Closing Brief After Remand.pdf

Please find attached for filing with the LAX OAH on behalf of our client Respondent CHP's Closing Brief After Remand. Please return a filed/conformed copy via e-mail to me for our records. Should you wish to discuss this matter please contact Simerdip Khangura, Deputy Attorney General, at telephone number (213) 897-6564. Thank you for your courtesy in this matter.

Marsha A. Petty, Legal Secretary
Office of the Attorney General
Department of Justice
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Email: Marsha.Petty@doj.ca.gov

Marsha Petty

From: LAX Filings@DGS <LaxFilings@dgs.ca.gov>
Sent: Friday, June 26, 2015 1:40 PM
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Beginning November 4, 2013, OAH will require all case documents filed by governmental entities with our Los Angeles and San Diego offices to be submitted electronically. Attorneys representing individuals or individuals who choose to do so may also file documents electronically, but documents filed electronically must be filed according to the electronic filing and naming guideline. The guideline can be found at (http://www.dgs.ca.gov/oah/GeneralJurisdiction/EFiling.aspx).

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ATTACHMENT 2

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Attorneys for Respondent Department of California Highway Patrol

OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION FOR REINSTATEMENT FROM INDUSTRIAL DISABILITY RETIREMENT OF **KERRI A. HAWKINS,** Respondent, **and** **DEPARTMENT OF CALIFORNIA HIGHWAY PATROL,** Respondent.	Case No. 2010020578 **RESPONDENT DEPARTMENT OF CALIFORNIA HIGHWAY PATROL'S CLOSING BRIEF AFTER REMAND** **HEARING:** Date: January 4-5 & 26, 2011 Location: OAH Los Angeles Administrative Law Judge Amy Lahr **REMAND HEARING:** Date: May 12-14, 2015 Location: OAH Los Angeles Administrative Law Judge Matthew Goldsby

Respondent Department of California Highway Patrol (CHP) submits the following Closing Brief After Remand.[1]

INTRODUCTION

Respondent Kerri Hawkins (Hawkins) is a former CHP sergeant who submitted an application for industrial disability retirement in October 2003. (Exhibit (Exh.) 3.)[2] The California Public Employees' Retirement System (CalPERS) granted Hawkins' disability retirement in August 2004 on the basis of a psychological condition – Post Traumatic Stress Disorder (PTSD). (Exhs. 1 & 4.) In April 2007, Hawkins submitted a Reinstatement from Disability/Industrial Disability Retirement Application to CalPERS. (Exh. 5.) Following submission of the reinstatement application, Dr. William Goldsmith, who was retained by CalPERS, conducted a psychiatric evaluation of Hawkins in November 2007. (Exh. 13.) Based upon Dr. Goldsmith's evaluation, CalPERS determined that Hawkins was no longer disabled or substantially incapacitated from the performance of the usual job duties of a CHP sergeant. (Exh. 6.) CalPERS informed the CHP of its decision in January 2008, and the CHP informally appealed the CalPERS decision, which is the subject matter of this appeal. (Exhs. 7-8.)

Concurrently and in conformance with CHP policy, Hawkins submitted to a psychological evaluation conducted by Dr. David Steinberger in June 2008. (Exh. 39.)[3] In short, he did not recommend that Hawkins be reinstated to her former position as a CHP sergeant because of her long history of chronic PTSD. (*Ibid.*)

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[1] For the sake of brevity, Respondent incorporates herein the legal arguments it previously made in this case and which were presented in its initial Closing Brief, particularly the applicability of Government Code section 1031 to these proceedings. A copy of the brief is attached as Attachment 1 and incorporated herein.

[2] The transcripts from the original hearing were lodged as Exhibit 51 in chronological order and will be referenced as TR-I (Day 1, Jan. 4, 2011), TR-II (Day 2, Jan. 5, 2011) and TR-III (Day 3, Jan. 26, 2011). They were also marked for identification at the remand hearing as Exhibit 52-A (Jan. 4, 2011), 52-B (Jan 4, 2011), 52-C (Jan. 26, 2011), and 52-D (July 30, 2010). The exhibits referenced herein are listed on the updated Index of Exhibits, attached as Attachment 2 for the Court's convenience.

[3] Part of the CHP's reinstatement process requires former employees to successfully complete a psychological evaluation mandated by Government Code section 1031, subdivision (f)(1)-(2). (Exh. 25; TR-I 176:18-177:25.)

PROCEDURAL HISTORY

This matter came before the Office of Administrative Hearings (OAH) on July 30, 2010, January 4-5, 2011, and January 26, 2011. Administrative Law Judge Amy Lahr presided over the hearing and submitted a Proposed Decision to Board of Administration (Board) of CalPERS on or about April 19, 2011. Judge Lahr granted the CHP's appeal and determined that Hawkins did not meet her burden of establishing that she was presently capable of performing the usual job duties of a CHP sergeant. On or about November 6, 2013, the Board remanded the matter for the purpose of taking additional evidence. The hearing took place on May 12, 2015.

At the remand hearing, CalPERS and Hawkins presented no additional direct evidence. The only additional direct evidence admitted at the hearing was the testimony of CHP expert Dr. Michael Carroll. CalPERS offered Exhibit 55, a report by Dr. Lawrence Albers, which was admitted solely as administrative hearsay.

Because the sole purpose of the remand hearing was to allow CalPERS the opportunity to provide additional evidence of Hawkins' ability to do her job as a CHP Sergeant, and neither CalPERS nor Hawkins provided any direct evidence on this issue, there is no additional evidence to alter the Proposed Decision of ALJ Lahr. The report by Dr. Albers, which came in solely as administrative hearsay, cannot be used to supplement medical evidence that does not otherwise exist. Thus, there is no competent, direct evidence in the record that Hawkins' is no longer substantially incapacitated.

I. BASED ON A TOTALITY OF THE EVIDENCE HAWKINS REMAINS SUBSTANTIALLY INCAPACITATED FROM PERFORMING THE USUAL AND CUSTOMARY DUTIES OF THE CHP SERGEANT POSITION – SHE IS NOT ENTITLED TO REINSTATEMENT

Under Government Code section 21192, Hawkins may be reinstated to her former position as a CHP sergeant if she is no longer mentally incapacitated. However, neither CalPERS nor Hawkins established that she was presently capable of performing the usual job duties of a CHP sergeant for the following reasons:

- The duties of a CHP sergeant are set forth in Exhibit 29 – the SPB class specification. Hawkins acknowledged that she would be required to fulfill all of those duties if she was

reinstated. (TR-I 22:11-25.) Those duties encompass a sergeant's usual and customary duties which include but are not limited to (i) monitoring and supervising subordinates in the field, (ii) direct and evaluate officer involved shootings, (iii) incident commander, (iv) dispute mediator, (v) enforcement and (vi) conduct accident investigations including fatalities. (TR-I 26:13-29:13; 30:4-8; 119:2-23; 131:4-7; 132:1-5.)[4]

- Hawkins admitted that her PTSD was the result of cumulative trauma which occurred over the course of her CHP career while performing her duties. (TR-I 34:4-10; 36:11-14; Exhs. 32, 34, 37 & 46.)

- Hawkins admitted that triggers for the stress she experienced included responding to and investigating incidents or accidents involving fatalities. (TR-I 40:6-41:4.)

- In addition to PTSD, Hawkins was diagnosed with depression and took psychotropic medications over the course of several years. (TR-I 44:3-46:5.)

- Dr. Steinberger has performed over 5000 psychological evaluations of persons who were applicants to become peace officers or active/former peace officers. (TR-II 17:24-18:18.) Of those evaluations, Dr. Steinberger has performed approximately 500-1000 psychological evaluations for the CHP. (TR-II 117:5-10.)

- Dr. Steinberger performed a psychological evaluation of Hawkins by reviewing data from psychological tests (MMPI and 16 PF personality test) and conducting an interview with her. He also reviewed Hawkins' medical records including reports from Drs. Bassett, Blum, Curtis and Goldsmith, and Hawkins' psychological history questionnaire. (TR-II 27:26-28:12; 29:19-24; 30:13-17; 31:17-32:2; 32:5-33:10; 36:12-20; 45:24-47:14.) Based upon the totality of the evaluations of Hawkins, Dr. Steinberger opined that she suffers from PTSD, and has so for over a decade (since 1998). (TR-II 37:10-18; 64:1-65:16.)

- Dr. Steinberger also concluded that Hawkins suffers from chronic PTSD which means that the condition is "ongoing" and "will continue." She is not cured of PTSD (TR-II 49:8-50:10; TR-III 130:8-13), and he does not know of any research which suggests there is a cure for PTSD. (TR-II 51:11-14; TR-III 130:14-17). Specifically, Dr. Steinberger is unaware of any research suggesting a cure for PTSD equal to an absence of any concern of trauma reigniting PTSD. (TR-III 129:3-130:23.) He agreed with both Drs. Bassett and Blum who opined that Hawkins could not perform her duties as a CHP sergeant because of PTSD and recommended disability retirement in 2004. (TR-II 86:7-17; 105:8-15.)

- Dr. Steinberger opined that Hawkins should not return to her prior peace officer position with the CHP because on-the-job stress triggered the onset of PTSD. Thus, there is a high risk that the PTSD will recur if Hawkins resumes her CHP sergeant duties (TR-II 78:13-81:7; 130:6-11; 138:4-139:12), and with chronic PTSD, he had concerns about her ability to carry out the usual and customary duties of her prior position. (TR-II 89:20-91:24). Dr. Steinberger noted that Hawkins had a history of exhibiting PTSD symptoms after returning to the CHP

[4] Sergeant Holloway, who has been a Field sergeant for 7 years, testified about the usual and customary duties of CHP sergeant. (See, e.g., TR-I 152:20-24; 155:13-16; 158:18-25; 160:22-25; 162:24-163:15; 164:7-166:2.)

following periodic medical leaves. (TR-II 83:4-84:6; see also Exh. 48 – Dr. Blum's September 17, 2003 report, p. 2.)

- As to why Hawkins was not currently experiencing PTSD symptoms, Dr. Steinberger opined that she was not in the situation that caused the disorder in the first place (her work for the CHP). (TR-II 100:6-16.) He was also unaware of any treatment for PTSD that would eliminate the disorder completely. (TR-III 310:24-131:2; 131:6-9; 131:17-24.) Further, Dr. Steinberger was unaware of any treatment provided to Hawkins that would eliminate her chronic PTSD. (TR-III 131:3-5.)

- Dr. Steinberger's opinions are supported by Dr. Bassett's findings in 2004, including her opinion that due to a peace officer's work, "it is not possible for this woman to return to modified work as a peace officer without serious risk of an exacerbation of her current and mental disorders." (Exh. 47, pp. 17-19.)

- Dr. Steinberger's opinions are also supported by the opinions of Dr. Carroll, who is an expert in PTSD. (Exh. 53.) Dr. Carroll is fellowship trained and a Board Certified Forensic Psychiatrist specializing in civil and criminal cases involving psychiatric issues. He's performed thousands of mental evaluations. (Exh. 53.)

- Dr. Carroll reviewed Hawkins' medical records, including reports from Drs. Bassett, Steinberger, Blum, Curtis, Goldsmith, and Albers, as well as Hawkins' psychological history questionnaire. Based upon the totality of the information, Dr. Carroll opined that Hawkins suffers from PTSD. (Remand Hearing Transcript (RHT), 13:15-14:10; 17:23-18:22.)

- Dr. Carroll also opined that Hawkins could return to the position of a CHP sergeant. He agreed with Dr. Steinberger's conclusions. (RHT, 18:14-16; 51:19-60:1.)

- Dr. Carroll stated that in all the research he was aware of regarding PTSD and re-exposure, there is no research to suggest that re-exposure to cumulative trauma will not cause PTSD symptoms to reappear. (RHT, 27:5-23.)

- Dr. Carroll stated that Hawkins' records were void of what techniques she learned to cope with PTSD after she stopped seeing Dr. Blum. (RHT, 42:24-43:10.) Furthermore, Dr. Carroll believed that Dr. Blum's records and reports were confusing because during that time that Hawkins was under his care, her prognosis went from good to poor, and then all of a sudden without having seen Hawkins for three years, Dr. Blum opined she was cured. (RHT, 79:4-10.)

- Dr. Carroll also opined that Hawkins was asymptomatic now because she had removed herself from working as a CHP Sergeant and has avoided the traumatic stimuli associated with the job. He opined that while she did not have symptoms, there is no cure for PTSD. Dr. Carroll stated that he was unable to identify any information in the records, reports or testimony that Hawkins had been re-exposed to an environment similar to her job, which is necessary to evaluate how she would respond if returned to the same traumatic environment of her job. (RHT, 20:5-15; 84:24-85:6.)

CalPERS attempts to establish that Hawkins is entitled to reinstatement based primarily upon the opinion of Dr. Goldsmith and to a lesser extent, the administrative hearsay opinions of Dr. Blum and Dr. Albers. The opinions do not warrant a finding that she is no longer mentally incapacitated for the following reasons:

- Hawkins admitted that she provided false information about when she stopped taking Trazadone and Celexa during the SPB psychological evaluation. She attempted to wean herself off of the medications without consulting a physician and only later consulted Dr. Susan Sleep, who is not a psychiatrist. Instead of stopping the medications in 2005 as she initially indicated, she testified at the SPB appeal hearing that she stopped the medications in 2007. (TR-I 46:9-49:17; 51:6-11; 52:8-53:19; Exh. 46.)[5]

- Hawkins admitted to treatment by Jan Watkins, a therapist, from 1998 for about 2 years, but denied treatment from Ms. Watkins for anger management. However, she admitted to having problems with her temper which she attributed to her work as a CHP sergeant. (TR-I 56:6-57:24; 61:24-62:12; 66:12-67:3; 68:4-19.) Dr. Steinberger testified that Hawkins denied that she had treatment for anger management or treatment from any other provider, except for Dr. Blum, when he interviewed her in 2008. Dr. Steinberger learned later that Hawkins did have anger management treatment from Ms. Watkins. (TR-II 68:10-70:6.) Hawkins sought treatment from Lawrence Blum, Ph.D. for depression and PTSD from about 2001 through 2004. (TR-I 58:13-22; 72:4-73:7.)

- Dr. Goldsmith's entire testimony is undermined by his admission that he was fired from Kaiser Permanente for dispensing to patients medications previously prescribed to others in violation of stated instructions from his employer to cease that practice. (TR-III 52:2-54:6.) The basis for his termination calls into question Dr. Goldsmith's competency and ethics as a licensed physician.

- Dr. Goldsmith opined that Hawkins does not have PTSD or is cured of it. Based upon that finding, he concluded that she should be reinstated to her position with the CHP. However, his opinions should be rejected as flawed because:

    1. In comparison to Drs. Steinberger and Carroll, Dr. Goldsmith only completed about 12 psychiatric evaluations of peace officers. (TR-III 34:14-35:2; 35:10-17.)

    2. For his evaluation, Dr. Goldsmith did not conduct or order any psychological testing of Hawkins. (TR-III 55:9-15.) He reviewed psychological testing data for the first time about 2-3 months before the 2011 hearing. (TR-III 57:5-19; Exhs. 23-24.)

[5] Sergeant Carter testified that the CHP expects that former peace officers seeking reinstatement from retirement to be truthful in completing necessary documents and undergoing evaluations. (TR 175:10-176:12.)

3. Dr. Goldsmith's initial report of November 2007 (Exh. 13) did not mention Hawkins' use of psychotropic medications, even though she had taken them for years. (TR III 41:5-8.)

4. Dr. Goldsmith agreed that it was ill-advised that Hawkins weaned herself off of psychotropic medications without consulting a physician, and he was unaware of who Hawkins' health care provider was when she ceased taking her medications. He did not know who Dr. Susan Sleep was. (TR-III 42:8-43:5; 44:11-16.)

5. Dr. Goldsmith was unaware that Hawkins underwent anger management counseling, and had sought counseling from Jan Watkins. He admittedly did not ask her about past counseling during his evaluation. (TR-III 36:14-25; 37:17-38:14.)

6. Dr. Goldsmith did not know when Hawkins first exhibited signs of PTSD or when she was diagnosed with PTSD. When asked if he knew what type of PTSD Hawkins had been diagnosed with, he said no. (TR-III 35:18-36:13.)

7. Dr. Goldsmith was ignorant as to why Hawkins stopped treatment for PTSD. (TR-III 69:11-25.)

8. Dr. Goldsmith conceded that the DSM does not refer to PTSD as curable. (TR-III 63:15-25.)

9. Dr. Goldsmith also conceded that he did not base his opinion on any particular literature or research. (TR-III 67:17-24.)

10. Dr. Goldsmith agreed that Hawkins' PTSD and major depression arose from her job with the CHP. (TR-III 67:5-8.) But he believed that Hawkins could be reinstated. Yet, he could not state to a medical certainty that Hawkins' PTSD would not recur if she returned to the CHP. (TR-III 62:20-23; 70:1-10; 71:22-72:1.) He even admitted that exposure to PTSD stimuli could trigger a recurrence of the disorder. (TR-III 68:6-9.) In fact, he stated that Dr. Steinberger's opinion, that re-exposure to traumatic stimuli may trigger a recurrence of PTSD, is reasonable. (TR-III 91:24-93:2; Exh. 14.)

11. Dr. Goldsmith was unsure what psychological exercises Hawkins was taught which would mitigate PTSD from recurring. (TR-III 93:18-94:10.) He could not opine to a medical certainty that any learned psychological exercises eliminated the likelihood of PTSD returning. (TR-III 94:19-95:6.)

12. Dr. Goldsmith could not definitively opine that Hawkins does not have chronic or recurring PTSD as of January 26, 2011. (TR-III 77:9-12.)

13. Lastly and most importantly, Dr. Goldsmith did not know what the usual and customary duties of a CHP sergeant are. (TR-III 67:14-16.) He also could not recall if Hawkins worked in the MAIT unit. (TR-II 170:18-20.)

CalPERS' *additional* evidence, Dr. Albers' report, also concluded that Hawkins was not substantially incapacitated from performing "her duties." (Exh. 55.) His opinion should similarly be rejected as flawed because:

1. Dr. Albers did not conduct or order any psychological testing of Hawkins. (Exh. 55.)

2. Dr. Albers' report did not provide an explanation for why he summarily concluded that Hawkins is able to perform the duties of a CHP Sergeant.

3. Dr. Albers' report did not opine whether Hawkins has chronic or recurring PTSD, offer an opinion on the nature of her PTSD condition, or whether Hawkins would suffer from PTSD symptoms if she was exposed to the same stimuli that caused the PTSD.

4. Dr. Albers' report indicated that he reviewed "the job duties (sic) statements and critical tasks of a CHP Officer"; however, Hawkins' job was that of a CHP Sergeant, not Officer. There is no indication that Dr. Albers knew what the usual and customary duties of a CHP sergeant are.

5. Dr. Albers' report did not provide *additional* information or opinion about Hawkins' PTSD condition and symptoms, and the impact it has on her ability to work, that had not already been admitted into evidence.

As previously noted, neither CalPERS nor Hawkins provided additional evidence to alter the Proposed Decision of ALJ Lahr. The report by Dr. Albers, which came in solely as administrative hearsay, cannot be used to supplement evidence that does not otherwise exist. Thus, there is no competent, direct evidence in the record that Hawkins' is no longer substantially incapacitated.

Based upon the totality of the medical reports admitted into evidence, and in light of Dr. Steinberger's and Dr. Carroll's direct, comprehensive and unrebutted testimony about Hawkins' chronic PTSD, Hawkins should not be reinstated to her former peace officer position. There is a significant risk that she will suffer from PTSD symptoms if she is exposed to the same stimuli that caused the PTSD. Both the CHP, and especially the public, cannot assume the risk a peace officer will be unable to carry out his or her duties when those duties include the carrying and use of a firearm. Hawkins remains incapacitated from performing the usual and customary duties of a CHP sergeant. Under the standard found in section 21192, CalPERS simply cannot prevail based

on Dr. Goldsmith's opinion about Hawkins' PTSD and her mental status, and the administrative hearsay in Dr. Albers' report does not salvage it.

CONCLUSION

No law enforcement agency should be required to reinstate a former peace officer who has had a long history of a psychiatric disorder such as PTSD, and where there is significant evidence that the disorder will return should that peace officer resume duties which caused the disorder in the first place. Thus, public and officer safety dictate that Hawkins needs to be free of any psychopathology before being reinstated. We should expect no less from our first responders. The CHP has established that Hawkins cannot fulfill the usual and customary duties of a CHP sergeant because of her chronic PTSD. Thus, the CHP requests that CalPERS' decision to reinstate Hawkins be reversed.

Dated: June 26, 2015

Respectfully Submitted,

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ATTACHMENT 1

CONFORMED COPY

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STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION FOR REINSTATEMENT FROM INDUSTRIAL DISABILITY RETIREMENT OF **KERRI A. HAWKINS,** Respondent, v. **DEPARTMENT OF CALIFORNIA HIGHWAY PATROL,** Respondent.	Case No. 2010020578 **RESPONDENT DEPARTMENT OF CALIFORNIA HIGHWAY PATROL'S CLOSING MEMORANDUM OF POINTS & AUTHORITIES** **HEARING:** **Date:** **January 4-5 & 26, 2011** **Location:** **OAH Los Angeles** Administrative Law Judge Amy Lahr

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Respondent Department of California Highway Patrol (CHP) submits the following Closing Memorandum Points and Authorities.[1]

INTRODUCTION[2]

Respondent Kerri Hawkins (Hawkins) is a former CHP sergeant who submitted an application for industrial disability retirement in October 2003. (Exh. 3.) Hawkins was granted disability retirement in August 2004 on the basis of a psychological condition – Post Traumatic Stress Disorder (PTSD). (Exhs. 1 & 4.) In April 2007, Hawkins submitted a Reinstatement from Disability/Industrial Disability Retirement Application to the California Public Employees' Retirement System (CalPERS). (Exh. 5.) Following submission of the reinstatement application, Dr. William Goldsmith, who was retained by CalPERS, conducted a psychiatric evaluation of Hawkins in November 2007. (Exh. 13.) Based upon Dr. Goldsmith's evaluation, CalPERS determined that Hawkins was no longer disabled or substantially incapacitated from the performance of the usual job duties of a CHP sergeant. (Exh. 6.) CalPERS informed the CHP of its decision in January 2008, and the CHP informally appealed the CalPERS decision which is the subject matter of this case before the OAH. (Exhs. 7-8.)

Pursuant to its reinstatement policy, the CHP requires former peace officers who request reinstatement from disability retirement to satisfy the minimum standards mandated by Government Code section 1031, subdivision (f)(1)-(2). (Exh. 25.) Part of the reinstatement process requires former employees to successfully complete a psychological evaluation. (TR-I 176:18-177:25.)

The psychological evaluation is conducted by a SPB-selected psychologist, whose evaluation, findings, and conclusions are reviewed by the SPB's Psychological Screening Unit (PSU) pursuant to SPB regulations, specifically, California Code of Regulations, title 2, sections 172.4 et seq. If the PSU finds the former peace officer psychologically disqualified from

[1] The transcripts from the hearing in chronological order were lodged as Exhibit 51 and will be referenced as TR-I (Day 1), TR-II (Day 2) and TR-III (Day 3).

[2] Without yielding the CHP's position regarding the burden of proof as set forth in its opening brief filed, Government Code section 11504 places the burden on respondents. Here, there are two responding parties: CHP and Hawkins. However, Hawkins did not affirmatively come forward with proof; she relied on CalPERS' evidence, e.g., Dr. Goldsmith.

appointment to a peace officer position, he or she may file an appeal with the SPB. The findings and recommendations of the Appeals Division are reviewed and approved or rejected by the SPB.

In conformance with its policy, the CHP required Hawkins to undergo a psychological evaluation which was conducted by Dr. David Steinberger in June 2008. (Exh. 39.) In short, he did not recommend that Hawkins be reinstated to her former position as a CHP sergeant because of her long history of chronic PTSD. (*Ibid.*) Hawkins' appeal of Dr. Steinberger's recommendation to the PSU was heard on January 12, 2009. The PSU's proposed decision to disqualify Hawkins for the classification she sought and to deny her appeal was adopted by the SPB on April 14, 2009. The SPB's notice denying the appeal was served on April 17, 2009. Hawkins did not challenge the SPB's decision by seeking a writ of mandamus in the superior court within a year. (Exh. 45.)

I. GOVERNMENT CODE SECTION 1031

A. SECTION 1031 APPLIES TO ALL PEACE OFFICERS INCLUDING THOSE SEEKING TO REINSTATE TO THEIR FORMER POSITIONS FOLLOWING RETIREMENT

> Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standards: . . . (f) Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer.

(Gov. Code, § 1031, subd. (f).) "This statute reflects the public's interest in high quality law enforcement personnel." (*County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 798.) Being free from any emotional or mental condition for a peace office is paramount to public safety, as well as the safety of peace officers. This is especially critical because a CHP peace officer carries a firearm and is authorized to use lethal force. (TR-I I 144:17-146:5; 174:8-175:2.)

County of Riverside v. Superior Court is instructive on the application of section 1031 to both peace officers and candidates for peace officer positions. There, the California Supreme Court acknowledged that section 1031, in particular background investigations under subdivision (d), may be applied to new applicants and to existing peace officers seeking transfers to another law enforcement agency or a new position within the same agency. (See *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 798-799; accord *Pitts v. City of Sacramento* (2006) 138 Cal.App.4th 853, 857, fn. 4.)

The Third District Court of Appeal confirmed that section 1031 applied to applicants seeking to become peace officers and to peace officers who have had a gap in service and wish to return to active duty, like Hawkins.[3] (See *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1058-1059.) The *Sager* court further stated:

> [T]he section 1031 standards must also be maintained throughout a peace officer's career. Section 1031 reflects a *minimum* set of standards for allowing a new recruit to become a peace officer and it would be illogical to conclude the Legislature believed those standards disappeared once an officer began working.

(*Id.* at p. 1059, emphasis in original.) In summary, the appellate court held that "the POST standards,[4] which flesh out the section 1031 standards, are 'a matter continuing education[.]' In our view the section 1031 standards are incorporated by law into every peace officer's job description." (*Ibid.*)[5]

Under section 1031, the CHP has an obligation to confirm that Hawkins is qualified to return to active duty despite the decision by PERS that she is no longer incapacitated. The CHP should be afforded an opportunity to inquire about her fitness before reinstating her. (See generally *Pitts, supra,* 138 Cal.App.4th at p. 855.) In *Pitts*, the plaintiff was a peace officer who suffered a shoulder injury and was found by a hearing officer to not be substantially incapacitated from performing her usual and customary duties. Following the hearing officer's decision, the plaintiff sought reinstatement to her former position. But the City of Sacramento insisted that she pass certain tests including a psychological evaluation. The plaintiff refused and argued that she should be reinstated without any conditions. The Court of Appeal disagreed and noted the plaintiff could not demand an unconditional reinstatement to active status as a peace officer. (*Id.*

---

[3] "A public agency must enforce the criteria for peace officers in Government Code section 1031 at the time of hire, prior to a transfer between agencies, and also possibly when an employee changes positions within the same agency. [Citation.] Moreover, peace officers must certify compliance with the criteria that the Commission on Peace Officer Standards and Training promulgates (citations) both as a matter of continuing education and **after a break in active status.**" (*Pitts, supra*, 138 Cal.App.4th at p. 857, fn 4, emphasis added.)

[4] Here, the POST standards were admitted into evidence as Exhibit 31 and testified to by Dr. David Steinberger.

[5] "[S]ection 1031 applied as a matter of law to Sager's fitness, and the POST standards were conceded to be relevant by [Sager's doctor]. In fact, they are incorporated into Sager's job description, and therefore her ability to comply with them forms an important part of her 'usual' duties." (*Sager, supra*, 156 Cal.App.4th at p. 1057, emphasis omitted.)

at pp. 856-857, fn. 4; but see *Hulings v. State Dept. of Health Care Servs.* (2008) 159 Cal.App.4th 1114, 1125 [Section 1031, subdivision (d) which requires background investigations is not applicable to a peace officer mandatorily reinstated to his former position following a rejection during probation from a different peace officer position].)

Yet, CalPERS as well as Hawkins, contend that section 1031 does not apply to a peace officer seeking to reinstate after disability retirement. But that is a flawed and illogical position which is not supported by any case law.

> If [Hawkins'] position is correct, an officer who lost his moral compass would be immune from these standards and only subject to a moral character standards if the applicable job description in that department reiterated that standard as a defined duty of that classification of officers. That absurd result highlights the flaw in [Hawkins'] position.

(*Sager, supra*, 156 Cal.App.4th at p. 1059.)[6]

Hawkins must be required to satisfy the criteria of section 1031, which among other requirements directs that all peace officers be free from any psychological condition that might adversely affect the exercise of peace officer powers. As the Supreme Court held in *County of Riverside*, law enforcement agencies must evaluate whether an officer satisfies the section 1031 provisions even when the officer changes positions within the same agency. Thus, the CHP cannot reinstate Hawkins to her former sergeant position if she has a psychological condition which prevents the proper execution of peace officer duties.

B. EITHER SECTION 1031 TAKES PRECEDENCE OVER GOVERNMENT CODE SECTION 21192, OR SECTION 1031 SHOULD BE HARMONIZED WITH THE PERS STANDARD TO EFFECTUATE THE PUBLIC POLICY THAT ALL PEACE OFFICERS BE FREE OF PSYCHOPATHOLOGY TO ENSURE PUBLIC AND OFFICER SAFETY

Both CalPERS and Hawkins rely upon the decision reached in *Willie Starnes* (2000) PERS Dec. No. 99-03. The *Starnes* decision is inapposite.[7] At the outset, it was decided before the

[6] Even in *Hulings*, the appellate court reiterated that "the standards set forth in Government Code section 1031 must be maintained throughout a peace officer's career." (*Hulings, supra*, 159 Cal.App.4th at 1125, fn. 3.) The court noted further that a law enforcement agency "retains authority to assure its employees are fit for their positions." (*Id.* at p. 1125; cf. *Richard Coelho* (2004) SPB Dec. No. 04-03.) In *Coelho*, the SPB held that the employing law enforcement agency could not condition the reinstatement of a peace officer upon the completion of a background investigation. The SPB specifically did not address section 1031, subdivision (f)'s requirement that peace officers be mentally and physically fit. (See *id.* at p. 17, fn. 21.)

Supreme Court and Court of Appeal decisions noted above and thus, its precedential value is questionable regarding the applicability of section 1031.

Apart from *Starnes*, there is no case authority precluding the applicability of section 1031, especially subdivision (f), to the process in which a former peace officer seeks reinstatement following disability retirement. In fact, there is no case authority dealing directly with the interplay between section 1031, subdivision (f), and Government Code section 21192. The issue under section 21192 is whether the former employee seeking reinstatement is still incapacitated, physically or mentally, for duty, or substantially incapable for performing the usual duties. And as stated above, the issue under section 1031, subdivision (f), is whether a "peace officer" is free from any mental condition that may adversely affect the exercise of peace officer powers.

First, "in the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (Code Civ. Proc., § 1859.) Here, section 21192 applies to any former public employee, not just peace officers. On the other hand, section 1031 applies specifically to peace officers. In addition, section 1031 is not limited to applicants, but to all peace officers. Thus, section 1031 should control over section 21192, and be applied accordingly.

Alternatively, courts must "construe statutes to reach a reasonable legislatively intended result, and to harmonize competing statutes to effectuate the legislative policy. [They] "'should seek to consider the statutes not as antagonistic laws but as parts of the whole system which must

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(...continued)

[7] The *Starnes* ALJ, in opining that section 1031 does not apply to determining whether a former peace officer should be reinstated from disability retirement, relies upon 6 cases. The cases, except for *Phillips v. County of Fresno* (1990) 225 Cal.App.3d 1240, do not even discuss section 1031. Therefore, they cannot support the ALJ's determination. (See *Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985 ["A decision is authority only for the point actually passed on by the court and directly involved in the case"].) The *Phillips* court touches upon section 1031, yet its discussion is dicta at best. (*Phillips, supra*, 225 Cal.App.3d at p. 1257.) The sole issue in *Phillips* was whether Government Code section 31725 governs the procedures to be followed by the county when the Retirement Board and the employing agency disagree about the peace officer's retirement status. (*Phillips, supra*, 225 Cal.App.3d at p. 1250.) In addition, the *Phillips* court does not address the interplay between sections 1031 and 21192.

be harmonized and effect given to every section [citations]. Accordingly, statutes which are in *pari materia* should be read together and harmonized if possible."" (*Johnston v. Sonoma County Agricultural Preservation & Open Space Dist.* (2002) 100 Cal.App.4th 973, 986, internal citations omitted.)

In the abstract, sections 1031 and 21192 seem to be in conflict as one may apply to a person's current functioning as opposed to a person's prospective functioning. If so, the statutory schemes should be harmonized because they touch upon a common issue and effectuate a similar public policy goal that peace officers be fit for duty.[8] Peace officers such as Hawkins must be capable of carrying out their duties without harm to themselves and most important to the public. It is axiomatic that public safety is paramount when persons are authorized to carry firearms and use deadly force when reasonably necessary. Therefore, no peace officer should be reinstated from retirement if there is any reasonable determination that he or she cannot carry out the usual duties of their former peace officer positions whether currently or in the future. This is more than a concern of liability to the employing agency.

Lastly, "literal construction of the statute will not prevail, however, if 'contrary to the legislative intent apparent in the statute.' In addition, we must give the statute a reasonable interpretation, avoiding, if possible, a literal interpretation which will lead to an absurd result." (*Scottsdale Ins. Co. v. State Farm Mut. Auto. Ins. Co.* (2005) 130 Cal.App.4th 890, 898-899, internal citations omitted.) To not apply section 1031 to the reinstatement process for a peace officer who disability retired may lead to absurd results. For example, a peace officer like Hawkins retires due to a mental disability, e.g., depression. Under section 21192, the peace officer must be returned to work if he or she is no longer substantially incapacitated from the usual duties of a peace officer position regardless if the disability is fully resolved. Proof would lie within a mental examination conducted under section 21192.

[8] When statutes touch upon a common subject, they must be harmonized, both internally and with each other to the extent possible. (See *Barajas v. Oren Realty & Development Co.* (1997) 57 Cal.App.4th 209, 216-217.)

Yet, under that process alone, neither PERS nor the employing agency would have uncovered that the peace officer has physical problems which prevent he or she from carrying out usual peace officer duties, such as running or sitting for more than 10 minutes in a car, because the peace officer would not have been subjected to a physical exam under section 1031, subdivision (f). The absurdity lies in the result that the peace officer would be reinstated under section 21192, but would still be unable to perform his or her job as a peace officer. It is implausible to believe that the Legislature meant for reinstated peace officers to remain idle on the job.

C. HAWKINS IS ESTOPPED FROM ARGUING AGAINST, AND CONSENTED TO, THE APPLICABILITY OF SECTION 1031 TO HER REINSTATEMENT FROM DISABILITY RETIREMENT.

"'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.' ... Consequently, judicial estoppel is especially appropriate where a party has taken inconsistent positions in separate proceedings." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181, citations omitted.) Additionally, the maxim "volenti non fit injuria" is codified under Civil Code section 3515 which states: "He who consents to an act is not wronged by it."

Here, Hawkins agreed to the psychological evaluation authorized under section 1031 when she sought reinstatement. (See Exhs. 35 & 36.) Although Exhibits 35 and 36 refer to cadets, Sergeant Carter testified that the CHP did not consider Hawkins to be a cadet and it understood that she was seeking reinstatement following retirement. (TR-I 184:11-24.) The exhibits are standard forms used by the CHP for both cadets and former officers seeking reinstatement. (TR-I 184:25-186:1.) Hawkins' consent to the application of section 1031 is confirmed by her treating psychologist who prepared a July 2007 report finding her fit for reinstatement under section 1031. (Exh. 20, p.3.)

Further, following the psychological evaluation conducted by Dr. Steinberger, the SPB determined that Hawkins was not qualified for her former peace officer position. (See Exh. 40.) Hawkins appealed that decision, and an administrative hearing was conducted by the SPB in 2009.

The SPB concluded that Hawkins "does not meet the minimum psychological qualification standards for State peace officer employment under Government Code section 1031." (See Exh. 45.) Representing herself at the administrative hearing, Hawkins failed to challenge the applicability of section 1031 to her reinstatement to the CHP. (TR-I 135:23-137:3.) She only contested the finding made by Dr. Steinberger that she was not qualified because of her long history with PTSD. (See Exh. 45, pp. 5-6.)

Now, Hawkins, as a party to this matter, challenges the applicability of section 1031. However she cannot have it both ways. Having consented to the psychological testing under section 1031 and remaining silent in challenging the disqualification decision, Hawkins is judicially estopped from taking an inconsistent position regarding section 1031's relevance to these proceedings. Equally important, CalPERS is in privity with Hawkins due to their common objectives and positions here, and thus, CalPERS should be bound by Hawkins' consent to the application of 1031 to her reinstatement application, Moreover, to prevent an unfair advantage to CalPERS, it should be estopped from asserting that section 1031 is inapplicable because the party, whom it is acting in concert with to defeat the CHP's appeal, took an inconsistent position in a former administrative matter which was decided on the merits and is now final.

II. HAWKINS IS DISQUALIFIED FROM HER FORMER POSITION AS A CHP SERGEANT AND REMAINS SUBSTANTIALLY INCAPACITATED FROM PERFORMING THE USUAL AND CUSTOMARY DUTIES OF THAT POSITION – SHE IS NOT ENTITLED TO REINSTATEMENT

A. IF SECTION 1031 APPLIES, THEN HAWKINS & CALPERS ARE BOUND BY THE 2009 SPB DECISION DISQUALIFYING HER FOR THE CLASSIFICATION OF CHP PEACE OFFICER BECAUSE SHE FAILED TO EXHAUST JUDICIAL REMEDIES

Government Code section 19630 maintains that parties to a SPB proceeding have one year from the time a decision is rendered to seek judicial review. To wit, a party has a judicial remedy to overturn an adverse SPB decision which must be exercised within a one-year time-frame.

> Exhaustion of *judicial* remedies, on the other hand, is necessary to avoid giving binding 'effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action.'

(*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70, citation omitted, emphasis in original.)

Therefore, "unless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions." (*Id.* at p. 65, quoting *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d. 465.)

Here, the PSU recommended that Hawkins be disqualified from holding her former position as a CHP peace officer because of her long history of significant PTSD symptoms which precipitated her disability retirement. (See Exh. 45, p. 6.) The PSU's recommendation was adopted by the SPB and served on Hawkins in April 2009.[9] Hawkins could have challenged the decision through a mandamus proceeding. (See Civ. Proc. Code, § 1094.5.) But she failed to do so. Consequently, the SPB's decision of April 2009 disqualifying her from being a CHP peace officer is final and binding in further civil actions such as this pending matter. Her attempt to unravel the adverse April 2009 decision and its effect through this appeal should be rejected.

With the April 2009 SPB decision final, "issue preclusion by collateral estoppel 'prevents 'relitigation of issues argued and decided in prior proceedings.'" (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90.) "Traditionally, collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding 'if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].'" (*Id.* at pp. 90-91, citations omitted.)

Here, all three elements are satisfied. First, the issue of whether Hawkins should be reinstated to her former peace officer position was litigated in the SPB appeal and in this proceeding. Second, the SPB's April 2009 decision is final. And third, Hawkins and CalPERS are undoubtedly in privity with each other.[10] They have a "sufficiently close" relationship and a

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[9] The CHP requested that this court take judicial notice of the April 2009 SPB decision (see Exh. 45) which was granted, and in addition, the court received it into evidence as an exception to the hearsay rule. (TR 99:13-22.)

[10] "'The concept of privity for the purposes of ... collateral estoppel refers 'to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a (continued...)

common financial and proprietary interest which is the cancellation of her disability retirement allowance following a return to compensated employment with the CHP.[11] Accordingly, CalPERS is estopped from challenging the prior finding that Hawkins is disqualified from holding her former peace officer position.

B. HAWKINS' CHRONIC PTSD MIGHT ADVERSELY AFFECT HER EXERCISE OF PEACE OFFICER POWERS INCLUDING THE USUAL AND CUSTOMARY DUTIES OF A CHP SERGEANT

The facts underlying the *Sager* case are instructive here. In *Sager*, a deputy sheriff challenged the County's adoption of an administrative law judge's finding that she should be retired due to a mental condition. Plaintiff Sager had a number of issues over the course of her career which raised concerns about her mental status, including threats to a woman she believed was having an affair with her husband, a suicide attempt, complaints about personnel issues, emotional control, anger management and negative relationships with her peers and supervisors. (See, e.g., *Sager, supra*, 156 Cal.App.4th at pp. 1051-1052, 1054.)

> Sager may be able to serve warrants, drive a patrol car and do many of the other tasks listed on her "class specification" job description, as she asserts, but if the evidence shows she is not able to maintain *mental fitness*, that is, control her anger, work with other officers, and make sound judgments, then she is not performing the duties described above *in the proper manner*.

(*Sager, supra*, 156 Cal.App.4th at p. 1059, emphasis in original.)

Hawkins argues that section 1031 applies standards that are prospective and thus, there is no evidence that she cannot presently perform the usual and customary duties of a sergeant. She is wrong on both counts. First, as argued in Section C below, Hawkins is still substantially incapacitated from her duties. Second, the CHP is permitted to rely upon mental health opinions that she is unfit for peace officer duty because of what may happen should she return to duty with PTSD.

(...continued)
relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of the doctrine of collateral estoppel.'" (*Rodgers, supra*, 136 Cal.App.4th at pp. 90-91.)

[11] "A nonparty should reasonably be expected to be bound if he had in reality contested the prior action even if he did not make a formal appearance. Thus, collateral estoppel has been applied against nonparties who had a proprietary or financial interest in and control of, a prior action." (*Lynch v. Glass* (1975) 44 Cal.App.3d 943, 949.)

> The County *should not have to wait until harm occurs* before taking action to have Sager retired due to her mental disability. It is not the appropriate public policy to wait until Sager *actually* shoots the other woman in the courtroom, kills herself on duty, overreacts to a perceived threat or loses her temper in a dangerous situation to conclude that she is mentally unfit for duty.

(*Sager, supra*, 156 Cal.App.4th at p. 1061, emphasis in original.) In reaching that position, the appellate court rejected Sager's argument that actual, rather than potential, harm is required in finding a peace officer mentally incapacitated. The same conclusion must be reached here based upon the evidence presented at the hearing:

- The duties of a CHP sergeant are set forth in Exhibit 29 – the SPB class specification. Hawkins acknowledged that she would be required to fulfill all of those duties if she was reinstated. (TR-I 22:11-25.) Those duties encompass a sergeant's usual and customary duties which include but are not limited to (i) monitoring and supervising subordinates in the field, (ii) direct and evaluate officer involved shootings, (iii) incident commander, (iv) dispute mediator, (v) enforcement and (vi) conduct accident investigations including fatalities. (TR-I 26:13-29:13; 30:4-8; 119:2-23; 131:4-7; 132:1-5.)[12]

- Hawkins admitted that her PTSD was the result of cumulative trauma which occurred over the course of her CHP career before the retirement. (TR-I 34:4-10; 36:11-14; Exhs. 32, 34, 37 & 46.)

- Hawkins admitted that triggers for the stress she experienced included responding to and investigating incidents or accidents involving fatalities. (TR-I 40:6-41:4.)

- In addition to PTSD, Hawkins was diagnosed with depression and took psychotropic medications over the course of several years. (TR-I 44:3-46:5.)

- Hawkins admitted that she provided false information about when she stopped taking Trazadone and Celexa during the SPB psychological evaluation. She attempted to wean herself off of the medications without consulting a physician; she later consulted with Dr. Susan Sleep who is not a psychiatrist. Instead of stopping the medications in 2005 as she initially indicated, she testified at the SPB appeal hearing that she stopped the medications in 2007. (TR-I 46:9-49:17; 51:6-11; 52:8-53:19; Exh. 46.)[13]

- Hawkins admitted to treatment by Jan Watkins, a therapist, from 1998 for about 2 years, but she denied treatment from Ms. Watkins for anger management. However, she admitted to

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[12] Sergeant Holloway who has been a Field sergeant for 7 years testified about the usual and customary duties of CHP sergeant. (See, e.g., TR-I 152:20-24; 155:13-16; 158:18-25; 160:22-25; 162:24-163:15; 164:7-166:2.)

[13] Sergeant Carter testified that the CHP expects that former peace officers seeking reinstatement from retirement to be truthful in completing necessary documents and undergoing evaluations. (TR 175:10-176:12.)

having problems with her temper which she attributed to her work as a CHP sergeant. (TR-I 56:6-57:24; 61:24-62:12; 66:12-67:3; 68:4-19.) Dr. Steinberger testified that Hawkins denied that she had treatment for anger management or treatment from any other provider, except for Dr. Blum, when he interviewed her in 2008. Dr. Steinberger learned later that Hawkins did have anger management treatment from Ms. Watkins. (TR-II 68:10-70:6.) Hawkins later sought treatment from Lawrence Blum, Ph.D. for depression and PTSD from about 2001 through 2004. (TR-I 58:13-22; 72:4-73:7.)

- Dr. Steinberger has performed over 5000 psychological evaluations of persons who were applicants to become peace officers or active/former peace officers. (TR-II 17:24-18:18.) Of those evaluations, Dr. Steinberger has performed approximately 500-1000 psychological evaluations for the CHP. (TR-II 117:5-10.)

- Dr. Steinberger performed a psychological evaluation of Hawkins by reviewing data from psychological tests (MMPI and 16 PF personality test) administered by the SPB and conducting an interview with her. He also reviewed Hawkins' medical records including reports from Drs. Bassett, Blum, Curtis and Goldsmith, and Hawkins' psychological history questionnaire. (TR-II 27:26-28:12; 29:19-24; 30:13-17; 31:17-32:2; 32:5-33:10; 36:12-20; 45:24-47:14.) Based upon the totality of the evaluation of Hawkins, Dr. Steinberger opined that she suffers from PTSD, and has so for over a decade (since 1998). (TR-II 37:10-18; 64:1-65:16.)

- Dr. Steinberger also concluded that Hawkins suffers from chronic PTSD which means that the condition is "ongoing" and "will continue." She is not cured of PTSD (TR-II 49:8-50:10; TR-III 130:8-13), and Dr. Steinberger does not know of any research which suggests there is a cure for PTSD (TR-II 51:11-14; TR-III 130:14-17). Specifically, he is unaware of any research suggesting a cure for PTSD equal to an absence of any concern of trauma reigniting PTSD. (TR-III 129:3-130:23.) He agreed with both Drs. Bassett and Blum which opined that Hawkins could not perform her duties as a CHP sergeant because of PTSD and recommended disability retirement in 2004. (TR-II 86:7-17; 105:8-15.)

- Dr. Steinberger opined that Hawkins should not return to her prior peace officer position with the CHP because on-the-job stress triggered the onset of PTSD. Thus, there is a high risk that the PTSD will recur if Hawkins resumes her CHP sergeant duties (TR-II 78:13-81:7; 130:6-11; 138:4-139:12), and with chronic PTSD, he has concerns about her ability to carry out the usual and customary duties of her prior position (TR-II 89:20-91:24). Dr. Steinberger noted that Hawkins had a history of exhibiting PTSD symptoms after returning to the CHP following periodic medical leaves. (TR-II 83:4-84:6; see also Exh. 48 – Dr. Blum's September 17, 2003 report, p. 2.)

- As to why Hawkins was not experiencing PTSD symptoms currently, Dr. Steinberger opined that she was not in the situation that caused the disorder in the first place (her work for the CHP). (TR-II 100:6-16.) He is also unaware of any treatment for PTSD that would eliminate the disorder completely. (TR-III 310:24-131:2; 131:6-9; 131:17-24.) Further, Dr. Steinberger was unaware of any treatment provided to Hawkins that would eliminate her chronic PTSD. (TR-III 131:3-5.)

- Lastly, Dr. Steinberger's opinions are supported by Dr. Bassett's findings in 2004, including her opinion that due to a peace officer's work, "it is not possible for this woman to return to modified work as a peace officer without serious risk of an exacerbation of her current and mental disorders." (Exh. 47, pp. 17-19.)

Based upon the totality of the medical reports admitted into evidence, excluding the reports of Drs. Goldsmith and Blum (except for Exhibit 48), and Dr. Steinberger's comprehensive testimony about Hawkins' chronic PTSD, Hawkins should not be reinstated to her former peace officer positions. There is a significant risk that she will suffer from PTSD symptoms if she is exposed to the same stimuli that caused the PTSD. Both the CHP and especially the public cannot assume the risk a peace officer will be unable to carry out his or her duties when those duties include the carrying and use of a firearm.

C. CALPERS HAS NOT ESTABLISHED THAT HAWKINS IS ABLE TO PERFORM THE USUAL AND CUSTOMARY DUTIES OF A CHP SERGEANT BASED UPON THE OPINIONS OF DR. GOLDSMITH

Under section 21192, Hawkins may be reinstated to her former position as a CHP sergeant if she is no longer mentally incapacitated. CalPERS attempts to establish that Hawkins is entitled to reinstatement based primarily upon the opinions of Dr. Goldsmith and to a lesser extent, the administrative hearsay opinions of Dr. Blum. The opinions proffered are subject to scrutiny and do not warrant a finding that she is no longer mentally incapacitated for the following reasons:

- Dr. Goldsmith's entire testimony is undermined by his admission that he was fired from Kaiser Permanente for dispensing to patients medications previously prescribed to others in violation of stated instructions from his employer to cease that practice. (TR-III 52:2-54:6.) The basis for his termination calls into question Dr. Goldsmith's competency and ethics as a licensed physician.

- Dr. Goldsmith opined that Hawkins does not have PTSD or is cured of it. Based upon that finding, he concluded that she should be reinstated to her position with the CHP. However, his opinions should be rejected as flawed because:

  1. In comparison to Dr. Steinberger, Dr. Goldsmith has only completed about 12 psychiatric evaluations of peace officers. (TR-III 34:14-35:2; 35:10-17.)
  2. For his evaluation, Dr. Goldsmith did not conduct or order any psychological testing of Hawkins. (TR-III 55:9-15.) He reviewed psychological testing data for the first time about 2-3 months before the hearing in this matter commenced. (TR-III 57:5-19; Exhs. 23-24.)

3. Dr. Goldsmith was unaware that Hawkins underwent anger management counseling, and had sought counseling from Jan Watkins. He admittedly did not ask her about past counseling. (TR-III 36:14-25; 37:17-38:14.)
4. He did not know either when Hawkins first exhibited signs of PTSD or when she was diagnosed with PTSD. When asked if he knew what type of PTSD Hawkins had been diagnosed with, he said no. (TR-III 35:18-36:13.)
5. Dr. Goldsmith was ignorant as to why Hawkins stopped treatment for PTSD. (TR-III 69:11-25.)
6. He conceded that the DSM does not refer to PTSD as curable. (TR-III 63:15-25.) And he did not base his opinion on any particular literature or research. (TR-III 67:17-24.)
7. Dr. Goldsmith agreed with Dr. Blum that Hawkins' PTSD and major depression arose from her job with the CHP. (TR-III 67:5-8.) But he believes Hawkins can be reinstated. Yet, he could not state to a medical certainty that Hawkins' PTSD would not recur if she returned to the CHP. (TR-III 62:20-23; 70:1-10; 71:22-72:1.) He even admitted that exposure to PTSD stimuli could trigger a recurrence of the disorder. (TR-III 68:6-9.) In fact, he stated that Dr. Steinberger's opinion, that re-exposure to traumatic stimuli may trigger a recurrence of PTSD, is reasonable. (TR-III 91:24-93:2; Exh. 14.)
8. He was unsure what psychological exercises Hawkins was taught which would mitigate PTSD from recurring. (TR-III 93:18-94:10.) Dr. Goldsmith could not opine to a medical certainty that any learned psychological exercises eliminated the likelihood of PTSD returning. (TR-III 94:19-95:6.)
9. Dr. Goldsmith could not definitively opine that Hawkins does not have chronic or recurring PTSD as of January 26, 2011. (TR-III 77:9-12.)
10. Lastly and most important, Dr. Goldsmith did not know what are the usual and customary duties of a CHP sergeant. (TR-III 67:14-16.) He also could not recall if Hawkins worked in the MAIT unit. (TR-II 170:18-20.)

- Dr. Goldsmith's initial report of November 2007 (Exh. 13) is at best faulty. First, despite Hawkins taking psychotropic medications for years, the report does not mention Hawkins' use of such medications. (TR III 41:5-8.) Second, according to Dr. Goldsmith, Hawkins failed to disclose that her maternal grandfather was an alcoholic which is a psychiatric disorder. In fact, Hawkins denied all familial psychiatric history when asked by Dr. Goldsmith (TR-III 44:17-45:11; 46:9-12.)

- Dr. Goldsmith agreed that it was ill-advised that Hawkins weaned herself off of psychotropic medications without consulting a physician, and he was unaware of who was Hawkins' health care provider when she ceased taking her medications. He also did not know who Dr. Susan Sleep was. (TR-III 42:8-43:5; 44:11-16.)

Dr. Goldsmith's testimony is replete with shallow observations and tenuous opinions. His opinions are simply not weighty and lack the support necessary to establish that Hawkins is no longer incapacitated from the usual and customary duties of a CHP sergeant. Under the standard

found in section 21192, CalPERS simply cannot prevail with Dr. Goldsmith's deficient view about Hawkins' PTSD and her current mental status.

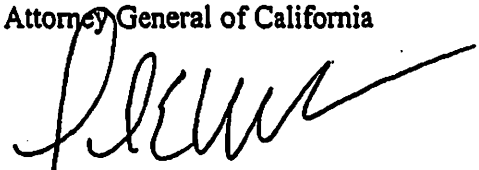
CONCLUSION

No law enforcement agency should be required to reinstate a former peace officer who has had a long history of a psychiatric disorder such as PTSD, and where there is a significant likelihood that the disorder will return should that peace officer resume duties which caused the disorder in the first place. Thus, public and officer safety dictate the application of section 1031 to the reinstatement process – Hawkins needs to be free of any psychopathology. We should expect no less from our first responders. The CHP has established under the standards of section 1031 or 21192 that Hawkins cannot fulfill the usual and customary duties of a CHP sergeant because of her chronic PTSD. Thus, the CHP requests that the OAH reverse CalPERS' decision to to reinstate Hawkins.

Dated: March 14, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Appeal by Kerri Hawkins (PERS)**
No.: **2010020578**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 15, 2011, I served the attached **Respondent CHP's Closing Brief** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Kerri A. Hawkins

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 15, 2011, at Los Angeles, California.

Yvette Wright
Declarant

Signature

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DECLARATION OF SERVICE BY FACSIMILE AND MAIL

Case Name: **Appeal by Kerri Hawkins (PERS)**

No.: **2010020578**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. My facsimile machine telephone number is (213) 897-1071.

On March 15, 2011 at 8:00 AM., I served the attached **Respondent CHP's Closing Brief** by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2.306. The facsimile machine I used complied with Rule 2.306, and no error was reported by the machine. Pursuant to rule 2.306(h)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. In addition, I placed a true copy thereof enclosed in a sealed envelope with postage thereof fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

John A. Mikita, Senior Staff Counsel
CalPERS
Legal Office
P.O. Box 942707
Sacramento, CA 94229
Fax #: (916) 795-3659

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 15, 2011, at Los Angeles, California.

Yvette Wright
Declarant

Signature

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DECLARATION OF SERVICE BY CERTIFIED MAIL

Case Name: **Appeal by Kerri Hawkins (PERS)**

Case No.: **9109; OAH No. 2010020578**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 11, 2016, I served the attached **Respondent Department of California Highway Patrol's Petition for Reconsideration and Request for Stay; Declaration of Stephen A. Mesi** by placing a true copy thereof enclosed in a sealed envelope as certified mail and return receipt requested, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Anthony M. Santana
Legal Counsel
California Association of Highway Patrolmen
2030 V Street
Sacramento, CA 95818-1730
(Attorney for Respondent Kerri Hawkins)

Rory Coffey
Senior Staff Counsel
California Public Employee's Retirement System - Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707
(Attorney for CalPERS)

I declare under penalty of perjury under the law of the State of California the foregoing is true and correct and that this declaration was executed on April 11, 2016, at Los Angeles, California.

Doris Kobata
Declarant

Doris Kobata
Signature

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AMENDED DECLARATION OF SERVICE BY CERTIFIED MAIL and E-MAIL

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California Public Employee's Retirement System - Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707
(Attorney for CalPERS)

In addition, I E-mailed the above named document to the **Office of Administrative Hearings, 320 W. 4th Street, Los Angeles, CA 90013.**

I declare under penalty of perjury under the law of the State of California the foregoing is true and correct and that this declaration was executed on April 11, 2016, at Los Angeles, California.

Doris Kobata	Doris Kobata
Declarant	Signature

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