

ATTACHMENT C
RESPONDENT'S ARGUMENT

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September 15, 2016

CalPERS Board of Administration
Cheree Swedensky
CalPERS Executive Office
PO Box 942701
Sacramento, CA 94229-2701

Re: McCormick, Cari
D.O.I CT 05/14/2012
EAMS # ADJ882413
Claim # CLKC-000001

To the CalPERS Board of Administration:

INTRODUCTION

Respondent Cari McCormick hereby submits this written argument against the proposed decision by ALJ Cheever to deny her application for a disability retirement. Respondent urges this Board to decline to adopt the ALJ's proposed decision and find instead that Respondent is entitled to a disability retirement based on her disabling condition.

The ALJ concedes Respondent is substantially incapacitated from performing her usual job duties. Yet he would deny her application based on a California Supreme Court case that was effectively overturned by the California Legislature in 2006. Respondent Cari McCormick is not only eligible for this disability retirement; she needs it to survive.

ANALYSIS

As the ALJ's proposed decision correctly notes, "To qualify for disability retirement, respondent had to offer sufficient evidence, based upon competent medical opinion, to establish

that she is permanently and substantially incapacitated for the performance of her usual duties as an Appraiser III for the County”. Respondent offered this evidence. Yet the ALJ nevertheless concluded, “Here, respondent's internal condition restricts her work at a particular location, but not her ability to complete her jobs duties. Consequently, her disability retirement application must be denied.”

The problem with this proposed decision is two-fold: First, it ignores the evidence that Respondent’s job in fact required her to work in a location that triggered her illness. Second, the proposed decision presupposes that Respondent would in fact have been able to complete her job duties at another location. On the contrary, this was attempted, and found not possible. The evidence clearly shows that the County had Respondent visit several different buildings to see if she would become symptomatic there, which she did. Regardless, the County never took steps to relocate Respondent to a different worksite. On top of that, the County denied her request to work from home as a reasonable accommodation for her disability. Therefore, because Respondent is undisputedly and substantially incapacitated from performing her Appraiser III duties at the Courthouse, and because the County would not grant her request to work from home or relocate her to another work area, the Board is required to approve Respondent’s Application. The ALJ would have this Board deny Respondent’s application based on speculation she may be able to perform her duties from some other location. In support of his position, the ALJ cites to three California cases interpreting disability retirement laws, which Respondent will discuss below. In two of those cases, benefits were denied based on completely different facts and different retirement laws than apply here. The third case cited by the ALJ, in which benefits were granted, is virtually identical to Respondent’s case and should be followed by this Board.

First, the ALJ cited *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335. *Nolan* is a case where the applicant, a police officer claiming a purely psychiatric injury, was found ineligible for disability retirement benefits under the PERL, and specifically Government Code section 21156. The court said Nolan had to show he was substantially incapacitated from performing both his

usual duties for his actual employer, as well as for any CalPERS employer throughout the entire state. Unsurprisingly, Nolan could not meet this burden.

The *Nolan* decision effectively set a higher standard of proof for disability retirement applicants. The California Legislature quickly realized the unintended consequence of the *Nolan* decision and enacted Assembly Bill 2244, which amended Government Code section 21156 effective July 24, 2006. This effectively overturned the *Nolan* decision and clarify that to be eligible for benefits, a disability retirement applicant need only show she is incapacitated from performing her usual duties, meaning the duties required of her current employer. Thus, *Nolan's* holding does not even apply here and should not guide this Board's decision.

The ALJ also cited *Craver v. City of Los Angeles* (1974) 42 Cal.App.3d 76. In that case, the court interpreted a section of the city charter pertaining to disability retirement, and found that the charter's use of the term, "in such department" required the applicant to show that he was not only substantially incapacitated from performance of his particular job duties in the department, but that he also could not perform job duties for other positions "within the department".

Craver is distinguishable. To begin, it interpreted a city charter, not the PERL, which has different language and legal standards for eligibility. To be eligible for a disability retirement under the PERL, an applicant only has to show she is substantially incapacitated from performing her usual job duties with her employer, not that she is incapacitated from performing any job in her department. (Government Code section 21156.) Thus, *Craver is also distinguishable and should not be followed by this Board.*

Finally, the proposed decision cites *Wolfinan v. Board of Trustees of the State Teachers Retirement System* (1983) 148 Cal.App.3d 787. *Wolfinan* involved an elementary school teacher with severe asthma and chronic bronchitis, which made her unable to teach. She applied for disability retirement benefits under the State Employees Retirement System based on illness resulting from her chronic asthma and bronchitis. The retirement board disputed that the teacher's condition met the legal standard to qualify for a disability retirement. The court held

that the teacher was disabled for purposes of the retirement law because her work environment exacerbated her condition and substantially incapacitated her.

Wolfinan is nearly identical to Respondent's case and should guide this Board in declining to adopt the ALJ's proposed decision. As in Wolfinan, Respondent McCormick has a chronic illness that is triggered by, among countless other things, her work environment. She cannot physically work there without becoming disabled from environmental allergens.

CalPERS' medical expert, Dr. Soheila Benrazavi, also concluded that Respondent is substantially incapacitated from the performance of her duties. Both Dr. Benrazavi and Respondent's own medical expert, Dr. Massoud Mahmoudi, agree that if performing her job duties would require Respondent to be located at the same building where she worked before, she would be temporarily and totally disabled from her job duties. The undisputed evidence in this case shows that, to perform her essential job duties, Respondent would have to be located at the same building where she worked before.

In connection with Respondent's application, CalPERS specifically asked its expert, Dr. Benrazavi: Is respondent substantially incapacitated for the performance of her usual duties?

Dr. Benrazavi responded: Yes, given the circumstances of her environment where she has to work indoors she is now temporarily and substantially incapacitated and she would not be able to perform in her usual and customary job duties. The disability began in September 2012.

It is undisputed that Respondent's job duties required her to work in the courthouse on Forbes Street in Lakeport, which triggered her disability. This puts her case squarely within the *Wolfinan* case and makes her eligible for benefits since she cannot work there without her disabling symptoms becoming triggered.

CONCLUSION

For the foregoing reasons, as well as those contained in Respondent's post-hearing brief dated June 24, 2016 (See Attachment 1 hereto), Respondent McCormick respectfully urges this Board to consider her arguments, to find that she is eligible for a disability retirement, and to grant Mrs. McCormick's application for a disability retirement.

Dated September 15, 2016

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12 **BOARD OF ADMINISTRATION**
 13 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

14 **CARI MCCORMICK,**) **OAH Case No.: 2015070687**
 15)
 16 **Respondent,**)
 17) **RESPONDENT CARI MCCORMICK'S**
 18) **HEARING BRIEF**
 19 **and**)
 20) **Presiding Judge: Hon. Cheever**
 21) **Hearing Location: Sacramento, CA**
 22 **COUNTY OF LAKE,**)
 23)
 24)
 25 **Respondent.**)

26 **INTRODUCTION:**

27 **The primary issue in this appeal is whether Cari McCormick is eligible for a disability**
 28 **retirement given the unique nature of her disability; it is undisputed she has a condition that**
 29 **substantially incapacitates her from the performance of her usual work duties, but she is not**
 30 **“permanently disabled” on a global basis, meaning there are times in her life when she is not**
 31 **symptomatic. The secondary issue is whether accommodation can be made for her disability**
 32 **such that she could perform her usual work duties.**

1 This brief explains why Mrs. McCormick's environmental illness qualifies her for
2 disability retirement benefits. Although she is not symptomatic on a permanent basis, her
3 condition is chronic and substantially incapacitates her from working as an Assessor III, since
4 that job requires her to work in the County Assessor's office, where she becomes symptomatic
5 and cannot work. Before terminating her employment, the County rejected her proposal to work
6 from home and did not offer her other effective accommodations. Because both CalPERS'
7 Independent Medical Examiner and the Qualified Medical Examiner from her workers'
8 compensation case agree that Mrs. McCormick is substantially incapacitated from the
9 performance of her work duties, she is eligible for disability retirement benefits as a matter of
10 law, regardless of whether or not there are times outside of work when she is not symptomatic.
11

12 1. **Mrs. McCormick is Incapacitated from the Performance of Her Duties Within the**
13 **Plain Meaning of Government Code sections 21150 and 20026.**

14 Government Code section 21150¹ states in part that a member incapacitated for the
15 performance of duty shall be retired for disability. Section 20026 defines the terms "disability"
16 and "incapacity for performance of duty" as a disability of permanent or extended and uncertain
17 duration. The Public Employees Retirement Law, Government Code section 20000 et seq., is
18 otherwise silent as to the meaning of the terms "disability" and "substantially incapacitated."
19 Thus we must apply basic canons of statutory interpretation and look to cases interpreting the
20 PERL and other disability retirement laws.

21 In construing the Legislature's intent with regard to the meaning of a statute, courts must
22 look to the statute's words and give them their usual and ordinary meaning. (*DaFonte v. Up-*
23 *Right, Inc.* (1992) 2 Cal.4th 593, 601.) The statute's plain meaning controls the court's
24 interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous,
25 no court need, or should, go beyond that pure expression of legislative intent. (*Ibid*; see also,
26 *Green v. State of California* (2007) 42 Cal.4th 254, 260.) Courts must avoid statutory
27

28 ¹ All statutory references are to the Government Code unless otherwise specified.

1 interpretations that lead to unreasonable results. (*Dreyer's Grand Ice Cream, Inc. v. County of*
2 *Alameda* (1986) 178 Cal.App.3d 1174, 1181–1182.)

3
4 **A. *Mansperger v. PERS: What It Means to be Substantially Incapacitated from the***
5 ***Performance of Duty Under the PERL.***

6 In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873
7 [*Mansperger*], the court held that to be “incapacitated for the performance of duty ‘means the
8 substantial inability of the applicant to perform his usual duties.’” (*Id.*, at p. 876.) The claimant
9 in *Mansperger* was a Fish and Game warden with an arm injury that only affected his ability to
10 lift heavy things. The court concluded that *Mansperger* was not substantially incapacitated from
11 the performance of his usual and customary duties because even with his disability, he could still
12 carry out the normal duties of his job, since lifting heavy items was a remote occurrence, and he
13 could do everything else the job required. (*Mansperger*, at pp. 876-77.) Though *Mansperger*
14 interpreted Section 21022—which applies specifically to safety members—the language of
15 section 21150, which applies in McCormick’s case, is identical. *Mansperger* thus sets forth the
16 legal standard that applies in Mrs. McCormick’s case.

17
18 **B. Mrs. McCormick is substantially unable to perform her usual work duties.**

19 Here, McCormick’s work duties require her to be in the same building that caused her
20 disability. The undisputed evidence from McCormick and her doctors shows that her worksite
21 triggers her disabling, environmental illness. This is distinguishable from the *Mansperger* case,
22 where the applicant—whom the court referred to as having a “limited incapacity” (*Mansperger* at
23 p. 876)—was able to perform all his usual duties except heavy lifting, which was a remote
24 occurrence. By contrast, Mrs. McCormick literally cannot enter her worksite without becoming
25 symptomatic.

26 The following is from page 10 of Dr. Benrazavi’s June 17, 2014, 2014 report (See
27 Exhibit 10 in the Administrative Record), where the County posed questions for her to answer in
28 her capacity as its Independent Medical Examiner:

1 CalPERS: If incapacitated, is the incapacity permanent or temporary?
2 If temporary, with (sic) what is the expected duration?

3 Dr. Benrazavi: The incapacity is temporary. It is contingent upon either of
4 the two options below:

5 (1) Upon inspection of the environment where she worked if there are
6 changes to be made by the recommendation by the hygienist, upon completion
7 of the changes the applicant can return to her job duties.

8 (2) The applicant can be relocated to another building where she could work
9 in her usual and customary duties.

10 Notably, Dr. Benrazavi authored this report more than one year after the County
11 terminated McCormick's employment, by which time the question of relocating her to another
12 building—an accommodation the County had previously denied her—was moot. Moreover, there
13 is no evidence an industrial hygienist ever performed an inspection of her worksite. In fact, this
14 never happened. Dr. Benrazavi's opinion that McCormick's disability was temporary was
15 specifically conditioned on the County's undertaking one of the two steps she outlined. The
16 County undertook neither of those steps.

17 This corroborates what Dr. Mahmoudi, the Qualified Medical Examiner in McCormick's
18 parallel workers' compensation case, wrote at page 3 of his August 12, 2013 report, where he
19 noted McCormick's "inability to work in the same work-environment which caused/triggered her
20 symptoms, and [her] expression of symptoms upon re-exposure, as has been documented."

21 **2. Mrs. McCormick is Substantially Incapacitated from Work Because None of the**
22 **Accommodations the County Offered Alleviated the Effects of Her Disability.**

23 There is a question as to whether Mrs. McCormick can perform her usual work duties
24 with accommodation for her disability. Yet nothing in the record supports this conclusion. At the
25 June 8, 2016 hearing, she testified that the County, in an attempt to accommodate her disability,
26 transferred her to different floors in the courthouse in which she worked, relocated her desk
27 under an air vent, asked other coworkers not to light candles or incense, and allowed her to use a
28 desk fan and air purifier. None of these accommodations alleviated her symptoms. The County

1 rejected Mrs. McCormick's request to work from home as a reasonable accommodation. The
2 County Assessor, Doug Wacker, told her she could not work in any other County building.
3 Aside from transferring Mrs. McCormick to a vacant position at another worksite, which the
4 County did not offer, all practicable accommodations were discussed, and none were effective in
5 permitting Mrs. McCormick to perform her job duties.

6 Analogizing to other disability retirement laws for public employees – under the State
7 Teachers Retirement System, a member is disabled and thus eligible for disability retirement if
8 she is unable to perform her regular duties or comparable duties without reasonable
9 accommodation, and that inability is permanent or expected to last at least a year from the date of
10 onset. (See, Ed. Code, § 22126; *Welch v. State Teachers Retirement System* (2012) 203
11 Cal.App.4th 1, 2.) Here, Mrs. McCormick tried each accommodation the County offered,
12 rejecting none. This makes her case distinguishable from one like *Mooney v. County of Orange*
13 (2013) 212 Cal.App.4th 865, where a county employee had been found ineligible for disability
14 retirement benefits because she rejected the county's offer to transfer her to a vacant position,
15 defeating her failure to accommodate claim under the Fair Employment and Housing Act.

16 Here, it is undisputed that the County fired Mrs. McCormick while she was on medical
17 leave, without exploring further accommodations that may have enabled her to work. This makes
18 it a moot point whether there is an effective accommodation with which she could work. Such
19 speculation would not be helpful. The bottom line is that each accommodation the County
20 explored with her failed. She should not be prejudiced merely because the County chose to
21 terminate her employment instead of making further efforts to accommodate her disability.

22
23 **3. Environmental Illnesses such as Mrs. McCormick's have been Held to be**
24 **Permanently Disabling.**

25 No published case discusses environmental illness in the context of disability retirement
26 law. However, one unpublished case discusses this issue in the context of an application for
27
28

1 social security disability benefits. In *Murray v. Apfel*, 2000 U.S.App. Lexis 190,² the Ninth
 2 Circuit Court of Appeals found that where, as here, it was undisputed that the claimant suffered
 3 some adverse reaction from chemicals in the environment, she was disabled under the applicable
 4 law, contrary to the finding of the ALJ who had denied her benefits. The court concluded that the
 5 evidence, including claimant's testimony, and that of a vocational expert concluding that
 6 claimant could not work, compelled the conclusion that she was entitled to an award of benefits
 7 absent specific, clear, and convincing evidence to the contrary.

8
 9 **4. Any Ambiguity as to Whether Ms. McCormick is Incapacitated from the**
 10 **Performance of Work Must Be Resolved in Her Favor.**

11 The California Supreme Court has declared that pension legislation must be liberally
 12 construed, and all ambiguities resolved in favor of the person applying for benefits. (*Glover v.*
 13 *Board of Retirement* (1989) 214 Cal.App.3d 1327, 1336-37, citing *Gorman v. Cranston* (1966)
 14 64 Cal.2d 441, 444; see also, *Lundak v. Board of Retirement* (1983) 142 Cal.App.3d 1040, 1043
 15 ["Pension legislation must be liberally construed and applied to the end that the beneficent
 16 results of such legislation may be achieved.]) The provisions for disability retirement found in
 17 the PERL are designed to prevent the hardship to an employee who, for reasons of survival, is
 18 forced to attempt performance of her duties when physically unable to do so. (*Quintana v. Board*
 19 *of Administration* (1976) 54 Cal.App.3d 1018, 1021.)

20 In this case, there is apparently an ambiguity as to whether Mrs. McCormick meets the
 21 statutory criteria for a disability retirement given there are times when she is not symptomatic.
 22 However, it is undisputed that she is disabled while at her worksite. Her symptoms have not
 23 improved, and are so frequently disabling outside of work that she has had to maintain separate
 24 living quarters from her own husband. Dr. Benrazavi wrote in June 2014 that McCormick had
 25 been disabled since September 2012. Thus her disability is of an extended and uncertain

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 28 ² Mrs. McCormick requests this Court to take judicial notice of this case pursuant to Evidence Code section 451,
 which states that a court shall take judicial notice of the decisional law of this State and of the United States.

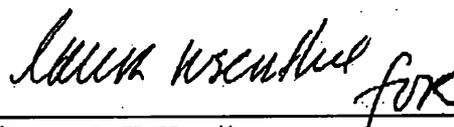
1 duration. (Gov. Code § 20026.) In sum, any ambiguity as to whether she is substantially
2 incapacitated from the performance of her work duties must be resolved in her favor.

3
4 **CONCLUSION:**

5 The undisputed medical evidence—as well as McCormick’s own testimony—establishes
6 her worksite causes her to experience disabling symptoms because of her environmental illness.
7 The County did not undertake any of the steps Dr. Benrazavi recommended which might
8 plausibly have enabled her to return to work. Moreover, although the County undertook some
9 basic steps at accommodating McCormick’s disability, none of these accommodations were
10 effective, and she had to take a medical leave of absence, during which the County terminated
11 her employment. The evidence compels the conclusion that she is substantially incapacitated
12 from the performance of her usual work duties. For these reasons, this Court should grant her
13 appeal and order that CalPERS award her a disability retirement.
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18 DATED: June 24, 2016

The Law Office of Richard J. Meehan

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