

ATTACHMENT A
RESPONDENT'S PETITION FOR RECONSIDERATION

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8 **BEFORE THE BOARD OF ADMINISTRATION**
9 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

10 **In the Matter of the Cancellation of the) AGENCY CASE NO.: 2012-0976**
11 **Application for Industrial Disability) OAH CASE NO.: 2013030889**
12 **Retirement of HARRY MOHAN SINGH)**
13 **DHESI, Respondent, and DEPARTMENT)**
14 **OF CORRECTIONS AND) RESPONDENT HARRY MOHAN SINGH**
15 **REHABILITATION, STATE PRISON,) DHESI'S PETITION FOR**
16 **SACRAMENTO COUNTY, Respondent) RECONSIDERATION OF DECISION**
17 **CALIFORNIA PUBLIC EMPLOYEES) AND REQUEST FOR STAY OF**
RETIREMENT SYSTEM,) EXECUTION OF THE DECISION OF
AGENCY) THE 9/21/2016 DECISION OF THE
) BOARD OF ADMINISTRATION OF THE
) CALIFORNIA PUBLIC EMPLOYEE'S
) RETIREMENT SYSTEM
)

18 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

19 NOTICE IS HEREBY GIVEN that pursuant to California Government Code §11521
20 Respondent HARRY MOHAN SINGH DHESI request reconsideration of the 9/21/2016
21 Decision of the Board of Administration of the California Public Employees' Retirement System
22 attached hereto as "Exhibit A." Respondent HARRY MOHAN SINGH DHESI pursuant to
23 California Government Code 11521 request a stay of execution of the effective date of the
24 decision to allow the filing and hearing of the request for reconsideration to a date set by the
25 CalPERS Chief Executive Officer.

26 **ARGUMENT FOR RECONSIDERATION**

27 **I. Jurisdictional Basis for Reconsideration and Stay**

1 California Government Code §11521 provides as follows:

2 “11521. (a) The agency itself may order a reconsideration of all or part of the case on its
3 own motion or on petition of any party. The agency shall notify a petitioner of the time
4 limits for petitioning for reconsideration. The power to order a reconsideration shall
5 expire 30 days after the delivery or mailing of a decision to a respondent, or on the date
6 set by the agency itself as the effective date of the decision if that date occurs prior to the
7 expiration of the 30-day period or at the termination of a stay of not to exceed 30
8 days which the agency may grant for the purpose of filing an application for
9 reconsideration. If additional time is needed to evaluate a petition for reconsideration
10 filed prior to the expiration of any of the applicable periods, an agency may grant a stay of
11 that expiration for no more than 10 days, solely for the purpose of considering the
12 petition. If no action is taken on a petition within the time allowed for ordering
13 reconsideration, the petition shall be deemed denied.

14 (b) The case may be reconsidered by the agency itself on all the pertinent parts of the
15 record and such additional evidence and argument as may be permitted, or may be
16 assigned to an administrative law judge. A reconsideration assigned to an administrative
17 law judge shall be subject to the procedure provided in Section 11517. If oral evidence is
18 introduced before the agency itself, no agency member may vote unless he or she heard
19 the evidence.”

20 The decision in this matter was served by mail on September 27, 2016. As such the time to file
21 a motion for reconsideration runs on October 27, 2016. This petition is being provided to the
22 CalPERS Executive Office within 25 days of mailing to all the Chief Executive Officer to grant a
23 stay of execution. (See “Exhibit B” 9/27/16 letter of Matthew G. Jacobs.)

24 The reason for this motion for reconsideration is that the Decision of the Board did not
25 address specifically the Legal Issues raised in Respondent Dhesi’s Written Argument for Hearing
26 dated September 20, 2016. In particular, the Board failed to address several issues regarding the
27 jurisdictional authority of the Board of Administration to consider issues abdicated by the ALJ.
28 These issues have a direct impact upon Respondent Dhesi’s appeal to allow the filing of an
application for disability retirement. They also would clarify the force and effect of the PERL
and provide necessary control over employing agencies to comply with the requirements of the
PERL. In order to clarify the PERL, the Board of Administration should make a ruling on the
jurisdictional issues raised, so that there is an adequate record for any potential Writ to the
Superior Court.

29 **II. CalPERS Has Jurisdiction to Determine Reasonable Accommodation**

30 In the proposed decision of ALJ Erin R. Koch throughout her opinion indicated that legal

1 determinations relevant to the instant case where not within the jurisdiction of CalPERS. The
2 first abdication of jurisdiction is on p. 4 of the Proposed decision in foot note 4 wherein she
3 states:

4 “Respondent asserts that he was never provided a full-time dental assistant. However,
5 failure to accommodate a “disabled” employee is a violation of the FEHA; jurisdiction for
such a claim is in superior court or as an affirmative defense at the SPB.”

6 The ALJ also states at p.7 footnote 7 states: “Respondent asks this Board to make a finding
7 against CDCR for its failure to accommodate him. The Board does not have jurisdiction to make
8 such a finding”

9 Respondent Dhesi objects to these abdications of jurisdiction as the determination as to
10 whether there was a failure to accommodate Respondent Dhesi (hereinafter “Respondent”) is
11 relevant to the determination whether he was substantially incapacitated from the performance of
12 his duties and as such something within the jurisdiction of CalPERS. The mere fact that he did
13 pursue a FEHA claim or raise his disability as an affirmative defense in the SPB Board should
14 not preclude him from raising the issue as it relates to the PERL on the separate issue of whether
15 he was disabled. Respondent had no legal requirement to file a FEHA complaint and any
16 determination of a defense in the SPB manner would have been made by his attorney.

17 In fact, the need to file a DFEH Complaint or pursue an administrative disciplinary action
18 in lieu of proceeding under the PERL was not required in *Lazan v. County of Riverside* (2006) 44
19 Cal.App.4th 453. In that case, the Plaintiff filed a Code of Civil Procedure §1085 Writ with the
20 Superior Court requiring the County to do its ministerial duty to file for Plaintiff’s disability
21 retirement under California Government Code §21153. The *Luzan* Court found that the County
22 had a ministerial duty to file for Lazan’s disability retirement because their conduct indicated that
23 he was disabled.

24 Here the ALJ’s **finding NO. 20** specifically states that “Dr. Abels was clear that
25 respondent was, at all times, capable of completing the essential functions of the Dentist job with
26 accommodation. Her conclusion, by definition makes respondent ineligible for a disability
27 retirement under the substantially incapacitated standard.”

1 Therefore, the determination as to whether Respondent was denied a reasonable
2 accommodation is in fact essential to the ALJ's determination of whether he was disabled. As
3 such, in order to effectively determine whether "Respondent was substantially incapacitated from
4 his duties," it was necessary to make a foundation as to whether he had been provided an
5 effective reasonable accommodation. As such, the instant matter should be **Remanded** to the
6 ALJ to make a finding as to whether there was a failure to reasonably accommodate Respondent
7 as if there was no reasonable accommodation, he would have been disabled.

8 **III. The Instant Matter should be remanded to determine whether California**
9 **Department of Corrections and Rehabilitation violated California Government**
10 **Code §21153 and §129253.5**

11 The decision of the ALJ at pp. 7-8 states as follows:

12 "Respondent asks this Board to make a finding against CDCR for its failure to file a
13 disability retirement application on respondent's behalf, under Government Code section
14 19253.5, subdivision (i)(1); or in the alternative, allow respondent's application under the
15 principles of equity because of CDCR's failure. To that end, respondent alleges that
16 CDCR knew, that without reasonable accommodation, respondent was unable to perform
17 the work of his position and they were therefore obligated to file for disability retirement
18 on his behalf. **First, the Board does not have jurisdiction to make a finding against**
19 **CDCR.** Second, assuming, *arguendo*, CDCR had filed an application on respondent's
20 behalf, simply filing an application does not mean CalPERS would grant disability
21 retirement to the applicant. Third, California Government Code section 19253.5,
22 subdivision (i)(1) requires an employee to be "unable to perform the work of his or her
23 present position or any other position in the agency." There are no facts in the record to
24 support such a conclusion."

25 The ALJ ignores the fact that it is Government Code §21153 that Respondent indicated
26 was violated. It is the obligation of CalPERS to enforce the PERL which includes Government
27 Code §21153. PERS is the agency responsible for awarding disability retirement in this case. (§§
28 20001, 20058.) PERS law (§ 20000 et seq.) provides a forum for appealing involuntary
disability retirement (§ 21156). Therefore, CalPERS does have jurisdiction to make a finding as
to whether CDCR should have filed an application for retirement. To not do so, would further
encourage agencies like CDCR to continue to default in proceedings like this in which they are
listed as a Respondent. Here CDCR claimed they were not a party in the instant matter, as such a
default finding against them would be appropriate to encourage them to participate.

It is anticipated that CalPERS staff will claim that no ministerial duty under §21153 exists

1 in state employment due to the existence of California Government Code §129253.2 pursuant to
2 *Gonzales v. Cal. Dept. of Corrections and Rehab.* (2011) 195 Cal.4th 89. However, such a
3 position would be inapposite. In *Gonzales* the Court indicated that Government Code §21153
4 and Government Code §12953.2 should be harmonized to effectuate the public policy regarding
5 providing disability retirement to vested employees. The Court in *Gonzales* court in relevant
6 part at pp. 95-96, states as follows:

7 “In any event, the two statutes do not conflict. *Section 21153* prohibits medical disability
8 termination of an employee who is eligible for disability retirement unless the employer
9 applies for disability retirement on the employee's behalf or the employee chooses to
10 waive the right to disability retirement. (See *Haywood v. American River Fire Protection*
11 *Dist.* (1998) 67 Cal.App.4th 1292, 1305 [79 Cal. Rptr. 2d 749].) *Section 19253.5, subdivision (d)*
12 permits termination of a medically disabled employee who is *not* eligible for disability retirement
13 or who chooses to waive his or her right to retire for disability. *Section 19253.5, subdivision (i)(1)*
14 reiterates that if the agency determines that an employee who is eligible for disability retirement is
15 medically unable to perform his or her current job functions or those of any other position in the
16 agency, the agency must apply for disability retirement on the employee's behalf. *Subdivision (i)(2)*
17 provides that the employee may be placed on involuntary leave (but not terminated) while the
18 application for disability retirement is pending, subject to the requirement that the agency must
19 insure that the employee receives payment equal to the retirement allowance during the application
20 process and must continue to make all employer contributions to the employee's health plan.

21 Similarly, there is no conflict between *section 21153* and *section 19253.5, subdivision (c)*, which
22 permits medical demotion or transfer within the agency when an employee is medically unable to
23 perform the functions of his or her present position but is able and qualified to perform the
24 functions of another position, even if it is less than full time or otherwise results in lower pay.
25 *Section 21153* prohibits only "separation" of a disabled employee, i.e., termination; it does not
26 prohibit demotion or transfer.”

27 From all of the foregoing, we conclude that, pursuant to *sections 21153* and *19253.5*, a state
28 agency's duty to apply for disability retirement on behalf of a civil service employee arises only
when the agency determines that the employee is medically unable to perform his or her usual job
functions or the functions of any other available position within the agency and the employee is
eligible for disability retirement and chooses not to waive the right to disability retirement.”

Therefore, the ministerial duty to retire instead of terminating plaintiff requires that CDCR comply with the
provisions of 19253.5 prior to terminating Dr. Dhes required CDCR to determine whether there were any
available jobs which plaintiff could have done prior to terminating him instead of filing for his disability
retirement.

Government Code § 19253.5 is a procedural mechanism from which a state agency determines
medical terminations and a manner to comply with the requirements of Government Code § 21153.

Government Code § 19253.5 (i)(1) provides for the manner in which the State can file a disability

1 retirement. The right regarding no termination if an employee is disabled is pursuant to California
2 Government Code § 21153. In fact, Government Code §19253.5 (i)(2) refers to Government Code
3 §19253.5 specifically indicating that allowing the removal of an employee so long they can exhaust leave
4 and be paid. This section does not divest CalPERS of jurisdiction under Government Code §21153.
5 Further, CalPERS has a vested interest that CDCR complies with Government Code §19253.5 and does
6 not file discipline when a retirement is available. Here Respondent did not work as a dentist since
7 November 2007 and the termination was in March 2009. If CDCR had complied with the provisions of
8 Government Code §19253.5, they would have had to have a medical evaluation to assist CalPERS and
9 there would have been plenty of time for CalPERS to make a consideration on accepting the application.
10 To allow an Agency to do nothing to advance its obligations under Government Code §21153 by
11 complying with Government Code §19253.5, would defeat the purpose of the PERL to ensure eligible
12 beneficiaries receive mature benefits.

13 Further, contrary to the ALJ's indication that there was no job at CDCR that Respondent could do,
14 the evidence at the hearing indicated that Respondent could not perform the job duties of the warehouse
15 work as well as even work in the mail room. (See Exh. XXXXXX , 5:7-30:13.) The fact, on 4/9/07, Dr.
16 Park (the Acting CDCR Regional Dental Director, Region 1 which included oversight of CSP-
17 Sacramento) in an e-mail to Dr. Kuykendall concerning Dr. Dhese stated as follows: **"If this dentist is not
18 able to meet the original Minimum Qualifications as a Dentist, CF, should they not be initiating a
19 Fit for Duty and possibly Medically Retiring this candidate."** (Exh. QQQQQ, ¶4, Exhibit GG, p. 3 of
20 4.) Further, Fran Conlin of June 21, 2007 wherein she stated:

21 "We'll continue to work with Dr. Dhese here until he reaches the point where his limitations
22 become so restrictive that he can't work at all. As you know, he already has medical restrictions
23 regarding patient care. If his new claim results in restrictions to the "desk work" as well, there
won't be anything we can do for him anyway. I think it is inevitable that we'll end up there, sooner
or later." (Exh. SSSSS, ¶ 25; O'Neill Decl., ¶8, Exh KK..)

24 The mere fact that Respondent continued to come to work does not establish that he was not
25 substantially incapacitated from the performance of his duties. The testimony of Dr. Dhese and the other
26 dentists shows that he was not able to perform his duties as he could not do physical activities which were
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1 essential to his job duties. (See Exh. XXXXXX, p. 14:16-16:14.)

2 In fact, the evidence cited shows that the Department itself was considering retiring his prior to his
3 termination and believed that he would not be able to do the essential functions of his job and he was
4 substantially incapacitated from his duties as a foregone conclusion from their actions taken towards him.
5 (See Exh. XXXXXX, pp. 16:15-29:13.) This is readily apparent due to as he was even unable to function in
6 his placement in the warehouse and the mailroom. He did not perform any functions of a dentist in fact,
7 since November 8, 2007.

8 CDCR had an obligation under Government Code §21153 and Government Code §19253.5 to
9 retire Respondent instead of firing him when they terminated him. Here they knew they were not
10 reasonably accommodating him and he could not perform his duties without reasonable accommodation.
11 They also had a history with Respondent of him previously having to go off work for extended period of
12 times due to his physical back conditions. This included times where he was off work for months. In the
13 process of the reasonable accommodation process, Dr. Park (the Acting Regional Dentist) and Fran Conlin
14 (the RTW Coordinator) both showed knowledge that inevitably he would need to be retired.(See Exh.
15 XXXXXX, pp.22:23-28, 24:18-22.)

16 Knowledge of CDCR's duty to retire Respondent if he was disabled was even in the options letters
17 which were given to Respondent on multiple occasions. When Ms. Conlin met with Dr. Dhesi she
18 discussed this option with him. (TR 3/9/16, pp. 38:23-39:3, 39:10-17; TR 3/21/16, 105:11-106:15.) Dr.
19 Dhesi testified that he relied upon that fact that if the Department felt he was disabled that they could file an
20 application for retirement on his behalf, in fact it was something that had been discussed with an early
21 intervention counsel in 2005 after he returned from an 11 month absence. (TR 3/21/16, 106:16-21.).

22 So CDCR knew they had a disabled employee who needed reasonable accommodation which they
23 were not actually providing him prior to even moving him to the warehouse. Respondent was not
24 physically able to do the warehouse job and in fact exacerbated his physical back injury while in the
25 warehouse in July 2008. Dr. Abels' Physician Report to CalPERS indicated at that time he was unable to
26 do his job as a Dentist. Regardless of whether CDCR was going to proceed with disciplinary action
27 against Respondent the facts at that time would indicate that he is unable to return to his job duties as a
28

1 Dentist.(See Exh. XXXXX, pp. 16:15-29:13.)

2 CDCR had a duty under the PERL to file for his retirement and/or comply with Government
3 Code §19253.5 and did not, Respondent relied upon CDCR's representations that they could retire him. If
4 CDCR had filed the retirement action, it did not preclude them from proceeding with a disciplinary action
5 against Respondent. (See *Hughes v. County of San Bernardino* (2016) 244 Cal. App. 4th 542, and *Hall-*
6 *Villareal v. City of Fresno* (2011) 196 Cal.App.4th 24.) The only effect would be that Respondent could
7 not be reinstated if he got better. Therefore, the application should be accepted as if CDCR had filed for
8 plaintiff's retirement instead of moving to terminate him. As such, then his application would have been
9 timely. Equitable principles dictate the Dhesi's application for disability retirement should be accepted.

10 The *Haywood* equitable exception is in reality an extension of the judicially created doctrine of
11 equitable estoppel tolling of statutes of limitations. As the Supreme Court in *McDonald v. Antelope Valley*
12 *Community College District* (2008) 45 Cal. 4th 88, pp. 101-102 states:

13 "We rejected the assertion that equitable tolling should be limited to cases in which a plaintiff was
14 required to pursue a particular alternate remedy before initiating suit, and instead espoused "the
15 principle that regardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of
16 another, if the defendant is not prejudiced thereby, the running of the limitations period is tolled."
17 (*Elkins v. Derby, supra, 12 Cal.3d at p. 414.*) After canvassing the various precedents that
18 supported this conclusion, we articulated the sound policy reasons that justified it. The filing of an
19 administrative claim, whether mandated or not, affords a defendant notice of the claims against it
20 so that it may gather and preserve evidence, and thereby satisfies the principal policy behind the
21 statute of limitations. (*Id. at pp. 417-418.*) Both courts and legislatures have, and should, "liberally
22 appl[y] tolling rules or their functional equivalents to situations in which the plaintiff has satisfied
23 the notification purpose of a limitations statute." (*Id. at p. 418.*) Failing to afford plaintiffs equitable
24 tolling in these circumstances would both create procedural traps for the unwary (*id. at p. 419*) and
25 encourage duplicative filings, with attendant burdens on plaintiffs, defendants, and the court
26 system (*id. at p. 420*).

21 Here Dr. Dhesi's employer CDCR as stated above had knowledge that he was suffering from an
22 orthopedic injury with associated pain which either resulted in the acts for which he was being disciplined
23 or predated the effective date of the discipline. As such, the statute of limitations would be tolled. In these
24 circumstance, the knowledge of CDCR is imputed to CalPERS as to do otherwise would constitute "an
25 intent to thwart an otherwise valid claim for disability." (*Smith, 102 Cal.App.3d at p.205.*) The reason for
26 imputing the knowledge of CDCR to CalPERS is due to the fact that it is the employer's obligation to file
27 for disability retirement under California Government Code §21153 and to comply with the provisions of

1 California Government Code §19253.5. Further, the employer (the State of California) is in a better
2 position to know whether an employee would qualify for the industrial disability.

3 These equitable principles would have been able to be accomplished if the CDCR had complied
4 with California Government Code §19253.5 at the time that he no longer worked as a Dentist after
5 11/8/07. (See "Exhibit HHHH" on page 10 in findings numbers 5 and 6—p. 991; Exhs. RRRRR, ¶4—p-
6 1539; PPPPP., ¶8—p. 1493.) In fact, the SPB found that he was denied due process during the period of
7 time from 11/8/07 through 3/16/09, but received no loss of salary during that time. ("Exh. HHHH, pp. 997-
8 998.) CDCR could have complied with Government Code §19253.5 (i) during that period of time. As the
9 Court in *Gonzales, supra*, at p. 95:

10 "The legislative history of subdivision (i) of section 19253.5, which was enacted in 1999 (Stats.
11 1999, ch. 310, § 11, p. 2421), bears this out as well. The Senate's bill analysis of the proposed
12 legislation stated as follows: "Existing law prohibits a state agency from medically terminating an
13 employee who is vested in the Public Employees' Retirement System (PERS) unless the employee
14 waives the right to retire for disability. (Government Code Sections 19253.5(d) and 21153[.] In
15 order to separate such employees, the state employer is required to apply for involuntary disability
16 retirement on the employee's behalf. (Government Code Section 21153[.] PERS can take over a
17 year to process the application for disability retirement. While most employees are covered by
18 some form of paid leave during the application process, their leave credits are sometimes
19 exhausted, which leaves the employee without either income or a retirement allowance while the
20 application is pending. [¶] This bill would require a state employer, if the employee cannot
21 perform in his or her position or any other position in the agency, to apply for disability benefits on
22 the employee's behalf. [¶] This bill would also require the employer to pay a temporary retirement
23 disability allowance and continue to contribute to employee health plans when the employer files
24 an application for involuntary disability retirement and the employee's leave credits are exhausted.
25 The employer will be reimbursed for the temporary allowance by PERS from the back retirement
26 benefits if the application is granted. If the application is not granted, the employer may deduct the
27 amount of the allowance from the back salary due the employee." (Sen. Com. on Public
28 Employment and Retirement, Analysis of Sen. Bill No. 1073 (1999-2000 Reg. Sess.) Apr. 12,
1999, § 11, pp. 4-5.)

21 Therefore, if CDCR had complied with Government Code section of 19253.5(i), they would not
22 have been any worse off and the intent of the PERL under Government Code §21153 would have
23 been accomplished by such compliance.

24 Further, CDCR knew they had a disabled employee who needed reasonable
25 accommodation which they were not actually providing him prior to even moving him to the
26 warehouse. Respondent was not physically able to do the warehouse job and in fact exacerbated
27 his physical back injury while in the warehouse in July 2008. Dr. Abels' Physician Report to

1 CalPERS indicated at that time he was unable to do his job as a Dentist or the warehouse
2 position. Regardless of whether CDCR was going to proceed with disciplinary action against
3 Respondent the facts at that time would indicate that he is unable to return to his job duties as a
4 Dentist.(See Exh. XXXXX, pp. 16:15-29:13.)

5 Further, the matter should be remanded as it would have been incumbent on CDCR to
6 show that there were available jobs which he could do. Which is another reason for CalPERS to
7 assert jurisdiction to ensure compliance with Agencies such as CDCR to ensure active
8 participation of the Employing Agency. Additionally, CDCR was on notice of the need to
9 comply with the procedures under Government Code §19253.5 and did nothing.

10 **III. The Decision Should be Reconsidered to the Extent that Findings 12, 13, and 14**
11 **Appear to Erroneously State that Plaintiff was only Disabled from a Warehouse**
12 **Position**

13 Respondent objects to the ALJ's findings 12,13, and 14, to the extent that the ALJ is
14 indicating that Dr. Abels found him to be disabled only from a warehouse job and not that of the
15 Dental position. Dr. Abels in making her determination that Dr. Dhese was disabled on July 17,
16 2008, reviewed the job description for a dentist. (TR 3/21/16, 29:11-23.)

17 Dr. Abels specifically testified that Dr. Dhese's physical condition resulted in him being
18 substantially incapacitated from his job duties by discussing what he did physically in his job that
19 would be disabling. (TR 3/21/16, 34:10-36:6.)

20 Dr. Abels testified went on to testify that the earliest date Respondent was unable to do
21 the usual and customary duties of his job as a CF Dentist was on 12-7-07 and at the very latest it
22 would be on July 17th, 2008, the date that she indicated he was permanently disabled in her
23 Medical Report to Cal PERS. Dr. Abels testified that by July 2008 Respondent's condition
24 worsened since November 2007 And by July 17, 2008, she also found he was not able to do the
25 warehouse job. (TR. 3/21/16, pp. 49:14-50:19, 51:2-7, Exhs. W, GGGG, p. 974-984.) If the
26 pages designated on GGGG, pp. 974-984 are not in the record, then plaintiff would move to have
27 them added.

28 Dr. Abels clarified her selection of the 7/17/08 as the last date of disability as that

1 occurred after his exacerbation of his injury in the warehouse and his condition had deteriorated
2 as result of a flare-up of pain and possible re-injury. (TR 3/21/16, 76:9-81:1, Exhs. W, GGGG, p.
3 974, GGGG pp. 1218, 1219.)

4 Dr. Abels also opined as follows:

5 “ THE ADMINISTRATIVE LAW JUDGE: My question is at what point in time
6 would you answer no to the first question regarding his ability to complete the essential
7 functions? Would it be at the time in which the reasonable accommodation you suggest is
no longer viable to assist Dr. Dhese in completing the essential function of his job?

8 THE WITNESS: I think that is one scenario, certainly.

9 THE ADMINISTRATIVE LAW JUDGE: Okay.

10 THE WITNESS: But also, realistically, these were being set as things that
11 should have been done for him to allow him to function, so I would say that in the
absence of reasonable accommodation, that he probably should not have been working as
12 a dentist.

(TR. 3/21/16, pp. 69:23-70:11.)

13 **IV. The Decision Should Be Reconsidered and Amended as it Is Erroneous as Dr. Abel**
14 **Considered Objective Factors and Opinions of Other Treaters**

15 To the extent that finding number 15 implies that Dr. Abel’s decision was based solely on
16 her own findings and relied heavily on subjective complaints, it is erroneous. In fact, Dr. Abels
17 testified not only on her own notes and observations but also on medical reports and opinions by
18 orthopedic doctors. Further, Dr. Abels testified that she can and does diagnose patients as having
19 lumbar disc protrusion. Dr. Abels testified that she relied upon the QME report from Dr. Nyak
20 (TR 3/21/16, pp. 27:11-28:7.) This also included reviews of MRI scans which confirmed the
21 subjective complaints of pain being made by Respondent due to disk protrusion, L5-S1 annual
22 rear, and displacement of right S1 root. (TR 3/21/16, 47:16-48:17.)

23 Dr. Abels specifically testified that Dr. Dhese’s physical condition resulted substantially
24 incapacitated him from his job duties by discussing what he did physically in his job that would
25 be disabling. (TR 3/21/16, 34:10-36:6.) Dr. Abel’s testimony concerning plaintiff’s inability to
26 do his essential job functions was buttressed by the other supervising CDCR Dentists Dr.
27 Kuykendal, Dr. Park, Dr. Maciel, and Dr. Weisman. (See Exh. XXXXX, pp. 14:16-16:3.) Dr.

1 Dhesi also confirmed the work functions and his inability to do them. (See Exh. XXXXXX, pp.
2 14:16-16:3.)

3 **V. The Board Should Reconsider the Decision And Remand it to the ALJ as the**
4 **Decision Does Not Address the Maturity Date Issue Raised on Appeal and Should**
5 **Be Remanded for That Consideration**

6 The ALJ's decision fails to address the date of maturity issue, this is an important issue to
7 the instant matter. The Decision appears to claim that there is no need to make a determination
8 on the date due to the erroneous position that Respondent was being reasonably accommodated.
9 Respondent contends that the date of maturity is the date he was terminated in March 2009 due to
10 equitable estoppel principles.

11 The Court in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th
12 1292, at p. 1306 limits its ruling as follows:

13 "There is no claim, or evidence which would support a claim, that the termination for cause was
14 due to behavior caused by a physical or mental condition. And there is no claim, or evidence
15 presented which would support a claim, of eligibility for disability retirement that could have
16 been presented before the disciplinary actions were taken. Instead, Haywood asserts he has
17 become psychologically unable to return to employment with the District as the result of his
18 reaction to the disciplinary proceeding which resulted in a complete severance of the employment
19 relationship."

20 In fact, as the Court in *Smith v. City of Napa* (2004) 120 Cal. App.4th 194, the Third
21 District Court of Appeals explained that the *Haywood* "holding would not apply where the cause
22 for dismissal was the result of a disabling medical condition or where the dismissal would be
23 'preemptive of an other wise valid claim for disability retirement.' [Citation..]" *Smith, supra*, 120
24 Cal.App.4th at p. 205.) The *Smith* court explained that:

25 "if an agency dismisses an employee solely for a cause unrelated to a disabling medical
26 condition [such dismissal] cannot result in the forfeiture of a matured right to a pension
27 absent express legislative direction to that effect. [Citations.] Thus if a plaintiff were able
28 to prove that the right to a disability retirement matured before the date of the event
giving rise cause to dismiss, the dismissal cannot preempt the right to receive a disability
pension for the duration of the disability. [Citation.] Conversely, the 'right may be lost
upon occurrence of a condition subsequent such as lawful termination of employment
before it matures...' [Citation.]"

(*Id.* at p. 206.)

As a result of the foregoing rules, the *Smith* court concluded that the key issue in the case
was whether the employee's right to a disability retirement matured prior to the effective

1 termination. (*Smith, supra* 120 Cal.App.4th at p. 206.) The appellate court concluded a “vested
2 right matures when there is an unconditional right to immediate payment.” The court then
3 concluded a duty to provide a disability pension payment only arises once the pension board has
4 determined that the employee is no longer capable of performing his duties. In other words, a
5 right to pension payment is considered “matured” once the pension board approves the
6 employee’s disability retirement application. Therefore, the court reasoned that if a plaintiff were
7 able to prove that the pension board determined the plaintiff was no longer capable of performing
8 his duties before the date of the event giving cause to dismiss, then dismissal cannot preempt the
9 right to receive a disability pension for the duration of the disability. Based upon this rule, the
10 court determined that the firefighter’s disability retirement claim was correctly denied, because
11 the firefighter was terminated before the pension board made a determination about his abilities
12 to perform his job. (*Ibid.*)

13 Nevertheless, the appellate court noted, “there may be facts under which a court, applying
14 principles of equity, will deem an employee’s right to a disability retirement to be matured and
15 thus survive a dismissal for cause.” (*Smith, supra*, 120 Cal.App.4th at pp. 206-207.) For
16 example equity might require a different result if there was undisputed evidence that a plaintiff
17 was eligible for a disability retirement, such that a favorable decision on his claim would have
18 been a foregone conclusion, such as the loss of limb case. (*Id.* at p. 207.) The appellate court
19 concluded equity did not require a different outcome in the firefighter’s case, because the
20 firefighter’s medical evidence was equivocal.

21 The *Smith* equitable exception applies if there is medical evidence that Dr. Dhese’s
22 physical condition was such that he was substantially incapacitated from his duties as a Dentist,
23 Correctional Facility prior to the disciplinary actions being taken against him. As such plaintiff
24 has “proved his disability for performance of duty on the basis of competent medical opinion....”
25 (Cal. Gov. Code §20026.)

26 The *Smith* case as stated above seems to indicate that there are two possible dates on
27 which the right would have to have matured, either “ before the date of the event giving rise
28

1 cause to dismiss” or “the effective date of termination.” (*Id.* at p. 206.) However, the California
2 Supreme Court in *Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749 states:

3 “We can perceive no significant difference in this respect between provisions for
4 pensions on retirement for disability and provisions for full salary payments for disability
5 during active career employment. Each would appear to be a part of the contemplated
6 compensation to police officers that would vest upon the acceptance of employment. The
7 Board contends, however, that plaintiffs' rights to full salary disability benefits do not vest
8 until all the contingencies have occurred, that is, until the police officer is incapacitated
9 for the performance of his duties and such incapacity is determined to be the result of
10 "bodily injury received in or illness caused by the performance of his duty." (See fn. 1
11 ante.) It is obvious that the officer would not be entitled to receive the benefits until all
12 the conditions prescribed by the San Francisco City Charter have been met. However, as
13 our above decisions make abundantly clear, **the right to the benefits vests upon
14 acceptance of employment although the right may be lost upon occurrence of a
15 condition subsequent such as lawful termination of employment before it matures**
16 (see and compare *Kern v. City of Long Beach, supra*, 29 Cal.2d 848, 853) or may not be
17 enforceable because of the nonoccurrence of one or more conditions precedent. (See and
18 compare *Strumsky v. San Diego County Employees Retirement Assn., supra*, 11 Cal.3d
19 28, 45-46; *Kern v. City of Long Beach, supra*, 29 Cal.2d 848, 853.)” (Emphasis ours.)

20 As such, it would appear that the date on which Respondent Dhesi’s disability would have to be a
21 foregone conclusion would be prior to the effective date of his termination (March 16, 2009) or
22 March 3, 2013 (the date on which he was served the adverse action).

23 Further, it would be inequitable to indicate that the date the incidents giving rise to the
24 termination would be the effective date of maturation, as Defendant CDCR caused any delay in
25 the matter by delaying the decision to terminate plaintiff by nearly a year and a half. As such
26 there should be a tolling of any right of maturity to the date of the termination. In fact, the State
27 Personnel Board found that the transfer of Dr. Dhesi to the warehouse and the jail did not meet
28 operation needs or to find a proper roll for him and in violation of due process and as such he
was entitled to his full salary until the date of his termination. (Exh. HHHH.) This court can has
granted judicial notice of Exhibit HHHH pursuant to California Evidence Code §§ 451 and
452(d) (1) as records of any court of the State of California of these findings. (TR 3.21.16,
141:24-142:2.)

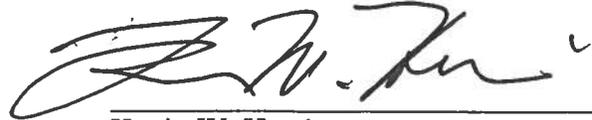
Conclusion

For the foregoing reasons, the Board of Administration of Cal PERS should reconsider its
decision and/or remand it to the ALJ for a further finding of facts relating to the issues under

1 California Government Code §§ 19253.5 and 21153. The Board of Administration of Cal PERS
2 should declare their responsibility in determining issues under the failure to provide Reasonable
3 Accommodation to disability and to ensure compliance of California Government Code
4 §19253.5 to ensure State Agencies are in compliance with California Government Code §21153.
5 Failure to do so, would undermine the PERL.

6 Dated: October 21, 2016

Respectfully submitted,

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9 Kevin W. Harris
10 Attorney for Harry Mohan Singh Dhesi
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EXHIBIT 1

1 BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

2 In the Matter of the Cancellation of the) CASE NO. 2012-0976
3 Application for Industrial Disability) OAH NO. 2013030889
4 Retirement of)
5 HARRY MOHAN SING DHESI,)
6 Respondent,) DECISION
7 and)
8 DEPARTMENT OF CORRECTIONS AND)
9 REHABILITATION, STATE PRISON)
SACRAMENTO COUNTY,)
Respondent.)

10
11 RESOLVED, that the Board of Administration of the California Public Employees'
12 Retirement System hereby adopts as its own Decision the Proposed Decision dated August 4,
13 2016, concerning the application of Harry Mohan Sing Dhesi; RESOLVED FURTHER that this
14 Board Decision shall be effective 30 days following the mailing of the Decision.

15 * * * * *

16 I hereby certify that on September 21, 2016, the Board of Administration,
17 California Public Employees' Retirement System, made and adopted the foregoing
18 Resolution, and I certify further that the attached copy of the Administrative Law
19 Judge's Proposed Decision is a true copy of the Decision adopted by said Board of
20 Administration in said matter.

21 BOARD OF ADMINISTRATION, CALIFORNIA
22 PUBLIC EMPLOYEES' RETIREMENT SYSTEM
DOUGLAS HOFFNER
23 INTERIM CHIEF EXECUTIVE OFFICER

24 Dated: 9/27/2016

BY



DONNA RAMEL LUM
Deputy Executive Officer
Customer Services and Support

25

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

In the Matter of the Cancellation of the
Application for Disability Retirement of:

HARRY MOHAN SINGH DHESI,
Respondent,

and

DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2012-0976

OAH No. 2013030889

PROPOSED DECISION

This matter was heard before Erin R. Koch-Goodman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on March 8, 9, 21, and 22, 2016, in Sacramento, California.

John Shipley, Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Kevin Harris, Attorney at Law, represented Harry Dhesi (respondent).

There was no appearance by or on behalf of the Department of Corrections and Rehabilitation (CDCR). The matter proceeded as a default against CDCR pursuant to California Government Code section 11520, subdivision (a).

Evidence was received at hearing. The record remained open for submission of closing briefs. Respondent's Closing Brief was received on May 27, 2016, and marked as Exhibit XXXXX. CalPERS's Closing Brief was received on June 20, 2016, and marked as Exhibit 17. Respondent's Rebuttal Brief was received on July 5, 2016, and marked as Exhibit YYYYY. The record was closed and the matter was submitted for decision on July 5, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

August 9, 2016

Ruthie L. Schuetz

ISSUE

Is respondent precluded from filing an application for disability retirement in light of his for-cause dismissal from state service?

FACTUAL FINDINGS

1. Respondent was employed by the CDCR, California State Prison, Sacramento (CSP-Sac), as a Dentist from July 2, 2001, through March 16, 2009. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21154.

Respondent's Dismissal

2. On or about March 3, 2009, respondent was served with a Notice of Adverse Action (NOAA), for dismissal, effective March 16, 2009. The NOAA alleged respondent failed to properly diagnose and treat five inmate patients resulting in a gross departure from the dental standard of care; slept while at work on two occasions; and made inappropriate comments to a coworker. Respondent was charged with violations of Government Code section 19572, subdivisions (b) Incompetency, (c) Inefficiency, (d) Inexcusable neglect of duty, (m) Discourteous Treatment of the Public or Other Employees, and (t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

3. Respondent appealed the NOAA. On February 22, 2010, his appeal was heard by an administrative law judge of the State Personnel Board (SPB). Respondent denied all charges and contended that he followed *Perez Policies*¹ in providing dental care to inmate patients. On August 17, 2010, the SPB approved a Decision finding respondent violated Government Code section 19572, subdivisions (b) Incompetency, because his treatment of patients A, B, C, and E fell below the standard of care; (c) Incompetency, because he failed to properly diagnose, prioritize, and timely treat patients, such that the patients had to be seen multiple times, by other dentists, to resolve their issues; (d), Inexcusable Neglect of Duty, because respondent was sleeping while at work on two occasions; (m) Discourteous Treatment of the Public or Others, because he made inappropriate comments about his supervisor, including wishing him dead, to a coworker and made inappropriate sexual

¹ On December 19, 2005, a group of inmates housed in California correctional institutions filed a class action lawsuit alleging that they were not receiving adequate dental care as required by the Eighth Amendment to U.S. Constitution. (*Perez v. Tilton*, N.D. Cal. C-05-5241-JSW.) On May 1, 2006, the Court approved a stipulation between the inmate plaintiffs and CDCR regarding the provision of dental care to inmates with serious dental care needs. As part of the stipulation, CDCR agreed to implement the Health Care Services Division Dental Policies and Procedures (*Perez Policies*).

comments to a female coworker; and (t) Other Failure of Good Behavior, because respondent's conduct caused discredit to the institution and harm to inmate patients.

4. On January 28, 2011, respondent filed a Writ of Mandate with the Sacramento Superior Court appealing the SPB Decision. On August 8, 2011, Judge Timothy M. Frawley denied respondent's petition. Judge Frawley signed the judgment on October 11, 2011.

Respondent's Application for Disability Retirement

5. On September 6, 2011, respondent filed an application with CalPERS for industrial disability retirement (Application). Respondent stated he was disabled and/or substantially incapacitated from the performance of his usual job duties as a Dentist based upon his orthopedic (lower back) condition. Respondent submitted a Physician Report on Disability by Alicia Abels, M.D. with his Application. In the Report, Dr. Abels found respondent unable to perform his duties as of July 17, 2008. On August 24, 2012, CalPERS wrote respondent informing him his Application was cancelled.

You were dismissed from employment for reasons which were not the result of a disabling medical condition. Additionally, the dismissal does not appear to be for the purpose of preventing a claim of disability retirement. Therefore, under the Haywood case, you are not eligible for disability retirement. For that reason, CalPERS cannot accept this application for disability retirement.

Respondent's Medical Conditions

LOW BACK

6. On August 18, 2003, respondent had a low back injury (disc injury at L-5) at work. He filed a worker's compensation claim. He was off work from August 18, 2003, until approximately July 28, 2004, when he was released to work with no restrictions. On August 25, 2006, respondent was deemed permanent and stationary² in his worker's compensation case for his lower back condition.

7. On October 21, 2006, respondent made a request for reasonable accommodation (RA)³ to CSP-Sac to have a dental assistant present to assist him when he is

² "Permanent and stationary" is a worker's compensation term. A "permanent and stationary" finding means that the employee's condition or injury has plateaued to the point where additional medical treatment is not likely to improve the condition or injury. It also signals the end of temporary disability payments.

³ The Fair Employment and Housing Act (FEHA) allows a "qualified" disabled employee to request reasonable accommodation of their job duties, as long as the

performing complicated medical procedures. Dr. Abels provided a letter of support for respondent's request, dated December 5, 2006. On December 11, 2006, Dr. Abels completed a CDCR RA questionnaire, and provided further clarification of respondent's RA request, indicating: "when involved in prolonged procedures requiring greater than 10 minutes of time in one position (i.e., leaning forward – bent position at waist or neck), he should be allowed assistance i.e. licensed dental assistant." On February 6, 2007, CDCR informed respondent that his limitation (i.e. not bend or lean forward for more than 10 minutes at a time) might preclude him from completing the essential functions of the job of Dentist. As a result, CDCR sent respondent an "options letter" and reviewed the duties of a Quality Management Policies and Procedures (QMAT) Dentist position, as a potential lateral transfer. On April 2, 2007, CDCR sent Dr. Abels a questionnaire regarding the QMAT Dentist job duties.

8. In June 2007, respondent reinjured his back by bending over to pick up inmate patient files on the floor. Respondent filed another worker's compensation claim. In or about August 2007, State Compensation Insurance Fund (SCIF) informed respondent he could not file a claim for re-injury or aggravation to an already existing industrial injury. SCIF closed the file.

9. On June 26, 2007, respondent filed another request for RA, to have a dental assistant present to assist him when performing complicated medical procedures. CDCR determined that the 10-minute restriction dealt specifically with patient care, and most, if not all procedures take more than 10 minutes, meaning respondent's request was for a fulltime dental assistant for all of his patient care. On August 13, 2007, CDCR informed respondent that his RA was granted, and CSP-Sac Chief Dentist Marc Weisman agreed to ensure a dental assistant was available to respondent during his patient care.⁴

CHEST PAINS

10. On November 8, 2007, respondent was temporarily reassigned from the dental clinic to the medical warehouse, while CDCR investigated complaints against respondent for poor patient care in August 2007. On November 9, 2007, respondent suffered severe chest pains. He was hospitalized for several days and remained off work for eight months. On June 12, 2008, Dr. Abels provided CDCR with limitations for respondent's return to work: from July 1 to 30 – four hours per day maximum; from July 31 to August 29 – six hours per day maximum; and return to full duty with no restrictions on August 30, 2008. Respondent returned to work in the warehouse on July 7, 2008. On July 17, 2008, respondent again

accommodation is not an undue burden on the employer. The employer and employee must engage in an "interactive process" to determine if an accommodation is reasonable and available.

⁴ Respondent asserts that he was never provided a fulltime dental assistant. However, failure to accommodate a "disabled" employee is a violation of the FEHA; jurisdiction for such a claim is in superior court or as an affirmative defense to a NOAA at the SPB.

reinjured or aggravated his low back. On October 24, 2008, CDCR transferred respondent to the mailroom.

Respondent's Medical Evidence – Alicia Abels, M.D.

11. Dr. Abels testified at hearing. Dr. Abels practices physical medicine and rehabilitation in Folsom, California. She sees worker's compensation patients, after they are deemed permanent and stationary, for their "future medicals." Respondent was referred to Dr. Abels, by SCIF, in 2004 for a second opinion consultation. She became respondent's primary treating physician for his low back industrial injury and worker's compensation claim.

12. On September 15, 2011, Dr. Abels signed a Report on Physical Disability for respondent's Application. Dr. Abels documented the following: "Date Member Unable to Perform Job Duties - July 17, 2008"; "Origin of Injury – [h]ad a severe flare-up of pain/possible re-injury doing warehouse work." Dr. Abels answered "yes" to the following questions: "[i]s the member currently substantially incapacitated from performance of the usual duties of the position for their current employer"; "[w]ill the incapacity be permanent; [w]as the job duty statement/job description reviewed to make your medical opinion"; "[w]as the Physical Requirements of Position/Occupational Title form reviewed to make your medical opinion"; and "[w]as information reviewed that the member provided?" Dr. Abels described respondent's limitations as: "unable to lift > 25 lb. without increased pain. Unable to perform repetitive bending or stooping." At hearing, Dr. Abels said, when completing the Report on Physical Disability, she has no recollection of whether she was evaluating respondent using the Dentist position or the Warehouse Worker position.

13. A review of Dr. Abels's Progress Notes indicates that in and around July 2008, she was treating and evaluating respondent in his warehouse position. For example, among other dates, Dr. Abels saw respondent on August 5 and 21, 2008 and September 25, 2008. The August 5, 2008 notes stated, in part:

SUBJECTIVE: He is here today to discuss his job in the warehouse Harry says that on the date he had the re-injury to his back in the warehouse that his immediate supervisor in the warehouse operations had not been informed that he had any restrictions or any problems requiring accommodation with his low back. Since then, the supervisor has been informed that Harry should not lift or bend and so now Harry will have help with these activities.

ASSESSMENT: Harry's job analysis will now accommodate him for his low back problem. He should not be doing repetitive lifting and bending and should always ask for inmate help with these activities. If none is available, he should not perform the task. His supervisor was not aware of any work

restrictions at the time Harry was hurt in July. He is now aware of work restrictions.

14. Dr. Abels was questioned about the different definitions of qualifying disability under the law in California, including worker's compensation,⁵ the FEHA,⁶ and CalPERS retirement. On more than one occasion, Dr. Abels supported respondent's requests for RA, because she deemed him a disabled employee under the FEHA and entitled to a RA. Respondent had a physical condition that affected his musculoskeletal system and limited a major life activity, his work. Dr. Abels identified the CalPERS standard for disability as the substantial incapacity to perform the essential duties of an occupation, with no prophylactic measures, determined by objective findings only, not subjective complaints of pain by the patient. Dr. Abels compared the CalPERS disability standard to the worker's compensation standard, which allows for a finding based on prophylactic measures, to prevent further injury and undue patient pain.

15. When completing the Physician's Report on Disability, Dr. Abels admitted using respondent's subjective complaints of pain to make her findings. She noted that she is not an orthopedic doctor and did not complete an orthopedic examination of respondent prior to completing the Report. ~~In her practice, she believes in rehabilitation and wants her~~ patients to continue to work as long as they can. She does not believe she is in a position to tell patients to stop working, and she noted, she never said respondent should not be practicing dentistry. Instead, she was trying to help him get back to work. In sum, at all times relevant, Dr. Abels believes respondent was able to work as a Dentist, with a RA, and therefore, he is not disabled under the CalPERS standard.

Discussion

16. This Board determines an employee's eligibility for retirement benefits. The Board is guided by the Public Employees Retirement Law (PERL) (Gov. Code § 20000 et seq.). Case law has further interpreted the PERL; relevant here, are the cases of *Haywood v. American River Fire Protection District* (1999) 67 Cal.App.4th 1292, and *Smith v. City of*

⁵ A "Qualified Injured Worker" is "[a]n employee who (1) has an injury which permanently precludes, or is likely to preclude, him or her from engaging in his or her usual occupation or the position in which he or she was engaged, and (2) can reasonably be expected to return to gainful employment through vocational rehabilitation services." (Cal. Code Regs., tit. 2, § 599.779.1.)

⁶ A "physical disability" includes having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of several body systems and limits a major life activity. (Gov. Code, § 12926, subd. (m).) An employer is obligated to provide a reasonable accommodation to an employee with a qualifying disability, unless the accommodation would represent an undue hardship to the business operation. (Gov. Code, § 12926, subd. (p).)

Napa (2004) 120 Cal.App.4th 194. The Court in *Haywood* held that a severance of the employment relationship renders the employee ineligible for disability retirement, because he has no continuing relationship with the employer and is ineligible for reinstatement.

Haywood highlights two exceptions to the rule: (1) if the employee is discharged because of a disabling medical condition or (2) the employee's firing is preemptive of an otherwise valid claim for disability. (*Haywood, supra*, 67 Cal.App.4th at p. 1305-1306.) To be a valid claim, a vested right must be mature (i.e. when there is an unconditional right to immediate payment). (*Smith, supra*, 120 Cal.App.4th at p. 206.) However, the *Smith* Court stated that principles of equity might also deem an employee's right to a disability retirement to be mature, if (1) the employee "had an impending ruling on a claim for disability pension that was delayed, through no fault of his own, until after his dismissal," or (2) "there is undisputed evidence that the plaintiff was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with the loss of a limb)." (*Smith, supra*, 120 Cal.App.4th at p. 207.)

17. Here, respondent injured his low back at work in 2003. He was off work from August 2003 to July 2004, when he was released to work without restrictions. He filed a worker's compensation claim and was determined to be permanent and stationary in August 2006. In October 2006 and June 2007, respondent requested a RA, and was granted the accommodation of a dental assistant for all patient care. In August 2007, complaints surfaced regarding respondent's alleged failure to adequately diagnose and treat four inmate patients. In November 2007, he was transferred to the warehouse, pending an investigation. In October 2008, he was transferred to the mailroom. In March 2009, he was served a NOAA and terminated. He appealed, and in February 2010, his dismissal was upheld. He filed a Writ in January 2011. In September 2011, respondent filed his Application. In October 2011, the Writ was denied.

18. Respondent filed for disability retirement after he was terminated from State service. His termination was upheld. Under *Haywood*, respondent is precluded from filing an industrial disability retirement application unless he can provide evidence he meets an exception.

19. Respondent argues that CDCR failed to provide him a dental assistant as a reasonable accommodation.⁷ Without a dental assistant, respondent asserts he was unable to do his job because of his disabling medical condition.⁸ Therefore, because of his disabling

⁷ Respondent asks this Board to make a finding against CDCR for its failure to accommodate him. The Board does not have jurisdiction to make such a finding.

⁸ Respondent asks this Board to make a finding against CDCR for its failure to file a disability retirement application on respondent's behalf, under Government Code section 19253.5, subdivision (i)(1); or in the alternative, allow respondent's application under the principles of equity because of CDCR's failure. To that end, respondent alleges that CDCR knew, that without reasonable accommodation, respondent was unable to perform the work of his position and they were therefore obligated to file for disability retirement on his behalf.

medical condition, respondent was unable to properly treat the inmate patients at issue in the NOAA, and he was unlawfully terminated as a direct result of his disabling medical condition. At hearing, CSP-Sacramento Dentist John Maciel and Chief Dentist Marc Weisman testified. Maciel was respondent's acting supervisor from June through November 2007. During that time, respondent told Maciel he had back pain on some days and complained that his dental assistant was leaving early, but respondent never told Maciel he could not complete his patient care because of his back or because he was without a dental assistant. Similarly, respondent never told Weisman that he did not have a dental assistant for procedures, thereby precluding his ability to care for patients.

Statewide Dental Director Dentist William Kuykendall also testified. He opined regarding respondent's failures in treating the inmate patients at issue in the NOAA. Kuykendall testified as an expert at respondent's SPB hearing as well. Kuykendall believes that respondent's care of the five inmate patients at issue fell below the standard of care. For example, Kuykendall referenced Patient B, explaining that he had a clearly infected tooth that needed to be extracted. However, respondent failed to diagnose the infection or extract the tooth. Kuykendall opined that if respondent was unable to extract the tooth because of his back, he should have asked for assistance, or noted in the file he was unable to extract the tooth without assistance and ordered the inmate patient back immediately, because of the infection, to be treated by another dentist, but respondent did none of the above. Given the above, respondent was discharged for cause and not because of a disabling condition.

20. Perhaps most important, at hearing, Dr. Abels was clear that respondent was, at all times, capable of completing the essential functions of the Dentist job, with accommodation. Her conclusion, by definition, makes respondent ineligible for a disability retirement under the substantially incapacitated standard.

21. Given the above, respondent did not establish that he was discharged because of a disabling medical condition or that his firing was preemptive of an otherwise valid claim for disability. Respondent did not present evidence that he had a matured right to disability retirement before he was separated from service or that a favorable decision by CalPERS was a foregone conclusion. When all of the evidence and arguments are considered, respondent did not establish that his Application should be accepted by CalPERS.

First, the Board does not have jurisdiction to make a finding against CDCR. Second, assuming, *arguendo*, CDCR had filed an application on respondent's behalf, simply filing an application does not mean CalPERS would grant disability retirement to the applicant. Third, Government Code section 19253.5, subdivision (i)(1), requires an employee to be "unable to perform the work of his or her present position or any other position in the agency." There are no facts in the record to support such a conclusion.

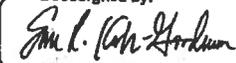
LEGAL CONCLUSIONS

1. Respondent has the burden to prove that, by a preponderance of the evidence, he is entitled to file an application for industrial disability retirement.
2. In *Haywood, supra*, 67 Cal.App.4th at p. 1297, the Court found that, when “an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination of the employment relationship renders the employee ineligible for disability retirement.” The Court opined that the employee’s dismissal “constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement—the potential reinstatement of his employment relationship with the District if it ultimately is determined that he is no longer disabled.” (*Ibid.*)
3. In *Smith, supra*, 120 Cal.App.4th at pp. 203-204, the Court explained “the key issue” is whether the employee’s right to a disability retirement “matured” before the employee’s separation from service (i.e. CalPERS determined that the employee had an unconditional right to immediate payment). (*Id.* at p. 206.) The *Smith* Court also discussed the application of equitable principles to “deem an employee’s right to a disability retirement to be matured and thus survive a dismissal for cause.” (*Id.* at p. 207.) For example, if the employee “had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after dismissal”; or “there is undisputed evidence that the plaintiff was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb).”
4. Government Code section 21154, provides, in relevant part, that an application for disability retirement “shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion.”
5. As set forth in the Factual Findings, before filing for disability retirement, respondent was dismissed for cause from state service. Respondent did not establish either: (1) that his separation from state service was the ultimate result of his disabling condition; or (2) that his separation from state service preempted an otherwise valid claim for disability retirement. In addition, respondent did not establish there were any equitable principles that should be applied to grant him the right to seek disability retirement.
6. Pursuant to the holdings in *Haywood* and *Smith*, CalPERS properly cancelled respondent’s application for disability retirement.

ORDER

The appeal of respondent Harry Mohan Singh Dhesi is DENIED. CalPERS properly cancelled respondent's application for disability retirement.

DATED: August 4, 2016

DocuSigned by:

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ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On September 27, 2016, I served the foregoing document described as:

DECISION – In the Matter of the Cancellation of the Application for Industrial Disability Retirement of HARRY MOHAN SING DHESI, Respondent, and DEPARTMENT OF CORRECTIONS AND REHABILITATION, STATE PRISON, SACRAMENTO COUNTY, Respondent; Case No. 2012-0976; OAH No. 2013030889.

on interested parties in this action by placing ___ the original XX a true copy thereof enclosed in sealed envelopes addressed as follows:

Kevin W. Harris
1387 Garden Hwy, Suite 200
Sacramento, CA 95833

Office of Administrative Hearings 2349
Gateway Oaks Drive, Suite 200
Sacramento, CA 95833-4231

Via Email:
OAH Sacto - sacfilings@dgs.ca.gov**

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P. O. Box 290002
Represa, CA 95671-0005

[X] BY MAIL -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

[X]** BY ELECTRONIC TRANSMISSION: I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.

Executed on September 27, 2016, at Sacramento, California.

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

Kathie Schnetz
NAME

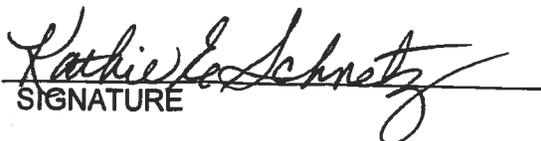

SIGNATURE

EXHIBIT 2



California Public Employees' Retirement System
Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707
TTY: (877) 249-7442
(916) 795-3675 phone • (916) 795-3659 fax
www.calpers.ca.gov

Ref. No. 2012-0976

September 27, 2016

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Kevin W. Harris
1387 Garden Hwy, Suite 200
Sacramento, CA 95833

Subject: In the Matter of the Cancellation of the Application for Industrial Disability Retirement of HARRY MOHAN SING DHESI, Respondent, and DEPARTMENT OF CORRECTIONS AND REHABILITATION, STATE PRISON, SACRAMENTO COUNTY, Respondent

Dear Mr. Harris:

We enclose a copy of the Board of Administration's Decision in the above matter. Please be advised that this Decision was made pursuant to the Administrative Procedure Act (Gov. Code, § 11370, et seq.) and California Code of Regulations, Title 2, sections 555-555.4, on September 21, 2016.

Any party who participated in this case and is dissatisfied with this Decision has a right to petition the Board for reconsideration within 30 days of the date of mailing of the Decision (the date of mailing is indicated on the attached Proof of Service), and the right of appeal to the courts within 30 days after the last day on which reconsideration can be ordered. (See Gov. Code, §§ 11521 and 11523.) It is not necessary that a Petition for Reconsideration be filed in order to appeal to the courts. (Gov. Code, § 11523.) **If you choose to file a Petition for Writ of Mandate, please submit a written request to our office for preparation of the administrative record.**

The Chief Executive Officer may grant a stay of the effective date of the Decision, not to exceed 30 days, so that a Petition for Reconsideration may be filed. If additional time is needed by the Board to evaluate a petition prior to the expiration of the stay, the Chief Executive Officer may grant an additional stay for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied. (Gov. Code, § 11521.)

All Petitions for Reconsideration **MUST BE** received by the CalPERS Executive Office within 25 days from the date the Decision was mailed in order for the Chief Executive Officer to grant a stay of execution.

Please title your submission "Petition for Reconsideration" and ensure that all personal information has been redacted, as this will become a public document when included in the agenda item. Please send this to:

Cheree Swedensky, Assistant to the Board
Executive Office
California Public Employees' Retirement System
P. O. Box 942701
Sacramento, CA 94229-2701
Fax: (916) 795-3972

In addition, it is recommended that you send, via facsimile, a copy of any Petition for Reconsideration to the attention of MATTHEW G. JACOBS, General Counsel, at (916) 795-3659.

If you do not file a Petition for Reconsideration or if your Petition for Reconsideration is denied, the next step in the appeal process is to file a Petition for Writ of Mandate in Superior Court.

Sincerely,


MATTHEW G. JACOBS
General Counsel

MGJ:kes

Enclosure

cc: California State Prison, Sacramento, California Department of Corrections & Rehabilitation
Katherine Minnich, California Department of Corrections & Rehabilitation

1 **PROOF OF SERVICE**

2 I am employed in the City and County of Sacramento, State of California. I am
3 over the age of 18 and not a party to the within action. My business address is 1387 Garden
4 Hwy., Ste 200, Sacramento, California 95833.

5 On October 21, 2016, I served the foregoing Documents(s) described as:

6 **RESPONDENT HARRY MOHAN SINGH DHESI'S PETITION FOR**
7 **RECONSIDERATION OF DECISION AND REQUEST FOR STAY OF EXECUTION**
8 **OF THE DECISION OF THE 9/21/2016 DECISION OF THE BOARD OF**
9 **ADMINISTRATION OF THE CALIFORNIA PUBLIC EMPLOYEE'S RETIREMENT**
10 **SYSTEM**

11 on the interested parties, by placing a true and correct copy thereof in a sealed envelope(s)
12 addressed as follows:

13 Matthew. G. Jacobs
14 General Counsel
15 John Shipley
16 CalPERS
17 PO Box 942883
18 Sacramento, CA 95811
19 Via Fax: (916) 795-3659

Cheree Swendensky, Assistant to the Board
Executive Office
California Public Employees Retirement Board
P.O. Box 942701
Sacramento, CA 94299-2701
Via Fax: (916) 795-3659

20 Robert K. Gaultney
21 Senior Staff Attorney
22 CDCR
23 Legal Affairs
24 PO Box 942883
25 Sacramento, CA 94283-0001
26 Via Fax: (916) 327-5306

Office of Administrative Hearings Sacramento
2349 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833
Via Email: OAH Sacto- sacfilings@dgs.ca.gov

27 Katherine Minnich
28 CDCR
Office of Personnel Services
1515"S" Street, Room 211-South
Sacramento, CA 958112

California State Prison, Sacramento
CDCR
Brian Holmes
Return to Work Coordinator
P.O. Box 290002
Represa, CA 95671-0005

29 **X VIA U.S. MAIL:**

30 I am readily familiar with the firm's practice of collection and processing of
31 correspondence for mailing. Under that practice such envelope(s) would be deposited with the
32 U.S. postal service on October 21, 2016, with postage thereon fully prepaid, at Sacramento,
33 California

34 **X VIA FACSIMILE:**

35 I sent a true copy thereof via telephone facsimile transmission to the persons at the
36 fax numbers listed above from fax number (855) 800-4454, pursuant to Government Code
37 section 11440.20 and California Code of Regulations, title 1, section 1008, subdivision (d) and a
38 hard copy to follow by U.S. mail to the address listed above.

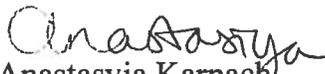
39 **X BY ELECTRONIC TRANSMISSION:** I caused such document to be sent to the
40 addressee at the electronic notification address above. I did not receive within a

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reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on October 21, 2016, at Sacramento, California.


Anastasya Karpach
Declarant