

ATTACHMENT C

**RESPONDENT'S ARGUMENT REGARDING THE
PETITION FOR RECONSIDERATION**

ATTACHMENT C

**LAW OFFICE OF
RICHARD J. MEECHAN**

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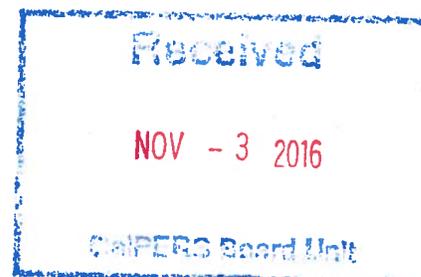
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November 2, 2016

Ms. Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
PO Box 942707
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**Board of Administration (Board) of the California Public Employees Retirement System
(CalPERS)**

Case No. 2015-0088/ OAH NO. 2015070687

In the Matter of the Application for Disability Retirement of Cari J. McCormick

To the CalPERS Board of Administration:

I. INTRODUCTION

Respondent Cari McCormick hereby submits this written argument in support of her Petition for Reconsideration of its decision to deny Respondent a disability retirement. This argument, which explains the legal errors in the ALJ's *Decision*, should be read in conjunction with Respondent's *Petition for Reconsideration* (filed October 25, 2016), which will be before this Board at the scheduled meeting on November 16, 2016.

II. ARGUMENT

The ALJ applied an incorrect legal test of disability by suggesting that the Respondent had to show, not only that she was incapacitated from performing the usual duties of her Appraiser III position with the County, but that she had to additionally show that she was incapacitated from performing those duties for other California agencies covered by the PERL. The ALJ's *Decision*, which this Board adopted, relied on *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340-342 for its authority.

Re: McCormick, Cari
November 2, 2016

Subsequent to the Nolan decision, however, the State amended the PERL law and legislatively reversed the Nolan decision. Now, it is only necessary for Respondent to demonstrate she is incapacitated from performing her usual and customary duties for her employing agency. See Gov. Code § 21156, amended in 2006 effective 1/1/2007 by AB 2244, which now provides, *inter alia*:

If the medical examination and other available information show to the satisfaction of the board ... that the member in the state service is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability. (Emphasis by underlining added.)

The ALJ also cited language from *Craver v. City of Los Angeles* (1974) 42 Cal.App.3d 76 in which the court found that the City 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." The court in *Nolan* explained why *Craver* and the other *Seminole* "light duty" cases are inapposite to disability retirement cases arising under the PERS statute: *those cases* involved construction of disability retirement provisions of city charters, not the PERS.¹ Unlike *Craver*, the PERS statute specifically identifies the duties from which Respondent McCormick must be incapacitated:

If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.
(Gov. Code, § 21156, subd. (a)(1).)

¹ See, *Barber v. Retirement Board* (1971) 18 Cal.App.3d 273, 276 [San Francisco]; *Craver, supra*, 42 Cal.App.3d at p. 79 [Los Angeles]; *O'Toole v. Retirement Board* (1983) 139 Cal.App.3d 600, 603 [San Francisco].)

Re: McCormick, Cari
November 2, 2016

In *Nolan*, the Court continued by explaining that:

The provision of the Public Employees' Retirement Law (PERL) at issue here is section 21156, which provides for disability retirement for a member who is incapacitated physically or mentally for the performance of his or her duties in the state service. (*Supra.* at p. 353)

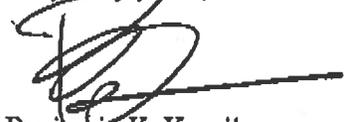
The PERS provision differs markedly from *Craver*. The latter allowed the disabled employee – a police officer – to be assigned to duties so long as they were still within the same City "Department." The PERS provision has a much narrower scope because incapacity is measured only against the disabled employee's actual duties. Thus, merely maintaining an employee within the same Department does not satisfy the requirements of Gov. Code, § 21156.

Therefore, because Respondent has shown she is incapacitated from performing her Appraiser III duties for the County insofar as those duties require her to work in the courthouse in which she becomes symptomatic, she qualifies for a CalPERS' disability retirement.

III. CONCLUSION

For the foregoing reasons, as well as those contained in Respondent's *Petition for Reconsideration* dated October 25, 2016, Respondent McCormick respectfully urges this Board to consider her arguments, to find that she is eligible for a disability retirement, and to grant her *Petition for Reconsideration*.

Very truly yours,



Benjamin K. Karpilow
BKK: mm

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PROOF OF SERVICE BY MAIL

I, the undersigned, am employed in the County of Sonoma; I am over 18 years of age, and I am not a party to the within action; my business address is: Law Office of Richard J. Meechan, 703 Second Street, 2nd Floor, Suite 200 , Santa Rosa, CA. On November 3, 2016 I served the within:

RESPONDENT CARI MCCORMICK'S ARGUMENT IN SUPPORT OF HER PETITION FOR RECONSIDERATION

on the parties listed below in said action by placing a true and correct copy thereof in a sealed envelope with the required postage therein, fully prepaid, for collection and mailing on the date and at the place shown below following ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that this correspondence was placed for collection and mailing, it was deposited in the ordinary course of business in a sealed envelope with postage fully prepaid and deposited in the United States mail at Santa Rosa, CA, addressed as follows:

Mr. Matthew G. Jacobs
CalPERS, Legal Office
By Fax: (916) 795-3659

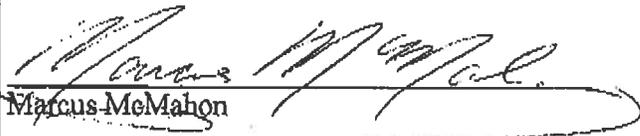
Mr. John Shipley
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Board of Administration of CalPERS
Ms. Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
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Sacramento, CA 94229
(and by fax: (916) 795-3972)

Case No.: 2015-0088/ OAH NO. 2015070687

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

Executed on November 3, 2016 at Santa Rosa, CA.


Marcus McMahon

PLEASE DELIVER IMMEDIATELY**FACSIMILE TRANSMITTAL**

5 Total pages, including cover sheet

TO:

FROM:

Board of Administration of CalPERS
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November 3, 2016

Re: Case No.: 2015-0088/ OAH NO. 2015070687

List Attachments: **RESPONDENT'S ARGUMENT IN SUPPORT OF HER
PETITION FOR RECONSIDERATION**

Greetings Ms. Swedensky,

Please find attached Respondent Cari McCormick's Argument in support of her Petition for Reconsideration in the matter of the application for Disability Retirement. A hard copy of this document will be forwarded to you by mail.

Very truly yours,



cc: Mr. Matthew G. Jacobs
CalPERS, Legal Office
By Fax: (916) 795-3659

IF THERE IS A PROBLEM WITH RECEIPT OF THIS TRANSMISSION, PLEASE CALL (707) 528-4409

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