

**ATTACHMENT C**  
**RESPONDENT(S) ARGUMENT(S)**

## RESPONDENT'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent **Sheldon 'Kyle' Scarber** (Respondent Scarber) rose to the rank of Assistant Chief with Respondent California Highway Patrol (CHP) – culminating at the Central Division Office, Fresno, California. Respondent Scarber's promotional advances occurred in Central Division (Sergeant); CHP headquarters, Sacramento (Lieutenant); Federal Bureau of Investigation, Washington, D.C.; Central Division (Captain) and CHP headquarters assigned to the Office of Assistant Commissioner Field; and Central Division (Assistant Chief). By virtue of his employment with the CHP, Respondent Scarber is a state safety member of CalPERS.

It is undisputable Respondent Scarber was and is entitled to fairness and equity regarding his Application for Industrial Disability Retirement (IDR), since he first submitted his Application in February of 2013; however, he was intentionally and otherwise denied a timely review and unjustly provided a denial of his Application for IDR. Upon the Boards review of the Proposed Decision and Order by the Honorable Judge Coren D. Wong (whom reviewed and considered factual and legal issues; evidentiary matters, statements, and legal conclusions citing case law used by CalPERS to deny Respondent Scarber's Application for IDR<sup>1</sup>); the Argument to Adopt the Proposed Decision; and ultimately applying the principles of equity and fairness, Respondent Scarber prays upon the Board to render the only reasonable conclusion in that the Board adopt the Proposed Decision/Order in its entirety.

Respondent Scarber was placed on **no-duty status** by his designated primary care physician (Doctor Robert Graham, M.D. and Julie Guyette, Family Nurse Practitioner (FNP)), on **December 20, 2012**, on the basis of hypertension, cardio, epilepsy, anxiety and hypertension. Respondent Scarber was instructed by his primary care physicians that he was never to return to a law enforcement position, nor within the CHP based on his medical conditions and his inability to perform the required critical tasks of a CHP officer.

On **February 27, 2013**, CalPERS received Respondent Scarber's Application for Industrial Disability Retirement, and all necessary required documents to process his application. This included documentation required to be filled out and signed by his immediate departmental superior prior to submission. Respondent Scarber's cumulative disabilities included hypertension, cardio, epilepsy, anxiety and hypertension beginning in 1997. (Application submitted by personal delivery to the Fresno CalPERS regional office.) Respondent Scarber was provided a response from CalPERS his Application will be processed as quickly as possible.

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<sup>1</sup> Legal Conclusions rendered by the Honorable Judge Coren D. Wong as a result of *the Hearing In the Matter of the Cancellation of the Application for Industrial Disability Retirement of Sheldon K. Scarber* conducted on September 15, 2016, in Fresno, California. Case number 2015-0243; OAH number 2016050434, pp 5-7.

On **August 26, 2013**, upon the advice of CalPERS representative(s), Respondent Scarber submitted his Application for Service Retirement by personal delivery to the Fresno CalPERS regional office.

(Note: Between March 11, 2013, and July 9, 2013, Respondent Scarber personally spoke with CalPERS representatives, up to and including the Senior Staff Attorney, Jeanlaurie Ainsworth, regarding the status of his pending Application. Respondent Scarber was provided several varying responses as to the review status of his Application.)

CalPERS representatives informed Responded Scarber his better alternative was to seek service retirement with an Application for IDR, since Respondent's pending Application was somewhere within CalPERS but nobody was sure where. Once again, Respondent followed the advice of CalPERS.

Respondent Scarber began receiving his service retirement benefits upon his 50<sup>th</sup> birthday; October 31, 2013.

On **April 14, 2014**, CalPERS notified Respondent Scarber that his Application for IDR was denied and he filed a timely appeal.

When the established and procedural process is disrupted or delayed by no fault of the applicant, as in Respondent Scarber's case, on the surface the acts and harm appear malicious and intentionally, not out of caution or slow decision making, but cause distress while Respondent Scarber's Application was delayed more than 13 months before the Board of Administration ruled on his Application.

From the time Respondent Scarber was placed on "no-duty" status on December 20, 2012, until his matter was resolved, Respondent Scarber was required to utilize the use of his sick leave/vacation time to seek continued medical care.

Respondent Scarber has patiently complied with any and all instructions, time frames, and directions of state entities (CalPERS and State Compensation Insurance Fund (SCIF)), in an effort to assist him with his Application and industrial related injuries and illnesses. Respondent Scarber willingly participated in Agreed Medical Examinations (AME) and Qualified Medical Examinations (QME) between the time he filed his initial Application and until such time the Board of Administration ruled on his Application. (Dr. Sobol's examination was conducted after the Board of Administration Ruling.) Each independent medical evaluator ruled in favor of Respondent Scarber as mentioned below. Unfortunately, the principles of equity, procedures and processes were to ensure accountability by Respondent Scarber and not by CalPERS representatives assigned to review Respondent Scarber's Application while collaborating with SCIF and the CHP.

**AME – Dr. Samuel Sobol. Cardiovascular. 37% industrial disability rating;**

**AME – Dr. Jacks. Psychological. 65% industrial disability rating, 26% permanent disability;**

**QME – Dr. Kurt Miller. Neurology. 25% industrial disability rating; and**

**QME – Dr. Mark Bernhard. Spine (lower back). 40% industrial disability rating.**

Additionally, Respondent Scarber had a Heart Monitor Implant inserted close to his heart by his Cardiologist, Dr. Dalpinder Sandhu and is required to take medications for the rest of his life. As of the preparation and submission of this Argument in Support of Proposed Decision, the Heart Monitor is still in place. Ms. Elizabeth Yelland, Senior Staff Attorney representing CalPERS, stated during the Hearing before Judge Wong that medical information was not evaluated/considered. This demonstrated act contradicts the document (booklet) for access by all state employees seeking guidance or answers pertaining to disability or industrial disability retirement.<sup>2</sup>

In accordance with Respondent Scarber's primary care provider, he is still not employable due to his chronic, job related, injuries and illnesses. Additionally, the state approved, primary treating physician (Dr. Polglase), has imposed strict limitations limiting Respondent Scarber's day-to day activities.

The overriding factor regarding Respondent Scarber's case was did he survive the termination in which the CHP was seeking? The answer is an unequivocal "yes!" Was Respondent Scarber's and his Application treated with fairness, ethical practices, and equitable treatment? The answer is an unequivocal "no!"

Respondent Scarber stipulates the CHP conducted an Internal Investigation against him as discussed within this matter and that he entered into a Settlement Agreement with CHP; and that the Board of Administration had not yet ruled on his claim for IDR when he signed the Agreement or the State Personnel Board's final approval of the Agreement. As argued in the Hearing and this document is the fact Respondent Scarber waited more than 13 months for the Board of Administration to apply a ruling on his Application. However, Respondent Scarber contests and contested, verbally and in writing, material used and/or not used by Ms. Elizabeth Yelland, Senior Staff Attorney representing CalPERS. The manner in which she prepared, presented, articulated, and "defended" this case, and in making the determination leading to the cancellation of Respondent Scarber's Application appeared biased and riddled with unfairness and unethical practices.<sup>3</sup> At no time did any CalPERS representative request any information or additional documentation of Respondent Scarber from the initial filing of his Application, through the cancellation of his Application. However, CalPERS did request several documents from the CHP and were only provided limited documents. An example of one such document was the "Skelly Hearing" in which Respondent Scarber participated. The timing of such request did not hinder the Board of Administration's decision process.

At no time did Ms. Elizabeth Yelland, provide any explanation nor plausible rationale, orally or in writing, to Respondent Scarber nor to Judge Wong, as to the exorbitant delay relating to Respondent Scarber's Application. A relevant and underlying question asked over and over

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<sup>2</sup> CalPERS. *A Guide to Completing Your CalPERS Disability Retirement Election Application; Other Considerations Regarding Disability Retirement; Workers' Compensation*, p. 26. "Medical evidence will be required to show that you meet the CalPERS definition of disability." (*Emphasis added.*) <https://www.calpers.ca.gov/.../disability-retirement-pub.pdf>. Accessed December 8, 2016.

<sup>3</sup> Addressed in detail in Respondent's Closing Argument.

again by Respondent Scarber. Instead she focused solely on irrelevant case laws,<sup>4</sup> without any consideration of the relevant and underlying question nor the totality of the case before her. Additionally, her methodology in “defending” the denial of Respondent Scarber’s Application for IDR is plagued with procedural, administrative, judicial prejudice and error.<sup>5</sup>

Respondent Scarber’s decision to appeal the denial of IDR was based on principle, courage – doing the right thing despite the adversity, and because the case was treated unjustly and unfairly, and without equity, therefore rendering the cancellation of the Application unjustifiable and without merit.

The Proposed Decision/Order is supported by the law and facts. Respondent Scarber argues that the Board adopt the Proposed Decision.

Because the Proposed Decision/Order properly applies the law to the salient facts of this case, the risks of adopting the Proposed Decision/Order of the Honorable Judge Coren D. Wong are minimal, justifiable, and proven beyond a preponderance by Respondent Scarber. The principles of equity here does not replace or violate the law, but it backs it up and supplements it as in this case before the Board. Equity follows appropriate rules of law which are thoroughly documented by the Honorable Judge Coren D. Wong. As such, Respondent Scarber respectfully requests the Board to render a just and proper decision that parallels that of Judge Wong in that Respondent Scarber be granted his Application for Industrial Disability Retirement. Thank you for your time!

Respectfully Submitted

December 8, 2016



SHELDON “KYLE” SCARBER

In Pro Per

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<sup>4</sup> *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*) and its progeny *Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01 (*Vandergoot*), and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*).

<sup>5</sup> Addressed in detail in Respondent’s Closing Argument.