

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

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In the matter of the Application  
for Industrial Disability  
Retirement of

-----  
SHELDON K. SCARBER )  
 )  
 Respondent, ) AGENCY CASE NO.  
 ) 2015-0243  
 and )  
 ) OAH NO. 2016050434  
 CALIFORNIA HIGHWAY PATROL, )  
 )  
 Respondent. )  
 )

CalPERS Regional Office  
10 River Park Place East, Suite 230  
Fresno, California 93720

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Thursday, September 15, 2016

9:00 a.m.

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Reported by: KELLI A. DIAZ, CSR No. 13930

DIAMOND COURT REPORTERS  
1107 2nd St., Suite 210  
Sacramento, CA 95814  
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A P P E A R A N C E S:

Administrative Law Judge: COREN WONG  
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1 Thursday, September 15, 2016, Fresno, CA 9:00 a.m.

2 ADMINISTRATIVE LAW JUDGE WONG: We're here on the  
3 record before the Board of Administration for the California  
4 Public Employees' Retirement System in the matter of the  
5 cancellation of the application of industrial disability  
6 retirement of Sheldon K. Scarber and the California Highway  
7 Patrol. It's agency case number 20150243, OAH number  
8 2016050434. My name is Coren Wong. I'm an Administrative  
9 Law Judge with the Office of Administrative Hearings.

10 Counsel, would you please state your appearance for  
11 the record?

12 MS. YELLAND: Good morning, Your Honor.  
13 Elizabeth Yelland on behalf of CalPERS.

14 ADMINISTRATIVE LAW JUDGE WONG: Good morning. And  
15 sir, are you Sheldon Scarber?

16 MR. SCARBBER: Sheldon Kyle Scarber. Yes, sir.

17 ADMINISTRATIVE LAW JUDGE WONG: Okay. Mr. Scarber,  
18 have you appeared in an administrative proceeding before?

19 MR. SCARBBER: Yes, sir. I have.

20 ADMINISTRATIVE LAW JUDGE WONG: Okay. I will tell you  
21 a little bit about what you can expect from this proceeding  
22 from a procedural standpoint, in case it's different from the  
23 one you attended before.

24 First, I notice that you're here representing  
25 yourself, which is your right. You also have the right to be

1 represented by counsel at your own expense. And is it your  
2 desire to proceed today without counsel?

3 MR. SCARBER: Well, I put in a motion for continuance  
4 because I've got a meeting at 10:00 -- I don't know how long  
5 this is going to take -- I have a meeting at 10:00 with the  
6 attorney because some things came up that parlay into this,  
7 some information I recently discovered within the past couple  
8 of days. But the continuance was denied, so I will go as  
9 long as I can and meet with the attorney after the fact.

10 ADMINISTRATIVE LAW JUDGE WONG: Okay. So we're here  
11 because you have filed -- you filed an application for  
12 disability retirement and the -- CalPERS denied it on the  
13 basis of the Haywood decision and you appealed the denial.

14 MR. SCARBER: Yes, sir.

15 ADMINISTRATIVE LAW JUDGE WONG: So the burden will be  
16 on Ms. Yelland to prove the applicability of the Haywood  
17 matter and the cases that follow Haywood. So she can  
18 introduce documents, she could also call witnesses, or she  
19 could do both. You have the right to object to any evidence  
20 she offers, whether it's a question she asks of a witness she  
21 calls, or of a document that she offers.

22 Now, recognizing you may not know the technical/legal  
23 grounds for an objection, what I would suggest is that if you  
24 have any questions or concerns about a document she offers or  
25 a question she asks, you immediately raise those questions or

1 concerns, and I will treat that as a legal objection and  
2 apply the proper standard when ruling on the objection.

3 MR. SCARBBER: Yes, Your Honor.

4 ADMINISTRATIVE LAW JUDGE WONG: With regard to any  
5 witnesses she may call, you have the right to cross-examine  
6 them, which is just a fancy way of saying you get to ask them  
7 questions after she is done asking her questions.

8 And then after Ms. Yelland is done presenting her  
9 case, you will have the opportunity to present yours. And,  
10 again, you could call witnesses, you could introduce  
11 documents, or you could do both. You could testify on your  
12 behalf or you could choose not to testify on your behalf.  
13 However, if you choose not to testify on your behalf, then  
14 Ms. Yelland has the right to call you as one of her witnesses  
15 after you finish presenting your case. So unlike in criminal  
16 proceedings where there is a right to remain silent and not  
17 testify, there is no such right in administrative proceedings  
18 this morning.

19 And just as you have the right to object to any of her  
20 evidence, she has the same right with regard to any of yours.  
21 She also has the same right of cross-examination of any  
22 witnesses you may call, including yourself.

23 If you have any questions during the hearing, please  
24 do not hesitate to ask. I'm happy to answer any questions  
25 you may have; however, I cannot give you legal advice.



1 MR. SCARBER: Correct.

2 ADMINISTRATIVE LAW JUDGE WONG: And, again,  
3 recognizing that you may not know the difference between a  
4 question that seeks legal advice and one that does not, what  
5 I would suggest is that, if you have any questions of any  
6 nature, that you simply go ahead and ask them. And if it's a  
7 question that I can answer, I will go ahead and do so. But  
8 if it's one that really seeks legal advice, then I will let  
9 you know that and explain that I cannot answer the question.

10 Do you have any questions at this time?

11 MR. SCARBER: No, sir. Just a couple of requests.

12 ADMINISTRATIVE LAW JUDGE WONG: Okay. And what are  
13 those?

14 MR. SCARBER: I've got a on-the-job back injury, so I  
15 would request that when it starts bothering me, if I can  
16 stand --

17 ADMINISTRATIVE LAW JUDGE WONG: Of course.

18 MR. SCARBER: -- or take a break and take medication,  
19 if necessary, but I will try to get through this as soon as  
20 possible.

21 ADMINISTRATIVE LAW JUDGE WONG: Sure, sure. Stand as  
22 needed, and when you need a break, just let me know.

23 MR. SCARBER: And I don't know when to -- when you  
24 anticipate how long this will go?

25 MS. YELLAND: I will take probably less than 45

1 minutes to present my case.

2 MR. SCARBBER: Okay. Do -- is there any objections to  
3 do for closing -- do we do closing arguments?

4 ADMINISTRATIVE LAW JUDGE WONG: You do, yes.

5 MR. SCARBBER: Closing statements?

6 ADMINISTRATIVE LAW JUDGE WONG: Yes, yes.

7 MR. SCARBBER: Is there -- what is the proper method of  
8 doing a written closing argument?

9 ADMINISTRATIVE LAW JUDGE WONG: If you want -- you can  
10 either, so oral or you could do written. You really could do  
11 both. I prefer not to have both because they tend to be  
12 duplicative, so if you want written closing arguments, then  
13 that's something we could talk about. And if that is what  
14 ultimately is ordered, then we set a timeline for filing the  
15 closing statements.

16 MR. SCARBBER: It depends on how long it takes. I  
17 called the attorney and said I would be there about 10:00 or  
18 10:30 and so it depends on how long this goes. And if we  
19 don't get an opportunity to do closings, I'd make a request  
20 to possibly do closing arguments in a written manner.

21 ADMINISTRATIVE LAW JUDGE WONG: Why don't we hold off  
22 on that and see where we go. And if it turns out we have  
23 time and you want to do an oral one, we'll go that way, or if  
24 it turns out we don't have time or we do have time, but you  
25 want to do it in writing anyway, we can talk about that.

1 MR. SCARBBER: And, lastly, I've got my right shoe off,  
2 if anybody is offended by my shoe, because my right foot  
3 swells up.

4 ADMINISTRATIVE LAW JUDGE WONG: Make yourself  
5 comfortable.

6 MR. SCARBBER: So I am shoeless. Well, one shoeless.

7 ADMINISTRATIVE LAW JUDGE WONG: All right. Very good.  
8 Ms. Yelland, do you wish to make an opening statement?

9 MS. YELLAND: Sure. Briefly, Your Honor, thank you.

10 ADMINISTRATIVE LAW JUDGE WONG: Okay.

11 MS. YELLAND: This case involves a cancellation of  
12 industrial disability retirement of Sheldon Scarber. CalPERS  
13 received Mr. Scarber's disability application of  
14 February 27, 2013, that's Exhibit 3. Mr. Scarber also  
15 submitted a service retirement application on July 9th, 2013,  
16 that's Exhibit 4.

17 Whenever CalPERS receives any application for  
18 retirement, we contact the employee, we contact the employer,  
19 and we request documents. So we did request documents from  
20 both Mr. Scarber and his employer, California Highway Patrol.

21 And by the way, California Highway Patrol has notified  
22 me that they will not be showing up today, so if you want to  
23 take a default as to them.

24 ADMINISTRATIVE LAW JUDGE WONG: Oh, okay. Thank you  
25 for reminding me of that. I don't want to interrupt your

1 statement, so I will have you finish your statement, and then  
2 we will do that. Thank you.

3 MS. YELLAND: That will be fine.

4 When we got the information and documents from  
5 California Highway Patrol, we found that Mr. Scarber had been  
6 served with a Notice of Adverse Action, that's Exhibit 10,  
7 effective date of termination August 29th, 2013. Mr. Scarber  
8 appealed his termination and during the pendency of his  
9 appeal, he entered into a Stipulated Settlement and Release  
10 of All Claims, that's Exhibit 11. And he was represented by  
11 counsel during his appeal and settlement.

12 On December 12th, he signed his settlement agreement,  
13 so did his attorney. One of the key terms of the stipulated  
14 settlement reads, paragraph four, Exhibit 11, page two,  
15 "Appellant agrees not to seek or accept employment with the  
16 CHP either now or in the future. If he should obtain  
17 employment in contravention of this provision, he may be  
18 immediately dismissed without limitation to time and with no  
19 right of appeal and no right to contest his dismissal."

20 On January 9th, 2014, the SPB approved the stipulated  
21 settlement and it is now final, that's Exhibit 12. So  
22 pursuant to the express terms of the stipulated settlement,  
23 Mr. Scarber can never return to employment with the  
24 California Highway Patrol. That's a complete severance of  
25 his employment relationship with CHP. And when there is a

1 complete severance of an employment relationship, that  
2 triggers the Haywood, Smith, Garcia, and Vandergoot cases,  
3 all of which -- well, actually, that's not true -- some of  
4 which are included in CalPERS request for official notice,  
5 specifically, Garcia and Vandergoot, Exhibit 15 and 16.

6           When CalPERS reviewed the documents provided by the  
7 CHP, they determined he was terminated for cause on the  
8 following grounds: He had pornographic images on his  
9 computer he used for private gain or advantage to prestige or  
10 influence as a member of the CHP. He directed a subordinate  
11 employee to unlawfully access CLETS in order to run a history  
12 check on a family member. He misused used e-mails. He  
13 willfully and insubordinately disobeyed a direct order  
14 directing him not to discuss an ongoing investigation. He  
15 aided and conspired to assist his son evade prosecution,  
16 filed a false missing persons report and dishonest statements  
17 to the sheriff's office in Fresno and gave dishonest  
18 statements to the postal inspection service on all of that.

19           CalPERS also became aware that Mr. Scarber is facing  
20 felony criminal charges regarding these facts and that he has  
21 been held answer as of March 11, 2016.

22           After CalPERS reviewed the case of Haywood, Smith,  
23 Garcia, and Vandergoot, CalPERS determined that Respondent  
24 was facing disciplinary action. His termination was  
25 effective August 29, 2013. He appealed but settled his

1 termination appeal, and the provision of his stipulated  
2 settlement bar any future employment with the CHP. CalPERS  
3 therefore properly cancelled Mr. Scarber's industrial  
4 disability retirement application and Mr. Scarber appealed  
5 May 14th and March 11th, 2015.

6 ADMINISTRATIVE LAW JUDGE WONG: Okay. Mr. Scarber, do  
7 you wish to give an opening statement?

8 MR. SCARBER: Yes, sir.

9 ADMINISTRATIVE LAW JUDGE WONG: Okay. And, before you  
10 start, I just want to remind you that opening statements are  
11 not evidence.

12 MR. SCARBER: Okay.

13 ADMINISTRATIVE LAW JUDGE WONG: So anything that you  
14 say during the statement that you will ultimately like me to  
15 consider needs to be repeated while you're testifying under  
16 oath or in some other admissible evidence.

17 MR. SCARBER: Yes, sir.

18 ADMINISTRATIVE LAW JUDGE WONG: With that, you may  
19 begin.

20 MR. SCARBER: I'm here today, thank you for being  
21 here. I disagree and I filed the appeal on -- for this  
22 industrial disability retirement based on facts. And some of  
23 the exhibits that are presented in this case folder, I have  
24 yet to see or have yet to go over. I did do a Public Records  
25 Act -- I mean, I'm sorry -- not a Public Records Act, but a

1 discovery -- Motion for Discovery on May the 14th of 2014,  
2 and I requested a -- all discovery and materials which  
3 enabled CalPERS to determine a finding. I made telephonic  
4 requests with the attorney assigned and numerous other  
5 requests, including filing a motion for discovery and  
6 mentioning it in my statement of facts on May the 14th of  
7 2014.

8 Today I have yet to receive any documentation from  
9 CalPERS regarding witnesses, documents, statements -- I will  
10 back that up -- I received a document from a department  
11 employee verifying some records. Cathleen Hegelein, and I  
12 will spell that, H-E-G-E-L-E-I-N, which I object to on the  
13 California Evidence Code.

14 There were a lot of other factors that went into this  
15 case. I don't know what all CalPERS used in making their  
16 finding. I do not believe for the case -- for my case that  
17 the Haywood case is appropriate for this hearing.

18 When I requested a continuance, it was for several  
19 reasons. One of the issues was the discovery issue, and I  
20 don't know why I wasn't allowed the discovery in order to  
21 prepare. But Ms. Yelland, representing CalPERS, declared in  
22 her opposition for a continuance, which that's why I'm here  
23 today, she prevailed, that this matter is not law, but  
24 it's -- it's a matter of law and not fact. And that is in  
25 her correspondence.

1 Well, correct me if I'm wrong, but Haywood is a  
2 precedential decision that is used to make decisions that  
3 applies to facts of a case. So, think about that for a  
4 while.

5 You know, if this is only about law and not facts, you  
6 know, I move the Court at this time, Your Honor, to honor  
7 Ms. Yelland's understanding and direction at my request to  
8 hear this matter striking any facts from the Haywood decision  
9 for the purposes of this hearing, because she wants to base  
10 it on Haywood only and not the facts. But yet my hearing is  
11 all supposed to be relevant to facts, which according to her  
12 letter, I understand, is irrelevant.

13 She talked about the internal investigation. What she  
14 did not talk about or bring up --

15 ADMINISTRATIVE LAW JUDGE WONG: You're getting into  
16 argument and/or evidence.

17 MR. SCARBBER: Okay. I disagree with the recommended  
18 penalty by the California Highway Patrol and I chose to fight  
19 it.

20 ADMINISTRATIVE LAW JUDGE WONG: Okay. You're still  
21 testifying.

22 MR. SCARBBER: Okay.

23 ADMINISTRATIVE LAW JUDGE WONG: Think of your opening  
24 statement as a summary of what you expect the evidence to  
25 show.



1 MR. SCARBBER: I've got information and documentation  
2 that will counter the Statement of Issues on behalf of the  
3 California Public Retirement System. And, once again, I have  
4 not had the opportunity to look at all the documents  
5 presented in this binder this morning. Some of them, like  
6 this one here (indicating), I don't recognize, I have never  
7 seen them. I have not had an opportunity to do any research  
8 on that case law, for example, Sergio Garcia versus CalPERS.

9 So it's going to be kind of hard to comment or present  
10 a case on that without being provided that in a timely manner  
11 and I request at of being two years ago. So I don't know how  
12 I'm going to do that, and I do not want to bypass the  
13 exhibits because they could be important and have exculpatory  
14 information, which would be relevant, extremely relevant and  
15 pertinent to the outcome of my hearing today.

16 I received the letter from Ms. Yelland asking me for  
17 discovery and giving me 30 days and if I did not receive  
18 it --

19 ADMINISTRATIVE LAW JUDGE WONG: You're getting into  
20 evidence again.

21 MR. SCARBBER: All right. Sorry.

22 So I'm here today to present evidence -- or counter  
23 the evidence in the manner which will prove that I am  
24 entitled to an application for disability retirement. And  
25 I'll leave it at that.

1 ADMINISTRATIVE LAW JUDGE WONG: Okay. All right.

2 MR. SCARBER: Sorry I was getting into argument.

3 ADMINISTRATIVE LAW JUDGE WONG: That's okay.

4 MR. SCARBER: Do you have any water?

5 THE COURT REPORTER: I don't, I'm sorry.

6 ADMINISTRATIVE LAW JUDGE WONG: Do you want to take a  
7 break and take a run to the drinking fountain?

8 MR. SCARBER: No, sir, because when I start talking, I  
9 will have to make a lot of runs.

10 ADMINISTRATIVE LAW JUDGE WONG: Okay. Ms. Yelland, do  
11 you have the green return receipt for service on CHP or is  
12 there correspondence verifying that they're not going to  
13 appear?

14 MS. YELLAND: No, it was a phone call.

15 MR. SCARBER: Your Honor, may I have something on the  
16 closing?

17 ADMINISTRATIVE LAW JUDGE WONG: Hang on. Let's finish  
18 this issue.

19 MS. YELLAND: I don't know that I do.

20 ADMINISTRATIVE LAW JUDGE WONG: Or anything indicating  
21 that they were aware of this hearing.

22 MS. YELLAND: The proof of service has the -- has  
23 their address and --

24 ADMINISTRATIVE LAW JUDGE WONG: Yes.

25 MS. YELLAND: -- I think it has even two.

1 ADMINISTRATIVE LAW JUDGE WONG: Yes, but to take a  
2 default, I need -- I need either personal service, or a  
3 notice of defense, or something.

4 MS. YELLAND: I have been in contact with them over  
5 the phone, but no, I don't. They know it's going forward.  
6 In fact, that phone call I took earlier today was from a CHP  
7 representative.

8 MR. SCARBBER: Can I ask for clarification, who is  
9 them?

10 ADMINISTRATIVE LAW JUDGE WONG: That is CHP.

11 MR. SCARBBER: Can you be more specific? Is it  
12 somebody in --

13 ADMINISTRATIVE LAW JUDGE WONG: Well, no. It is just  
14 CHP, the entity. They are a party to this action so they are  
15 entitled to know this.

16 MR. SCARBBER: Okay.

17 ADMINISTRATIVE LAW JUDGE WONG: Let me check to see if  
18 I have something in our system.

19 MS. YELLAND: I do not.

20 ADMINISTRATIVE LAW JUDGE WONG: Okay. Let me see what  
21 I have here. Okay. So while I do this, Ms. Yelland, do you  
22 have any objection to my taking or including OAH's notice of  
23 assigned hearing dates within the jurisdictional documents?

24 MS. YELLAND: No, that's fine.

25 ADMINISTRATIVE LAW JUDGE WONG: Okay. So I will go

1 ahead and add that to the jurisdictional documents. That  
2 includes the proof of service upon, among others, Tim Castle  
3 at the address -- same address as indicated on the proof of  
4 service for the statement of issues and the notice of  
5 hearing.

6 It is the 9:21 in the morning on Thursday, September  
7 15th, 2016. We're in Fresno, California. This is the time,  
8 date, and location for the hearing as indicated in the notice  
9 of hearing. No one is here for or on behalf of the  
10 California Highway Patrol. Based on the jurisdictional  
11 documents as well as the addition of the notice of the  
12 assigned hearing date, I'll find that CHP was properly  
13 serviced -- was properly served with the jurisdictional  
14 documents and so jurisdiction has been established. I'll  
15 enter its default and the matter will proceed by way a  
16 default prove-up as to them only.

17 So that takes care of that jurisdictional matter.  
18 And, Mr. Scarber, just so you know. As I mentioned, CHP was  
19 named as a party to this action. Generally, employers don't  
20 appear, but they're entitled to. And so, when a party is  
21 noticed -- well, let me say -- when a party is included in  
22 the operative pleading, in this case, the Statement of Issues  
23 and does not show up, if there is proper jurisdiction over  
24 them, then their default can be entered, so if they were  
25 properly served.

1           So I made the findings, based on the documents, that  
2 they were properly served. And since they didn't show, they  
3 basically waived their right to appear which is, in effect,  
4 what a default is. And it doesn't have any impact on  
5 you -- on your case in that sense because it just affects  
6 their rights in this matter. Okay?

7           MR. SCARBER: Yes, sir.

8           ADMINISTRATIVE LAW JUDGE WONG: Ms. Yelland, your  
9 first document or first witness?

10          MS. YELLAND: Thank you, Your Honor. I would like to  
11 move one and two in as jurisdictional.

12          ADMINISTRATIVE LAW JUDGE WONG: So the jurisdictional  
13 documents will be marked collectively as Exhibit 1 for  
14 identification.

15                               (CalPERS' Exhibit 1 marked.)

16          ADMINISTRATIVE LAW JUDGE WONG: Mr. Scarber, any  
17 objection to exhibit -- oh, one is separated, it's the  
18 Statement of Issues. Any objection to Exhibit 1,  
19 Mr. Scarber?

20          MR. SCARBER: No, sir.

21          ADMINISTRATIVE LAW JUDGE WONG: So one is admitted for  
22 jurisdictional purposes only.

23                               (CalPERS' Exhibit 1 admitted.)

24          ADMINISTRATIVE LAW JUDGE WONG: And let me check.  
25 Okay. So Exhibit 2 is the Notice of Hearing and I'll include

1 the Notice of Hearing and I will include the Notice of  
2 Assigned Dates within two.

3 Mr. Scarber, any objection to two for jurisdictional  
4 purposes only?

5 MR. SCARBER: No, sir.

6 ADMINISTRATIVE LAW JUDGE WONG: Two is so admitted.

7 (CalPERS' Exhibit 2 admitted.)

8 MR. SCARBER: Your Honor, can I ask a question? When  
9 you say "jurisdictional purposes?"

10 ADMINISTRATIVE LAW JUDGE WONG: So jurisdictional  
11 purposes means it is only here to establish jurisdiction and  
12 not here to offer -- not offered for the proof of what's  
13 asserted in there. So, in other words, think of  
14 jurisdictional purposes as, kind of like the invitation to  
15 the party. It is showing why we're here and establishing  
16 that there's proper jurisdiction to hear this matter, as  
17 opposed to something that's being proved or being offered to  
18 prove something.

19 MR. SCARBER: Okay.

20 MS. YELLAND: And then, Your Honor, I would like to  
21 move three through eight in as direct evidence.

22 ADMINISTRATIVE LAW JUDGE WONG: All right. So the  
23 Application for Industrial Disability will be marked as  
24 Exhibit 3.

25 (CalPERS' Exhibit 3 marked.)

1 ADMINISTRATIVE LAW JUDGE WONG: Mr. Scarber, any  
2 objection to three for all purposes?

3 MR. SCARBER: No, sir.

4 ADMINISTRATIVE LAW JUDGE WONG: Okay. Three is  
5 admitted for all purposes.

6 (CalPERS' Exhibit 3 admitted.)

7 ADMINISTRATIVE LAW JUDGE WONG: And then four is the  
8 Application for Service Retirement. Mr. Scarber, any  
9 objection to four for all purposes?

10 MR. SCARBER: No, sir.

11 ADMINISTRATIVE LAW JUDGE WONG: Four is so admitted.

12 (CalPERS' Exhibit 4 admitted.)

13 ADMINISTRATIVE LAW JUDGE WONG: And then five is the  
14 CalPERS October 31st, 2013, correspondence. That's five.  
15 Any objection to five for all purposes?

16 MR. SCARBER: No, sir.

17 ADMINISTRATIVE LAW JUDGE WONG: And then, how far did  
18 you ask --

19 MS. YELLAND: Eight.

20 ADMINISTRATIVE LAW JUDGE WONG: Okay. Eight. And  
21 then six is the letter of denial. Any objection to six for  
22 all purposes?

23 MR. SCARBER: Can I have one quick second, Your Honor?

24 ADMINISTRATIVE LAW JUDGE WONG: Sure.

25 MR. SCARBER: No, sir.

1 ADMINISTRATIVE LAW JUDGE WONG: All right. Six is  
2 admitted for all purposes.

3 (CalPERS' Exhibit 6 admitted.)

4 ADMINISTRATIVE LAW JUDGE WONG: Seven is the letter of  
5 appeal. Any objection to seven for all purposes?

6 MR. SCARBER: No objections, Your Honor.

7 ADMINISTRATIVE LAW JUDGE WONG: Okay. Seven is  
8 admitted for all purposes.

9 (CalPERS' Exhibit 7 admitted.)

10 ADMINISTRATIVE LAW JUDGE WONG: And then eight is the  
11 addendum to appeal. Any objection to eight for all purposes?

12 MR. SCARBER: No, sir.

13 ADMINISTRATIVE LAW JUDGE WONG: Eight is admitted for  
14 all purposes.

15 (CalPERS' Exhibit 8 admitted.)

16 MS. YELLAND: Thank you, Your Honor. Now I would like  
17 to turn to Exhibits 9 through 12. Nine is a declaration from  
18 the highway patrol, custodian of records, regarding  
19 authenticity. And the next three documents are the  
20 termination documents themselves.

21 ADMINISTRATIVE LAW JUDGE WONG: All right. Those  
22 exhibits will be so marked.

23 (CalPERS' Exhibits 9 through 12 marked.)

24 ADMINISTRATIVE LAW JUDGE WONG: All right.  
25 Mr. Scarber, any objection to nine for all purposes?



1 MR. SCARBBER: Yes, sir. I object to nine being listed  
2 as an exhibit on the grounds of authenticity. And it will  
3 begin at 1410.5, California Evidence Code Section 1413,  
4 Evidence Code Section 1414, 1415, 1416, 1417, 1418, 1419,  
5 1420 and 1421.

6 ADMINISTRATIVE LAW JUDGE WONG: All right.  
7 Ms. Yelland?

8 MS. YELLAND: Your Honor, the declaration is being  
9 brought in under the APA. You know, I don't have my APA  
10 here, but I think it is 11513. This declaration was served  
11 on Mr. Scarber on September 6th, 2016. On Tuesday, he had an  
12 opportunity to make those objections. He did not do so. And  
13 pursuant to Government Code -- I want to say one of the  
14 discovery APA sections and, I'm sorry, I don't know it off  
15 the top of my head -- after being served with a declaration,  
16 Respondent has seven days to object to the declaration, and  
17 that was not done; therefore, the declaration can come in as  
18 testimony.

19 ADMINISTRATIVE LAW JUDGE WONG: Do you have evidence  
20 of service and also the required notice?

21 MS. YELLAND: I have a proof of service behind the  
22 declaration to Sheldon Scarber and to the OAH. The address  
23 for Mr. Scarber has been blacked out.

24 ADMINISTRATIVE LAW JUDGE WONG: Do you have the  
25 requisite notice required by the code?

1 MS. YELLAND: I believe it's 10 days, Your Honor.

2 ADMINISTRATIVE LAW JUDGE WONG: No, but there is  
3 actually a notice that is supposed to be served.

4 MS. YELLAND: Oh, yeah, yeah, yeah. I know what  
5 you're saying.

6 ADMINISTRATIVE LAW JUDGE WONG: With the right to  
7 object and --

8 MS. YELLAND: Right. You know, I don't have that with  
9 me. I assume that that notice went to the declaration, but I  
10 could not swear to it. No, I don't have it. However,  
11 Mr. Scarber's had this document for -- since September 6th,  
12 and while he did manage to put together a request for  
13 continuance, he never once objected to the declaration and  
14 the authenticity of the document.

15 No mind, I'm not here to relitigate the termination of  
16 Mr. Scarber. If he's willing to stipulate that these three  
17 documents exist and were served on him, I'm happy to withdraw  
18 this.

19 ADMINISTRATIVE LAW JUDGE WONG: Hang on, one second.  
20 So the documents -- the declaration and anything that was  
21 served with the declaration on Mr. Scarber, was an identical  
22 set served on OAH?

23 MS. YELLAND: Yes.

24 ADMINISTRATIVE LAW JUDGE WONG: And I'm looking at the  
25 documents we received, and it does not include the proper

1 notice under the Government Code section. So it would not be  
2 admissible under that section.

3 But the objection on authenticity is overruled. I  
4 believe the document, as well as the official duty  
5 presumption under the Evidence Code establishes sufficient  
6 authenticity for nine, and so nine is admitted for all  
7 purposes.

8 (CalPERS' Exhibit 9 admitted.)

9 ADMINISTRATIVE LAW JUDGE WONG: And then you said 10  
10 and 11 are the documents subject to the declaration?

11 MS. YELLAND: Yes, 10, 11, and 12 are the documents  
12 purportedly authorized by the declaration which is Exhibit 9.  
13 Authenticated, sorry, not authorized.

14 ADMINISTRATIVE LAW JUDGE WONG: All right. So those  
15 documents will be so marked.

16 (CalPERS' Exhibits 10, 11, and 12 marked.)

17 MS. YELLAND: So 10, 11, and 12 are in?

18 ADMINISTRATIVE LAW JUDGE WONG: Not yet. They've been  
19 marked. And, actually, I am going to clarify them for the  
20 record. Ten is the Notice of Adverse Action. Eleven is the  
21 Settlement Agreement and Release of All Claims. And 12 is  
22 the Decision including the Stipulation for Settlement.

23 And, Mr. Scarber, any objection to 11 for all  
24 purposes?

25 MR. SCARBER: No, sir. Can I reserve the right to

1 have a standing objection on nine?

2 ADMINISTRATIVE LAW JUDGE WONG: Well, your objection  
3 is stated for the record, so you don't need a standing  
4 objection. Actually, I went out of order, sorry. Let's  
5 start with 10. Any objection to 10?

6 MR. SCARBER: No, sir.

7 ADMINISTRATIVE LAW JUDGE WONG: Ten is admitted for  
8 all purposes.

9 (CalPERS' Exhibit 10 admitted.)

10 ADMINISTRATIVE LAW JUDGE WONG: Any objection to 11  
11 for all purposes?

12 MR. SCARBER: No, sir.

13 ADMINISTRATIVE LAW JUDGE WONG: Eleven is admitted for  
14 all purposes.

15 (CalPERS' Exhibit 11 admitted.)

16 ADMINISTRATIVE LAW JUDGE WONG: Any objection to 12  
17 for all purposes?

18 MR. SCARBER: No, sir.

19 ADMINISTRATIVE LAW JUDGE WONG: And 12 is admitted for  
20 all purposes.

21 (CalPERS' Exhibit 12 admitted.)

22 MS. YELLAND: As to Exhibits 14, 15, and 16, they  
23 request that you, Your Honor, take official notice of.  
24 Again, pursuant to APA section -- I have that section, let me  
25 find it -- section 11515, official notice can be taken of the

1 following documents. First of all, Superior Court documents.  
2 The first one is excerpts from the court reporter's  
3 transcript, People of the State of California v. Sheldon  
4 Scarber, Gail Scarber, and Crystal Reynoso. This is a  
5 transcript -- relevant pages of the transcript from the  
6 preliminary examination dated March 11, 2016.

7 Fifteen is a superior court judgement on a petition  
8 for remand on the Sergio Garcia case. This is a case with  
9 remarkable facts similar to this one where Mr. Garcia, too,  
10 was terminated and Haywood held to reply. The same is true  
11 of Mr. Vandergoot, he was also terminated and Haywood was  
12 found to apply. And when I say "Haywood," I should clarify  
13 that to mean Haywood and Smith vs. The City of Napa.

14 And these precedential decisions are readily available  
15 on the CalPERS website to anyone and properly the -- proper  
16 subject for request for official notice.

17 ADMINISTRATIVE LAW JUDGE WONG: All right. So 13 is  
18 the request for judicial notice. Fourteen is the court  
19 reporter's transcript. Fifteen is the decision in  
20 Garcia vs. CalPERS. Sixteen is the Vandergoot decision.

21 All right. So 13, I guess it's not really evidence.

22 MS. YELLAND: It's argument, Your Honor.

23 ADMINISTRATIVE LAW JUDGE WONG: I'll just leave it  
24 marked.

25 (CalPERS' Exhibit 13 marked.)

1 MS. YELLAND: Okay.

2 ADMINISTRATIVE LAW JUDGE WONG: Fourteen. Any  
3 objection to 14 for all purposes, Mr. Scarber?

4 MR. SCARBER: I object to 13.

5 ADMINISTRATIVE LAW JUDGE WONG: It's not being  
6 admitted.

7 MR. SCARBER: Okay.

8 ADMINISTRATIVE LAW JUDGE WONG: Any objection to 14?

9 MR. SCARBER: Yes, sir, on the grounds of relevance.

10 ADMINISTRATIVE LAW JUDGE WONG: What is the relevance,  
11 Ms. Yelland?

12 MS. YELLAND: Your Honor, these excerpts --  
13 Mr. Scarber's credibility in this case is at issue. It's one  
14 of the issues you are being asked to address. In several  
15 places, when the Superior Court Judge was hearing preliminary  
16 proceedings against Mr. Scarber and his family members, the  
17 judge came out with quite a castigation, shall I say, of  
18 Mr. Scarber's credibility. Since Mr. Scarber is now -- well,  
19 will be sworn in to testify today, his credibility is  
20 certainly a key issue in this case.

21 ADMINISTRATIVE LAW JUDGE WONG: Mr. Scarber?

22 MR. SCARBER: Yes, sir, I object. I mean, the  
23 Constitution holds that we're innocent until proven guilty.  
24 And to make reference to this, when the objection goes to  
25 the -- when the objection was filed, it was placed in here.

1 I was only given a couple of documents to show that I was  
2 represented by an attorney and so, you know, I shouldn't have  
3 any problem -- and I am paraphrasing -- won't have issues  
4 with the documents, that I knew how to obtain an attorney, so  
5 a request for continuance on that grounds was opposed by  
6 Ms. Yelland -- Ms. Yelland?

7 MS. YELLAND: No, but go ahead.

8 MR. SCARBBER: No, I want to say it correctly.

9 But now it's being presented on a credibility issue.  
10 But there were other issues that she's claiming -- I mean  
11 utilizing this document that was in a clear violation of the  
12 stipulated settlement agreement between myself, the  
13 California Highway Patrol, State Personnel Board, and  
14 California Department of Justice. It violates several case  
15 laws and several codes including the California Peace  
16 Officer's Bill of Rights. And to just now present this as  
17 evidence without me having any opportunity to review it or  
18 respond to it orally or in writing, is unfair. And when you  
19 talk about due process, I mean, it goes back to exhibit  
20 number --

21 ADMINISTRATIVE LAW JUDGE WONG: Okay. You're rambling  
22 and going beyond the --

23 MR. SCARBBER: I --

24 ADMINISTRATIVE LAW JUDGE WONG: Let me ask a question  
25 of Ms. Yelland.

1 As I'm looking at this, this does not appear to be  
2 testimony. Is this argument between the Court and Counsel?

3 MS. YELLAND: It's the judge's findings on Respondent,  
4 Scarber's credibility after 10 days of prelim hearing  
5 proceedings. There is no discussion in there about  
6 Mr. Scarber's guilt or innocence. There is no discussion  
7 about whether or not he is innocent until proven guilty, none  
8 of that. It's just whether or not he presents as a credible  
9 witness.

10 ADMINISTRATIVE LAW JUDGE WONG: All right. I'm going  
11 to deny notice based on relevance and hearsay. I mean, to  
12 the extent you're asking me to take judicial notice of the  
13 truth of the Court's findings, that's improper judicial  
14 notice and is -- will present problems with the hearsay rule.  
15 With regard to relevance, if you're not asking me to take  
16 judicial notice of the substance of the substance of the  
17 findings, then I don't know what the relevance would be. So  
18 notice is not taken on 14.

19 And then Garcia -- any objection to 15, which is the  
20 Garcia decision?

21 MR. SCARBER: Yes, sir.

22 ADMINISTRATIVE LAW JUDGE WONG: What's your objection?

23 MR. SCARBER: Objection. I haven't seen this case. I  
24 don't know if it's applicable to my case, or this hearing, or  
25 my denial, or cancellation of application for disability



1 retirement. I don't know if there are portions of it that  
2 could be exculpatory. I have never seen this case and had  
3 CalPERS addressed my request for records or discovery, I  
4 probably -- or not probably -- would have definitely went  
5 through this document so that I could fairly address it in a  
6 hearing for you.

7 ADMINISTRATIVE LAW JUDGE WONG: All right.

8 Ms. Yelland, is this the published decision?

9 MS. YELLAND: This is a decision by the Superior Court  
10 of California, County of Los Angeles. And judges and orders  
11 for the Superior Court may be judicially noticed by Court's  
12 of the State, pursuant to APA 11515 and Evidence Code 452.  
13 This is a judgment.

14 ADMINISTRATIVE LAW JUDGE WONG: You can take judicial  
15 notice of the fact that a judgment was entered, but you can't  
16 take judicial notice of the truth of the contents.

17 MS. YELLAND: That would be fine with us.

18 ADMINISTRATIVE LAW JUDGE WONG: Okay. So you want me  
19 to take judicial notice of the fact that the judgment was  
20 issued; is that correct?

21 MS. YELLAND: Well, if that's as far as the Court is  
22 inclined to extend their judicial notice, then yes. If you  
23 would be interested in hearing argument on the merits of the  
24 Garcia case, I would be happy to bring them up.

25 ADMINISTRATIVE LAW JUDGE WONG: I don't think it's

1 relevant. I mean, it's --

2 MS. YELLAND: I don't either.

3 ADMINISTRATIVE LAW JUDGE WONG: Again, I could take  
4 judicial notice of the fact that -- hang on, let me get that  
5 notice of -- all right.

6 So I'll take judicial notice of 15 to the extent that  
7 I could take notice of the fact that the judgment was issued  
8 and the date on which it was issued, but I will not take  
9 notice of the truth of the findings --

10 MS. YELLAND: That's fine, Your Honor.

11 ADMINISTRATIVE LAW JUDGE WONG: -- and the conclusion  
12 in the judgment.

13 (CalPERS' Exhibit 15 admitted.)

14 MS. YELLAND: And the last is Vandergoot.

15 ADMINISTRATIVE LAW JUDGE WONG: Vandergoot. All  
16 right. Any objection to 16?

17 MR. SCARBBER: Yes, sir. I'm not aware of this case  
18 either. Based on the statement of issues given to me, the  
19 sole purpose is Haywood vs. American Fire Protection  
20 District, solely and only. And there are no other references  
21 to any other cases before the public retire -- PERS or Office  
22 of Administrative Hearings to indicate they -- in other  
23 words, in order for me to provide a defense, I was only  
24 focusing on Haywood. No other cases.

25 ADMINISTRATIVE LAW JUDGE WONG: Okay. The objection

1 is overruled. Vandergoot is a published decision available  
2 on the CalPERS' website. So notice will be taken of 16.

3 (CalPERS' Exhibit 16 admitted.)

4 ADMINISTRATIVE LAW JUDGE WONG: And then it looks like  
5 17 is a closing brief. Do you want to just that marked?

6 MS. YELLAND: That's argument only, Your Honor.  
7 Depending on what you decide with closing briefs, I may  
8 withdraw it.

9 ADMINISTRATIVE LAW JUDGE WONG: Okay. So let's go  
10 ahead and mark it for the time being so we don't forget. So  
11 the closing brief will be marked as 17.

12 (CalPERS' Exhibit 17 marked.)

13 ADMINISTRATIVE LAW JUDGE WONG: Any other exhibits,  
14 Ms. Yelland?

15 MS. YELLAND: No, that's it.

16 ADMINISTRATIVE LAW JUDGE WONG: Do you have any  
17 witnesses?

18 MS. YELLAND: No, I'm done.

19 ADMINISTRATIVE LAW JUDGE WONG: Do you rest?

20 MS. YELLAND: Yes.

21 ADMINISTRATIVE LAW JUDGE WONG: All right.  
22 Mr. Scarber, now is your opportunity to present your case.  
23 First, do you have any documents you wish to have marked?

24 MR. SCARBER: Yes, sir. But can I object to that one?

25 ADMINISTRATIVE LAW JUDGE WONG: Which one, 17?

1 MR. SCARBER: Yes, sir.

2 ADMINISTRATIVE LAW JUDGE WONG: No, it's not being  
3 admitted.

4 MR. SCARBER: Oh, okay.

5 ADMINISTRATIVE LAW JUDGE WONG: It's only being  
6 marked. There is no basis for objecting to something for  
7 only being marked.

8 MR. SCARBER: Okay.

9 ADMINISTRATIVE LAW JUDGE WONG: So provide copies of  
10 your document to Ms. Yelland and then provide copies to me.

11 MR. SCARBER: Was my statement of facts included in  
12 your exhibits?

13 ADMINISTRATIVE LAW JUDGE WONG: No. Or at least not  
14 that I saw, I should say.

15 MR. SCARBER: Okay. I'll include my statements of  
16 facts presented to California Public Retirement System on May  
17 the 14th, 2014.

18 MS. YELLAND: That's Exhibit 7.

19 ADMINISTRATIVE LAW JUDGE WONG: Oh, okay. So that is  
20 your notice of appeal.

21 MR. SCARBER: That is not going to be an Exhibit.  
22 Well, I would like to introduce the CH -- sorry, the state  
23 standard 634 document, absence, and additional time warp  
24 report. That was --

25 ADMINISTRATIVE LAW JUDGE WONG: Okay. Provide a copy.

1 Instead of going over each document, provide a copy to  
2 Ms. Yelland and then give them to me, and we'll go over them.  
3 But if you go over them one by one, it will take too long.

4 MR. SCARBBER: I was just going to introduce a title  
5 for her purposes (indicating).

6 ADMINISTRATIVE LAW JUDGE WONG: Okay. Why don't you  
7 give me a stack -- just give me the all the documents at  
8 once.

9 MR. SCARBBER: And this one I do not have a copy of it,  
10 so do you want me to give it to you, Your Honor?

11 ADMINISTRATIVE LAW JUDGE WONG: Why don't you show it  
12 to Ms. Yelland and after she's done looking at it, then show  
13 it to me.

14 MR. SCARBBER: Now, any documents that are provided to  
15 you, Your Honor, would you keep them or return them?

16 ADMINISTRATIVE LAW JUDGE WONG: No, I keep them  
17 because they become part of the record.

18 MR. SCARBBER: Okay.

19 MS. YELLAND: Did you see a copy of these, Your Honor?  
20 Or ...

21 ADMINISTRATIVE LAW JUDGE WONG: Let me see.

22 MR. SCARBBER: Okay.

23 MS. YELLAND: This is already in three.

24 MR. SCARBBER: In what?

25 MS. YELLAND: Part of three.

1 MR. SCARBER: Okay. Thank you.

2 ADMINISTRATIVE LAW JUDGE WONG: All right. Are those  
3 all the documents, Mr. Scarber?

4 MR. SCARBER: Yes, sir.

5 ADMINISTRATIVE LAW JUDGE WONG: All right.

6 MR. SCARBER: To the best of my knowledge.

7 ADMINISTRATIVE LAW JUDGE WONG: All right.

8 So CalPERS' March 11th, 2013, correspondence will be  
9 marked as Exhibit A.

10 (Respondent's Exhibit A marked.)

11 ADMINISTRATIVE LAW JUDGE WONG: The absence and  
12 additional time worked report and supporting documents will  
13 be marked as Exhibit B.

14 (Respondent's Exhibit B marked.)

15 ADMINISTRATIVE LAW JUDGE WONG: CalPERS' March 13th,  
16 2015, correspondence will be Exhibit C.

17 THE COURT REPORTER: March 13th?

18 ADMINISTRATIVE LAW JUDGE WONG: Yes, March 13th, 2015.  
19 Request for discovery is D as in David.

20 (Respondent's Exhibit D marked.)

21 ADMINISTRATIVE LAW JUDGE WONG: The prehearing  
22 conference statement in the Personnel Board matter will be  
23 Exhibit E.

24 (Respondent's Exhibit E marked.)

25 MR. SCARBER: I'm sorry. What was E?

1 ADMINISTRATIVE LAW JUDGE WONG: The PHC statement in  
2 the State Personnel Board matter.

3 Then a patient discharge summary dated November 19th,  
4 2015, is Exhibit F.

5 (Respondent's Exhibit F marked.)

6 ADMINISTRATIVE LAW JUDGE WONG: The December 22nd,  
7 2015 medical report Exhibit G.

8 (Respondent's Exhibit G marked.)

9 ADMINISTRATIVE LAW JUDGE WONG: The April 7th, 2015,  
10 medical report is Exhibit H.

11 (Respondent's Exhibit H marked.)

12 ADMINISTRATIVE LAW JUDGE WONG: The physician's report  
13 on disability is Exhibit I.

14 (Respondent's Exhibit I marked.)

15 ADMINISTRATIVE LAW JUDGE WONG: The notice of motion  
16 and the motion for continuance is Exhibit J.

17 (Respondent's Exhibit J marked.)

18 ADMINISTRATIVE LAW JUDGE WONG: The March 18th, 2013,  
19 correspondence for Mr. Scarber is Exhibit K.

20 (Respondent's Exhibit K marked.)

21 ADMINISTRATIVE LAW JUDGE WONG: And the June 25th,  
22 2013, correspondence for Mr. Scarber is Exhibit L.

23 (Respondent's Exhibit L marked.)

24 ADMINISTRATIVE LAW JUDGE WONG: All right.

25 MR. SCARBER: One more, Your Honor.

1 ADMINISTRATIVE LAW JUDGE WONG: What's that?

2 MR. SCARBER: I want to see -- was this in part of  
3 your -- your opposition?

4 ADMINISTRATIVE LAW JUDGE WONG: The -- CalPERS'  
5 opposition to the motion to continue is marked as Exhibit M.

6 (Respondent's Exhibit M marked.)

7 MR. SCARBER: All right. And I don't know how you  
8 want me to handle this one, Your Honor. All I have is a card  
9 that says that I have a heart monitor implant and this tells  
10 the doctor when it was implanted and --

11 ADMINISTRATIVE LAW JUDGE WONG: That's something you  
12 could probably testify to.

13 MR. SCARBER: Okay.

14 ADMINISTRATIVE LAW JUDGE WONG: All right. So any  
15 objection to Exhibit A?

16 MS. YELLAND: Your Honor, I don't have a set of these  
17 documents.

18 ADMINISTRATIVE LAW JUDGE WONG: Oh, I'm sorry.

19 MS. YELLAND: I'm sorry, I am going to come over and  
20 look at these. No.

21 ADMINISTRATIVE LAW JUDGE WONG: Okay. A is admitted  
22 for all purposes.

23 (Respondent's Exhibit A admitted.)

24 ADMINISTRATIVE LAW JUDGE WONG: Any objection to B?

25 MS. YELLAND: Yes, I have an objection to all the



1 medical documents. Do you want me to do it all at once or do  
2 you want me to per document?

3 ADMINISTRATIVE LAW JUDGE WONG: Why don't we do it per  
4 document and we'll go line-by-line?

5 MS. YELLAND: Okay.

6 ADMINISTRATIVE LAW JUDGE WONG: I guess if you -- as a  
7 shorthand, if you want to say, "Same objection as before."  
8 And I'll write it down the first time and then each time it's  
9 different.

10 MS. YELLAND: Ready?

11 ADMINISTRATIVE LAW JUDGE WONG: Yes. So B.

12 MS. YELLAND: B, medical evidence is irrelevant and  
13 administrative hearsay. There's no doctor here to testify as  
14 to the authenticity of all these documents that have been  
15 provided by Mr. Scarber.

16 But more importantly, this issue in this hearing has  
17 nothing to do with the medical evidence. There is no medical  
18 evidence or germane to a Haywood determination. This is only  
19 whether or not CalPERS properly canceled the disability  
20 application of Mr. Scarber. We have not even evaluated the  
21 merits of his medical condition to the extent there is one.  
22 It is only whether or not we can even accept the application,  
23 not the merits that are claimed in that application;  
24 therefore, any evidence given on Mr. Scarber's medical  
25 condition is premature and irrelevant at this point.

1 ADMINISTRATIVE LAW JUDGE WONG: Okay. Mr. Scarber  
2 your response?

3 MR. SCARBBER: Yes, sir. I don't know. We submitted a  
4 denial based on my file with CalPERS. That goes back to the  
5 discovery. I don't know what they have as far as in my file.  
6 I submitted doctor's reports. I know doctor's reports were  
7 sent to CalPERS, Benefits Division. Not only that one, but  
8 I've got -- there were two more.

9 ADMINISTRATIVE LAW JUDGE WONG: You need to argue why  
10 is this relevant and authenticity at an administrative  
11 hearing. Why should this come in?

12 MR. SCARBBER: Again, because it's relevant to the  
13 findings in my defense or my argument as to the hypertension,  
14 cardio issues, because that is from a qualified medical  
15 examiner or agreed medical examiner that I was assigned to by  
16 the State of California to go see. And he evaluated me on  
17 the symptoms that are in --

18 ADMINISTRATIVE LAW JUDGE WONG: Okay. We're only  
19 talking about the absence and additional time worked report  
20 at this time -- and supporting documents, the documents  
21 attached to it.

22 MR. SCARBBER: Yes, sir. This is showing that I  
23 actually filed a -- when I went off duty, I was directed off  
24 duty by my primary care physician before any notification of  
25 an investigation prior to any notification of findings of an

1 investigation. That I was placed off duty from  
2 December 20th, 2012, until January the 31st, 2013. This  
3 document shows that it was also, you know, my injuries were  
4 related to this claim for industrial disability retirement  
5 is -- I have doctor's support -- or doctor's notes attached  
6 to that. This was submitted to the department. It's a  
7 departmental document. And I don't know what all documents  
8 that the CHP or anyone else has provided to CalPERS in my  
9 file, which they stated that my claim was canceled based on  
10 my file. I don't know what that file consists of.

11 ADMINISTRATIVE LAW JUDGE WONG: Do you understand that  
12 the issue of this hearing is very narrow? It's whether  
13 you're eligible to apply for disability, not whether you  
14 qualify for disability.

15 MR. SCARBBER: Can you repeat that, Your Honor?

16 ADMINISTRATIVE LAW JUDGE WONG: The issue is whether  
17 you are eligible for disability retirement, not whether you  
18 are qualified for disability retirement.

19 So except in very, very, very narrow circumstances, as  
20 delineated in the City of Napa case, medical evidence is not  
21 relevant to the determination, unless it's to show that the  
22 equitable exception articulated in the City of Napa.

23 MR. SCARBBER: Well, I feel it does show relevance  
24 because I filed the claims and the injuries were pre to the  
25 denial and I think that they are relevant to show that I

1 filed these claims prior to any notice.

2 But, again -- and when we look at the case that I  
3 focused on Haywood, Haywood was terminated and then turned  
4 around several months later and filed for industrial  
5 disability. My case is different. I filed for industrial  
6 disability. I was put off duty before any investigation or  
7 any knowledge of any investigation. I was put on no duty. I  
8 was told I could never return to the occupation of -- in law  
9 enforcement and that's why I feel it's relevant in this case.

10 ADMINISTRATIVE LAW JUDGE WONG: Okay. All right.

11 MR. SCARBBER: Because it's contradictory to Maywood.

12 ADMINISTRATIVE LAW JUDGE WONG: Haywood.

13 MR. SCARBBER: I'm sorry. It's contradictory to  
14 Haywood.

15 ADMINISTRATIVE LAW JUDGE WONG: The objection as to  
16 relevancy is sustained and B is not admitted for any purpose.  
17 Any objection to C? C is the March 13th, 2015,  
18 correspondence.

19 MS. YELLAND: No, Your Honor.

20 ADMINISTRATIVE LAW JUDGE WONG: C is admitted for all  
21 purposes.

22 (Respondent's Exhibit C admitted.)

23 ADMINISTRATIVE LAW JUDGE WONG: And then D is the  
24 request for discovery. Any objection to D?

25 MS. YELLAND: No, Your Honor.

1 ADMINISTRATIVE LAW JUDGE WONG: D is admitted for all  
2 purposes.

3 (Respondent's Exhibit D admitted.)

4 ADMINISTRATIVE LAW JUDGE WONG: E is the PHC statement  
5 for the Personnel Board Matter.

6 MS. YELLAND: Right. Your Honor, pursuant to the  
7 express terms -- sorry, I have to go back -- of the  
8 stipulated settlement, which is Exhibit 11, Mr. Scarber  
9 withdrew his appeal from the notice of adverse action and it  
10 became final by operation of law on December 12th, 2013,  
11 which is the day he signed it. Any statement he may have  
12 made prior to that is simply irrelevant. It's also  
13 administrative hearsay.

14 He, you know, settled it. The dispute that CHP  
15 regarding his termination, that ship has sailed, and he  
16 agreed to withdraw his appeal to that action and, therefore,  
17 any prehearing conference statement, I think that is what  
18 that is, is irrelevant and administrative hearsay.

19 Also, I note on the proof of service, CalPERS was not  
20 a party in any way to the SPB proceedings and, therefore, in  
21 terms of CalPERS and it being admitted here, it's collateral  
22 estoppel.

23 ADMINISTRATIVE LAW JUDGE WONG: Okay. Mr. Scarber,  
24 what is the relevance of the PHC statement?

25 MR. SCARBER: So, the relevance of this one is, I do

1 not know if what's in their file and what's not in their  
2 file. What's so relevant about is that, it leads up to the  
3 decision by CalPERS to deny me the industrial disability  
4 retirement, because there is a statement in there from an  
5 attorney with State Compensation Insurance Fund, who in  
6 cooperation with the Highway Patrol, made a -- an offer and  
7 it was in the form of trickery to --

8 ADMINISTRATIVE LAW JUDGE WONG: All right. So this is  
9 going to take way too long. Was the SPB -- was the PHC filed  
10 before or after you entered into the settlement agreement?

11 MR. SCARBER: Before.

12 ADMINISTRATIVE LAW JUDGE WONG: Okay. So based on  
13 that --

14 MR. SCARBER: I think, can I look at the title, Your  
15 Honor? December 12th, 2013.

16 ADMINISTRATIVE LAW JUDGE WONG: It basically was filed  
17 about the same time you signed, so this was in the action  
18 that you ultimately settled.

19 MR. SCARBER: Yes, sir, but the construction of that  
20 is the trickery which calls --

21 ADMINISTRATIVE LAW JUDGE WONG: Let me get to the  
22 chase. What is the point of this? Why do you want me to  
23 know about the PHC statement? Why is that important to this  
24 case?

25 MR. SCARBER: Because I was going to retire -- service

1 retire at age 50 and run for sheriff for the Fresno County  
2 Sheriff's Department and I would retire --

3 ADMINISTRATIVE LAW JUDGE WONG: Okay. None of that is  
4 relevant to this action.

5 MR. SCARBBER: Okay. Then you have the State  
6 Compensation Insurance Fund that was handling my claim. And  
7 then it says, "If you drop your claims, we will" -- the  
8 California -- "we will not pursue any action against you."

9 ADMINISTRATIVE LAW JUDGE WONG: Not relevant to this  
10 action. That's SCIF.

11 MR. SCARBBER: That is the California Highway Patrol,  
12 Your Honor. We worked in cooperation with the California  
13 Highway Patrol when it says, "We will allow you to service  
14 retire at age 50, if you drop any and all claims, and receive  
15 all of your service benefits, if you agree to withdraw any  
16 and all workers' compensation claims that you have against  
17 the State of California." And it also asks me to produce a  
18 letter from my doctors that I would not participate in  
19 administrative interrogations.

20 ADMINISTRATIVE LAW JUDGE WONG: Sir, are you -- okay.  
21 You are so far afield on the relevant issues. Let me see if  
22 I could pick some potential relevance. Are you saying that  
23 you signed the settlement agreement under duress and you're  
24 wanting to void out the settlement agreement?

25 MR. SCARBBER: No, sir.

1 ADMINISTRATIVE LAW JUDGE WONG: Do you agree that the  
2 settlement agreement is final and binding, or do you not  
3 believe it's final and binding?

4 MR. SCARBBER: I believe it's final and binding, yes,  
5 sir.

6 ADMINISTRATIVE LAW JUDGE WONG: So you agree that your  
7 employment has been terminated by CHP?

8 MR. SCARBBER: I disagree with the term "terminated."

9 ADMINISTRATIVE LAW JUDGE WONG: Well, then -- you are  
10 no longer employed by the CHP?

11 MR. SCARBBER: By choice, correct.

12 ADMINISTRATIVE LAW JUDGE WONG: And do you agree that  
13 you waived any right to return to employment of the CHP?

14 MR. SCARBBER: By choice, yes, sir.

15 ADMINISTRATIVE LAW JUDGE WONG: Okay. All right. So  
16 based on the objection of relevance to E, it is sustained and  
17 E is not admitted.

18 All right. So F is the patient discharge summary.

19 MS. YELLAND: Another medical objection, same as  
20 before, Your Honor.

21 ADMINISTRATIVE LAW JUDGE WONG: All right. So what is  
22 the relevance of F, Mr. Scarber?

23 MR. SCARBBER: To show that I've been on  
24 care -- continued medical care with the State of California  
25 and I have extreme limitations and I cannot participate in



1 the 14 critical tasks and I'm still undergoing treatment.

2 ADMINISTRATIVE LAW JUDGE WONG: All right. Out of an  
3 abundance of caution, the objection is irrelevant -- is  
4 overruled. I think the arguments go to the weight rather  
5 than its admissibility. It is potentially relevant to the  
6 equitable exception articulated in the City of Napa.

7 The objection as to authenticity is overruled. I  
8 believe the document provides sufficient indicia of  
9 authenticity. And then, as to administrative hearsay, well,  
10 I guess as to hearsay, the objection is sustained in part and  
11 overruled in part. F will be admitted as administrative  
12 hearsay.

13 (Respondent's Exhibit F admitted.)

14 MS. YELLAND: Thank you, Your Honor.

15 ADMINISTRATIVE LAW JUDGE WONG: And then G is the  
16 first -- or not the first, but it's the December 22nd, 2015,  
17 medical report.

18 MS. YELLAND: Same objections.

19 ADMINISTRATIVE LAW JUDGE WONG: Same objections? All  
20 right, Mr. Scarber, anything additional you want to argue in  
21 response to G?

22 MR. SCARBBER: Yes, sir. It is directly related to my  
23 industrial disability retirement and the documents that they  
24 have, I'm guessing in my file, the injury and illnesses are  
25 consistent with that -- not QME, but --

1 ADMINISTRATIVE LAW JUDGE WONG: I think it's an AME.

2 MR. SCARBER: AME, you're correct, Your Honor. An AME  
3 that I was directed by the State of California to go to, and  
4 he cites in there that the injuries and the dates going back  
5 before -- years before any of this is  
6 industrial -- industrial -- industrially related.

7 ADMINISTRATIVE LAW JUDGE WONG: All right. So with  
8 regard to G, the objection as to relevance is overruled. To  
9 the extent it's potentially relevant to the equitable  
10 exception as articulated in the City of Napa, it has some  
11 relevance, and the argument goes to the weight rather than  
12 the admissibility into evidence. I believe the document  
13 provides enough indicia of authenticity.

14 And then the hearsay objection is sustained in part  
15 and overruled in part and G will be admitted as  
16 administrative hearsay.

17 (Respondent's Exhibit G admitted.)

18 ADMINISTRATIVE LAW JUDGE WONG: And then H is another  
19 medical report. That April 7th, 2016, report. Same  
20 objections or any --

21 MS. YELLAND: Same objections.

22 ADMINISTRATIVE LAW JUDGE WONG: Mr. Scarber, anything  
23 else you wanted to add with regard to H that you did not  
24 already argue?

25 MR. SCARBER: No, sir, it's just a follow-up to G --

1 ADMINISTRATIVE LAW JUDGE WONG: Okay.

2 MR. SCARBER: -- in the sense it's --

3 ADMINISTRATIVE LAW JUDGE WONG: All right. If there  
4 is nothing you want to argue additional, then that's enough.

5 MR. SCARBER: Well, they mention other reports and I'm  
6 not sure -- I'm pretty sure that CalPERS has been in  
7 possession of those medical reports, but I don't know because  
8 of the lack of discovery.

9 ADMINISTRATIVE LAW JUDGE WONG: All right. Same  
10 ruling with regard to of H as F and G, and so H is admitted  
11 as administrative hearsay only.

12 (Respondent's Exhibit H admitted.)

13 ADMINISTRATIVE LAW JUDGE WONG: And then I is the  
14 physician's report on disability that CalPERS performed.

15 MS. YELLAND: Same objections.

16 ADMINISTRATIVE LAW JUDGE WONG: Okay. Mr. Scarber,  
17 anything else you want to add with regard to I? This is the  
18 CalPERS physician's report on disability.

19 MR. SCARBER: No, sir.

20 ADMINISTRATIVE LAW JUDGE WONG: Okay. So same ruling  
21 on I as F, G and H and I will be admitted as administrative  
22 hearsay.

23 (Respondent's Exhibit I admitted.)

24 MR. SCARBER: And I'll tell you, with one of the -- I  
25 think it was included in that document, the California

1 Highway Patrol and CalPERS alleges that I did not go through  
2 the department, that I merely bypassed them and violated --

3 ADMINISTRATIVE LAW JUDGE WONG: You're providing  
4 testimony.

5 MR. SCARBER: Okay.

6 ADMINISTRATIVE LAW JUDGE WONG: All right.

7 MR. SCARBER: That would be the relevance, I just  
8 wanted to --

9 ADMINISTRATIVE LAW JUDGE WONG: I've already ruled.

10 MR. SCARBER: Okay.

11 ADMINISTRATIVE LAW JUDGE WONG: J is the notice of  
12 motion. Are you wanting to admit that into evidence or what  
13 are you wanting to do -- just have it marked? Your notice of  
14 motion to continue ...

15 MR. SCARBER: Yes, sir. I'd like it entered into  
16 evidence. I disagree with how it was prepared. It was  
17 prepared in a manner to sway any decision in this hearing, in  
18 my opinion.

19 ADMINISTRATIVE LAW JUDGE WONG: All right. You're  
20 making legal argument.

21 MR. SCARBER: Okay.

22 ADMINISTRATIVE LAW JUDGE WONG: What is  
23 the -- Ms. Yelland, any objection to J?

24 MS. YELLAND: Yeah, I'd object to it. That motion has  
25 been brought and denied.

1 ADMINISTRATIVE LAW JUDGE WONG: What the relevance of  
2 J? Why is it important?

3 MR. SCARBER: Because of the contents of the  
4 objection. She's bringing in or exposing this as a civil  
5 matter, and she is bringing up and contaminating the  
6 confidentiality of documents that are not supposed to be  
7 disclosed to the public.

8 ADMINISTRATIVE LAW JUDGE WONG: All right. The  
9 objection as to relevance is sustained, and J is not  
10 admitted.

11 And are you still wanting to offer -- oh, wait. That  
12 is something else.

13 And Exhibit K is a March 18th, 2013, letter.

14 MS. YELLAND: Same medical objection that I brought  
15 before.

16 ADMINISTRATIVE LAW JUDGE WONG: Okay. Anything else  
17 you want to add as to K that you did not already discuss with  
18 regard to the medical evidence?

19 MR. SCARBER: No, sir.

20 ADMINISTRATIVE LAW JUDGE WONG: Who is Mr. Grove?

21 MR. SCARBER: Mr. Grove was an attorney, a workers'  
22 comp attorney.

23 ADMINISTRATIVE LAW JUDGE WONG: Is it your attorney?

24 MR. SCARBER: Yes, sir.

25 ADMINISTRATIVE LAW JUDGE WONG: You understand that

1 this potentially violates the attorney/client privilege.

2 MR. SCARBER: No, sir.

3 ADMINISTRATIVE LAW JUDGE WONG: Yeah.

4 MR. SCARBER: Does it?

5 ADMINISTRATIVE LAW JUDGE WONG: Potentially.

6 MR. SCARBER: I don't want to --

7 ADMINISTRATIVE LAW JUDGE WONG: It's a communication  
8 between you and your attorney, so ...

9 MR. SCARBER: I don't know. I'll reconsider that.

10 ADMINISTRATIVE LAW JUDGE WONG: Do you want to  
11 withdraw K?

12 MR. SCARBER: Probably. I'll withdraw K, Your Honor.

13 ADMINISTRATIVE LAW JUDGE WONG: It looks like this one  
14 may be the same.

15 MS. YELLAND: "Dear Mr. Grove," I think that is also  
16 to your attorney.

17 MR. SCARBER: Okay. K and L, I will take out for the  
18 sake of attorney/client privilege. Thank you.

19 ADMINISTRATIVE LAW JUDGE WONG: Objection so K and L  
20 are withdrawn. And then M is the opposition to the motion to  
21 continue. Do you still wish to move that in, or do you want  
22 to withdraw it? The opposition to the motion to continue.

23 MR. SCARBER: I still want to keep that in, Your  
24 Honor.

25 ADMINISTRATIVE LAW JUDGE WONG: All right. Any

1 objection to M?

2 MS. YELLAND: Same objections, Your Honor. That  
3 motion has been brought, opposed, and denied.

4 ADMINISTRATIVE LAW JUDGE WONG: All right. So the  
5 objection based on relevance is sustained. M is not admitted  
6 for any purpose.

7 All right. So Mr. Scarber, that takes care of your  
8 documents. Do you have any witnesses you wish to call, other  
9 than yourself?

10 MR. SCARBER: No, sir.

11 ADMINISTRATIVE LAW JUDGE WONG: Do you wish to testify  
12 at this time?

13 MR. SCARBER: Yes.

14 ADMINISTRATIVE LAW JUDGE WONG: Okay. If you wouldn't  
15 mind standing for a moment and raise your right hand?

16 Do you solemnly swear or affirm under penalty of  
17 perjury that the testimony you will provide in this matter  
18 will be the truth, the whole truth, and nothing but the  
19 truth?

20 THE WITNESS: Yes, sir.

21 SHELDON KYLE SCARBER,

22 called as a witness on his own behalf, having been  
23 duly sworn to tell the truth, the whole truth, and nothing  
24 but the truth, was examined and testified as follows:

25 ADMINISTRATIVE LAW JUDGE WONG: Okay. Please have a

1 seat.

2 THE COURT REPORTER: Could we take a five-minute  
3 break?

4 ADMINISTRATIVE LAW JUDGE WONG: Okay. Before we  
5 continue, I just noticed the time, so let's take about a  
6 five-minute break. That will give everybody a chance to use  
7 the restroom and stretch their legs. Let's come back in five  
8 minutes and we're off the record until then.

9 (Brief recess taken.)

10 ADMINISTRATIVE LAW JUDGE WONG: Okay. Let's go back  
11 on the record. All right. Mr. Scarber, I think you were  
12 sworn just before we took the break, so I remind you that you  
13 are still under oath.

14 Typically, as you may have seen in the movies or on  
15 TV, it's typically an attorney that calls a witness and the  
16 attorney will ask questions with the witness giving answers.  
17 In this case, since you're representing yourself and it would  
18 be a little weird to have you ask yourself questions and give  
19 an answer, we just allow you to testify in the narrative. So  
20 whenever you are ready.

21 Oh, excuse me. I'm sorry. I forgot this yesterday,  
22 too, with the witness. If you would state and spell your  
23 full name for the record.

24 THE WITNESS: Sheldon Kyle Scarber, spelling of the  
25 last time S-C-A-R-B-E-R.



1 ADMINISTRATIVE LAW JUDGE WONG: And could you go ahead  
2 and just spell your Sheldon and Kyle -- your first and middle  
3 as well.

4 THE WITNESS: Sheldon, S-H-E-L-D-O-N, and Kyle is  
5 K-Y-L-E.

6 ADMINISTRATIVE LAW JUDGE WONG: Okay. Mr. Scarber,  
7 whenever you are ready.

8 DIRECT EXAMINATION

9 THE WITNESS: First of all, I just want to --  
10 unfortunately, on the CalPERS and administrative law arena  
11 utilizes a one size fits all approach, in my opinion, with  
12 respect to the Hollywood -- Haywood vs. American River Fire  
13 Protection District, the 1998 case, which I'm defending  
14 myself against today.

15 An application for industrial disability retirement.  
16 That's the sole reason why I'm here today. A review and  
17 findings should take into account each case individually  
18 based on the totality of the circumstances and document --

19 THE COURT REPORTER: I am going to ask you to slow  
20 down. It is just because you are reading and we have a  
21 tendency to speak faster.

22 ADMINISTRATIVE LAW JUDGE WONG: My suggestion is that  
23 you not read, because you do tend to talk faster when you  
24 read. And don't feel bad, I did it as an attorney and if you  
25 have a good judge, they'll catch you because the court

1 reporter will miss -- and then actually, they'll miss, too,  
2 when they're taking notes. Go ahead.

3 THE WITNESS: Okay. In the basis for the denial of my  
4 application for industrial disability retirement should be  
5 based on the totality of it, not in this case where they  
6 focus on a singular document, which has the potential to  
7 violate policies, procedures, law, to be incorrect, to be  
8 discriminatory and to be unfair.

9 And I'm contending, then going to prove the  
10 reasonableness that my application for industrial  
11 disability --

12 ADMINISTRATIVE LAW JUDGE WONG: Let me interrupt you.  
13 You're arguing. So you want to introduce evidence. So, it's  
14 often hard to distinguish the two, and so I was trying to  
15 think of a good way to distinguish between the two, and I was  
16 trying to think back to what I thought.

17 Think of argument as when you apply the law to the  
18 facts. And so, what you need -- what evidence is, is, I  
19 guess creating the facts, if you will, that you later apply  
20 the law to in your argument.

21 So you're going backward, you're putting the cart  
22 before the horse, if you will. So you want to apply the  
23 facts -- I'm sorry, not apply the facts. You want to  
24 establish the facts.

25 THE WITNESS: Okay. So that's confusing. Because in

1 the letter, it says we're not dealing with the facts, we're  
2 only dealing with the law.

3 ADMINISTRATIVE LAW JUDGE WONG: Don't get hung up on  
4 that. I mean, present the case you want to present it. I  
5 mean, if you think facts are relevant, then you need to  
6 introduce evidence to establish the facts that you believe  
7 are relevant. If you happen to not believe the facts are  
8 important, then you don't need to introduce evidence. But  
9 based on your previous statements, it sounds like you believe  
10 that this is a factual based case, and that's what you need  
11 to introduce evidence of.

12 THE WITNESS: Okay. I've had a -- preceding my claim  
13 for industrial disability retirement goes back to 1990, and  
14 I've been documenting injuries ever since with a finding of a  
15 potential brain lesion, which turned into a skull lesion, a  
16 back, I was sent to a psychiatrist to be evaluated at the  
17 direction of the State. And when I filed my industrial  
18 disability retirement in conjunction with service retirement,  
19 that was prior to any investigation being conducted by the  
20 California Highway Patrol, prior to my knowledge of any  
21 investigation being conducted by the Highway Patrol.

22 The internal investigation that was conducted on me --  
23 in an internal investigation, it results in an adverse action  
24 or a miscellaneous investigation. In this case, the CHP made  
25 a recommendation of termination. I disagreed with that. I

1 made every possible attempt to participate in an  
2 administrative interrogation to tell my side of the story,  
3 which I believe would have overturned this entire mess of the  
4 internal investigation, but was denied those rights.

5           The termination, in my opinion -- or the  
6 recommendation for termination, in my opinion, should be null  
7 and void, although and because the fact that -- which you  
8 didn't allow me to introduce as evidence, was a SCIF coming  
9 to me and making a proposed offer before an administrative  
10 interrogation on behalf of the department.

11           And that result calls me -- or calls me to get a  
12 doctor's note, asking if I could participate in an  
13 internal -- I mean -- administrative interrogation and I was  
14 due to come back to work on September the first on full duty.  
15 And I wanted to participate and tell my side of the story  
16 which would have negated all of this stuff, but I wasn't  
17 allowed to. And then the Highway Patrol, in one of the  
18 charges it alleges, was insubordination because I did not  
19 appear for a administrative interrogation.

20           I argued with the doctor and was allowed to  
21 participate in a Skelly hearing.

22           THE COURT REPORTER: I'm sorry, Skelly hearing?

23           ADMINISTRATIVE LAW JUDGE WONG: Skelly, S-K-E-L-L-Y.

24           THE COURT REPORTER: Thank you.

25           THE WITNESS: And I'm not sure if CalPERS has that. I

1 mean, they have the notice, but I don't know if they have the  
2 contents of this Skelly hearing in their possession because  
3 I've made repeated attempts for discovery, but I can't get it  
4 until today.

5           And, in that, I did, I pretty much begged to  
6 participate in an interrogation -- administrative  
7 interrogation and interview -- because I have a story to tell  
8 and it should have been handled in an appropriate manner.

9           In one of the documents they make reference to, "I  
10 interjected or come to the State with a resignation." That  
11 is inaccurate and that is false. The State came to me after  
12 I filed my appeal and offered a resignation to me. With the  
13 grounds that they would remove the notice of adverse action  
14 from the personnel file that I would resign for personal  
15 reasons and personal reason alone. And that's what the  
16 stipulated agreement says, that I would retire or resign for  
17 personal reasons.

18           The recommendation for termination on behalf of the  
19 Highway Patrol was not a recommendation because that was  
20 never approved, nor was it ever sustained by the State  
21 Personnel Board, the overseer of the State entity with  
22 disciplinary action especially with results in termination.  
23 That was never presented to them. It was never stipulated to  
24 the State Personnel Board, nor sustained; however, the State  
25 Personnel Board did stipulate to a resignation for personal

1 reasons and concurred with the administrative law judge that  
2 I would resign for personal reasons, solely for personal  
3 reasons.

4           The point about me, and they talk about never being  
5 able to return to state service is one of the arguments under  
6 Haywood. It was my request. And under medical -- I know she  
7 doesn't feel it was medical, but I was told and written I  
8 would never be able to entertain an occupation within law  
9 enforcement ever again by a few doctors.

10           I think one of the determining factors that CalPERS  
11 uses for the 14 critical tasks of that of law enforcement  
12 personnel. The 14 critical tasks was presented to the  
13 department, but I don't see that in the exhibits in front of  
14 CalPERS. And I believe the 14 critical tasks, that I could  
15 not do them, would have sentenced a different motion with  
16 respect to my application and the denial of my application.

17           I go -- again, I harp on the discovery because  
18 according to CalPERS in a certified letter, they stated that  
19 based on my application and file -- well, what does my file  
20 consist of? I don't know. And I think it's fair to me in a  
21 hearing like this to be allowed under the Government Codes,  
22 the Code of Civil Procedures, to see what's in that file and  
23 to see what evidence they are using against me or to make a  
24 review to make a determination to deny my application for  
25 industrial disability retirement, but I haven't seen any of

1 that. I do know the other doctor's reports were submitted to  
2 substantiate the incapacitation and could no longer work in  
3 law enforcement, but I don't see -- I don't know if it's  
4 selective or what they have in their files, what's excluded.  
5 I'm not sure which agencies or entities, CalPERS cooperated  
6 with in their findings, because again, I wasn't allowed or  
7 privy to any information since my May the 14th, 2014,  
8 request.

9 In that, I was pretty direct. I  
10 included -- requesting all discovery materials and  
11 information which enabled them to reach a finding and it's in  
12 my file. So why is it that I'm not exempt from the Code of  
13 Civil Procedures Act, it's pro per, and the State agency on  
14 behalf of this matter, CalPERS, is exempt. I don't know  
15 that. That's a question I've always had.

16 There was a September the 3rd, and it's in here, that  
17 CalPERS, in order to make their determination or assist them  
18 in their findings on September of 2016, when my claim was  
19 submitted in 2014, I believe it was, or 2013, they requested  
20 seven documents from the California Highway Patrol in order  
21 to help them make their finding. Of that, I know that the  
22 California Highway Patrol only turned over two documents.  
23 One of the documents wasn't even requested. And that means  
24 they turned over one document versus eight.

25 In all fairness and due process, how did they render a

1 decision other than their taking a investigation, which is a  
2 recommendation of termination, while it's still on the appeal  
3 process, and it was never stipulated to by a higher entity,  
4 the governing board, as to termination. And they used these  
5 limitless documents and applied Haywood to it. And when you  
6 look at Haywood, it doesn't fit my case at all in comparison  
7 with Haywood. And it's my understanding, if I were --

8 ADMINISTRATIVE LAW JUDGE WONG: Okay. Hang on one  
9 second. Let me give you a tip. If you're going to argue  
10 about Haywood, that's going to be legal argument. If you  
11 believe it's distinguishable, then you could present evidence  
12 of the differences, but to argue why it's different is  
13 argument.

14 THE WITNESS: Oh, okay. Well, with the -- did you  
15 admit the CHP 121. No, I think you objected to the document  
16 that is submitted on 12/20/2012?

17 ADMINISTRATIVE LAW JUDGE WONG: I don't know. What is  
18 it?

19 THE WITNESS: Its the -- me -- it matches what the --

20 ADMINISTRATIVE LAW JUDGE WONG: What is the document?

21 THE WITNESS: It is a --

22 ADMINISTRATIVE LAW JUDGE WONG: Is it your --

23 THE WITNESS: -- record of injury describing my  
24 cardiovascular hypertension and psychological --

25 ADMINISTRATIVE LAW JUDGE WONG: Is it the time sheet?



1 THE WITNESS: No, sir.

2 ADMINISTRATIVE LAW JUDGE WONG: So, I don't know, but  
3 it probably was admitted, then, because the medical records,  
4 I think I admitted as administrative hearsay.

5 THE WITNESS: The CHP record is -- I mean, I'm sorry,  
6 the CHP 121 is a documentation of medical injuries and  
7 illness.

8 ADMINISTRATIVE LAW JUDGE WONG: If it's not the  
9 absence and additional time work report and supporting  
10 documents, I don't think there were any other CHP documents  
11 that are were offered.

12 THE WITNESS: For the sake of time, I'll look for it  
13 later.

14 Like I said, I unbeknownst to any internal  
15 investigation or anything of that sort, and I was using my  
16 California Highway Patrol Employee Assistance Program with  
17 their licensed clinical social worker when I filed the  
18 initial claim for injury for cardiovascular. And I said that  
19 was prior to anything.

20 And in comparison -- hopefully this is not an  
21 argument -- in a comparison, you know, Haywood was -- he was  
22 terminated for following a series of serious disciplinary --

23 ADMINISTRATIVE LAW JUDGE WONG: That's an argument.  
24 You're talking about the Haywood case.

25 THE WITNESS: Okay.

1           The penalty of termination, which they're basing the  
2 denial of the case is, I mean, it was a recommendation. It  
3 was never sustained. It was never approved. I did request a  
4 stay and demand to the administrative and filed an appeal and  
5 was denied that, which I think would have -- is very relevant  
6 to this case because, had I been given the opportunity to do  
7 that, we would not be here today. I'm a firm believer in  
8 that.

9           I was under the impression that I was going to be  
10 submitted to a medical examination request and that's reading  
11 all of the documents that I found regarding CalPERS when you  
12 file for industrial disability retirement. And it said you  
13 may be required to submit to a medical examination if  
14 requested. When I was directed by the State to these medical  
15 examinations, I was under the impression that those were  
16 being utilized in conjunction with my application for  
17 industrial disability retirement, and I participated in, I  
18 think, three or four qualified medical examinations in  
19 conjunction with agreed medical examiners.

20           And each one -- each and every one of these in the  
21 findings came back and said that they -- that my -- the cause  
22 was industrial dating back to 1990 when I began taking  
23 medication for shingles. And the several patrol car  
24 accidents. And I'm pretty sure that those reports are in  
25 possession of CalPERS in my file. And I can only suspect

1 that or argue that they are.

2 I do know that I was eligible to apply for industrial  
3 disability retirement if you're using the standards applied  
4 in Haywood. They -- my statement is there was, again, that I  
5 was not terminated by using the comparison of Haywood because  
6 our cases are completely different. The -- and that's what  
7 they're basing it on. And they're not -- CalPERS stated that  
8 they -- in the exhibits -- that they don't -- they haven't  
9 utilized any medical evidence, so industrial disability  
10 curtails into medical issues.

11 ADMINISTRATIVE LAW JUDGE WONG: Okay. Let me explain  
12 something. That is where you're not understanding the  
13 process. You are correct that when you apply for disability  
14 retirement, if CalPERS is going to make a determination as to  
15 whether or not you're substantially incapacitated, and  
16 therefore qualified for disability retirement, they can and  
17 often send you to a medical evaluation; however, they denied  
18 your claim on a more procedural basis, if you will, rather  
19 than a substantive.

20 They haven't even reached a determination whether or  
21 not you're substantially incapacitated because they're saying  
22 you're not even qualified or eligible to apply for  
23 disability. That's why there is no -- there was no medical  
24 evaluation because it's CalPERS' position that any medical --  
25 whether you are or are not substantially incapacitated was

1 not relevant to the determination.

2 THE WITNESS: Okay. And a -- then I will go back to  
3 that, you know, I thought anything that I filed was not  
4 malicious. It was not for intent to avoid anything, because  
5 I didn't know anything was going on. I just reached a  
6 breaking point and filed that 121 work-related injury on  
7 December the 20th. I think that the argument saying that I  
8 was terminated should be voided, in my opinion, because the  
9 State Personnel Board makes a final determination and  
10 agreement as to the penalty. And in this case, they didn't.  
11 They did not even entertain termination. They entertained a  
12 resignation for personal reasons only. And that's evidence  
13 by the stipulated settlement agreement.

14 ADMINISTRATIVE LAW JUDGE WONG: All right.  
15 Mr. Scarber, is there anything else you wanted to add?

16 THE WITNESS: I was pausing to let you catch up.

17 ADMINISTRATIVE LAW JUDGE WONG: Oh, no. Go ahead.

18 THE WITNESS: I'll go through this briefly. With  
19 respect to the dates, on or about or shortly thereafter of  
20 December the 20th of 2012, I was instructed that I would  
21 never be able to return to the occupation of law enforcement  
22 and the department was provided a copy of the 14 critical  
23 tasks to substantiate that. I don't see that in this -- in  
24 the list of exhibits in making a determination, so I think  
25 that weighs into the resignation because they are saying that

1 the department wouldn't accept me back.

2 Well, I could never come back to a law enforcement  
3 profession again, according to medical professionals. My  
4 claims were -- let's say, my claims and application were  
5 filed prior to any knowledge of any disciplinary action. It  
6 was not filed to -- for the purpose to avoid administrative  
7 action up to and including the recommendation for termination  
8 and the request from the State to resign for personal  
9 reasons.

10 I submit that the industrial disability retirement  
11 claim or application for disability was delayed unduly  
12 through no fault of me. And in communications with CalPERS,  
13 this was filed in 2013, I believe it was, and I wasn't  
14 getting any response -- or, they weren't working on it till  
15 2015 or until after the departmental recommendation without  
16 any action. And I believe that the actions of CHP presented  
17 CalPERS' decision of Respondent's valid claim for industrial  
18 retirement.

19 The lapse of time, I don't -- I don't understand why  
20 when an employee files for disability retirement, it can take  
21 up to three years for them to make a ruling or finding or  
22 just request information. I was told by an employee in  
23 CalPERS, Maury, that it was lost. It was lost and misplaced  
24 and they don't know why. And that significantly delayed any  
25 ruling on my behalf.

1           The -- according to CalPERS, we're here on the Haywood  
2 matter and my case completely -- is completely different from  
3 that and I've learned my lesson now. But the discovery, too.  
4 I will make a big issue about discovery. I don't think it's  
5 right. I don't think it's fair that when you're defending  
6 yourself in a hearing that the Government Code, the Code of  
7 Civil Procedures is very descript. In Brady vs. Maryland,  
8 you name it, to disclose any discovery documents to allow a  
9 person to defend themselves or represent themselves. In this  
10 case, till this date, I haven't received any of those -- or,  
11 not any of those, but a lot of those documents. And I firmly  
12 believe there are more documents which should be in this  
13 binder that they are in possession of CalPERS.

14           You know, I -- I had a great career. When the  
15 allegations that were made against me that CalPERS hung their  
16 hat on were incorrect. They were biased and political in  
17 nature and I never got the opportunity to explain that. And  
18 I've been given the opportunity to shed light or we wouldn't  
19 be sitting here today. I would have retired at age 50 and  
20 ran for sheriff in Fresno County and taken it from there.

21           The injury that I sustained, I do have -- I don't know  
22 if this -- when you said bring this in. My cardiologist,  
23 because I was having blackout spells, beginning in 2006, I  
24 was passing out. And that I would not take any medication  
25 for. I -- my department was aware of it. I did not -- I

1 refused to take medication because -- for the safety of the  
2 public. And they -- the cardiologist put an implant in and I  
3 have to wear it for two more years, I have had it since 2014.

4 ADMINISTRATIVE LAW JUDGE WONG: Okay. Let me try to  
5 exploit this. You're -- you have to understand what the  
6 issue is. The issue is whether you are precluded by Haywood  
7 and the other cases from pursuing disability retirement. Not  
8 whether you are substantially incapacitated.

9 THE WITNESS: I think based on what I've stated --

10 ADMINISTRATIVE LAW JUDGE WONG: Okay. So --

11 THE WITNESS: -- I was not terminated.

12 ADMINISTRATIVE LAW JUDGE WONG: Okay. So don't repeat  
13 what you said. You've already said it. You don't need to  
14 repeat it.

15 THE WITNESS: Okay.

16 ADMINISTRATIVE LAW JUDGE WONG: So, really what you're  
17 focused on in this case should be showing why Haywood does  
18 not apply and showing why the other cases related to Haywood  
19 do not apply.

20 THE WITNESS: Okay. I think I stated my case on why  
21 Haywood doesn't apply, but as far as the other cases, I can't  
22 comment on because I was informed that this was going to be  
23 the sole focus on this. So I focused on Haywood. Haywood?

24 ADMINISTRATIVE LAW JUDGE WONG: Haywood.

25 THE WITNESS: So I focused solely on that because the

1 State Personnel Board said this appeal was limited to the  
2 issue of whether Respondents --

3 THE COURT REPORTER: I'm sorry, you're going to have  
4 to slow down.

5 ADMINISTRATIVE LAW JUDGE WONG: Yeah, slow down. And  
6 it's not State Personnel Board.

7 THE WITNESS: The issue of whether Scarber may file an  
8 industrial retirement based on cardio, epilepsy, anxiety,  
9 hypertension or whether his application for and eligibility  
10 for industrial disability preclude him from filing. So,  
11 that's a two-part question. It mentioned that --

12 ADMINISTRATIVE LAW JUDGE WONG: Are you eligible, not  
13 do you qualify. Two completely different issues.

14 THE WITNESS: Yes, sir. I've stated and I feel that I  
15 am qualified based on facts.

16 ADMINISTRATIVE LAW JUDGE WONG: All right. Is there  
17 anything else you want to say on your behalf?

18 THE WITNESS: No, sir.

19 ADMINISTRATIVE LAW JUDGE WONG: All right.

20 Cross-examination?

21 MS. YELLAND: Just a couple questions.

22 CROSS-EXAMINATION

23 BY MS. YELLAND:

24 Q. Can you put the binder in front of you, please,  
25 Mr. Scarber? Turn to Exhibit 3, page nine. That's it.



1 A. Okay.

2 Q. Is that your signature around the middle of the page?

3 A. Yes, ma'am.

4 Q. And did you sign this document February 27, 2013?

5 A. Yes, ma'am.

6 Q. Okay. And is Gail Scarber your wife?

7 A. Yes.

8 Q. And she, too, signed it on the 27th of February, 2013?

9 A. Yes, ma'am.

10 Q. And you had both of those signatures notarized,  
11 correct?

12 A. Yes, ma'am.

13 Q. And I believe you submitted this disability retirement  
14 application to the Fresno CalPERS Regional Office, also on  
15 February 27th, 2013; is that right?

16 A. Yes, ma'am.

17 Q. And I'm just looking at the stamp at the bottom. Do  
18 you see that?

19 A. Yes, ma'am.

20 Q. Okay. Let's do the same set of questions for  
21 Exhibit 4. Page eight of eight, is that your signature, the  
22 last page of the document?

23 A. Yes.

24 Q. And again Gail Scarber signed it as well?

25 A. Yes.

1 Q. And that is July 9th, both of you signed it July 9th,  
2 2013?

3 A. Correct.

4 Q. And at the bottom it indicates that a representative  
5 of CalPERS, Wendy Cabrerra, of the Fresno Regional Office,  
6 witnessed both of those signatures; do you see that?

7 A. Yes, ma'am.

8 Q. Do you recall a representative of CalPERS witnessing  
9 your signature on July 9th, 2013?

10 A. Yes, ma'am.

11 Q. Did you then submit this application to CalPERS on  
12 July 9th, 2013?

13 A. I would say yes, because it's stamped. So, yes.

14 Q. Okay. Do you have any reason to believe you didn't  
15 submit that July 9th, 2013?

16 A. No, it was kind of confusing. What I did, was I came  
17 to the Fresno -- on August 26, 2013 -- Regional Office, and I  
18 remember speaking to them and filing that and they said that  
19 they would take care of it so.

20 Q. Okay. So you remember coming to the Fresno Regional  
21 Office?

22 A. Yes, ma'am.

23 Q. Right where we are today?

24 A. Yes, ma'am.

25 Q. And you remember bringing in your application for

1 service retirement at that time?

2 A. Correct.

3 Q. Okay. Let's go to Exhibit 6. Well, actually, let's  
4 do five first. This is a letter from CalPERS to you  
5 October 31st, 2013; do you see that?

6 A. Yes, ma'am.

7 Q. Do you remember receiving this document from CalPERS  
8 indicating that you have a monthly retirement benefit?

9 A. I can't remember off the top of my head, but I  
10 can -- I can't remember off the top of my head if and when I  
11 received it.

12 Q. Do you have any reason to believe you did not receive  
13 it on or around October 31st, 2013?

14 A. No, ma'am.

15 Q. Do you remember starting to receive a service  
16 retirement benefit warrant, a check, from CalPERS around,  
17 according to this document, November 1st -- excuse me, I  
18 lied -- December 1st?

19 A. You didn't lie, you were just mistaken. That sounds  
20 about right. Yes, ma'am.

21 Q. Okay. And have you received a monthly warrant from  
22 CalPERS since December 1st, 2013, going forward?

23 A. Yes, ma'am.

24 Q. And it is your understanding that that monthly warrant  
25 hinges on your service retirement, not your disability

1 retirement application?

2 A. Yes, ma'am.

3 Q. Okay. And does \$10,441.97 sound about right for your  
4 beginning warrant?

5 A. I'm going to say yes, I'll agree to that.

6 Q. All right. And you may not know, but do you recall it  
7 ever being adjusted by COLA's cost of living adjustments  
8 since December 1, 2013?

9 A. Yes.

10 Q. It would have gone up, correct?

11 A. Correct.

12 Q. Do you happen to recall what you're being paid now on  
13 a monthly basis pursuant to your service retirements?

14 A. No, ma'am.

15 Q. Next Exhibit is Exhibit 6. Do you recall receiving  
16 this document on or around April 14th, 2014?

17 A. That one in conjunction with another document, yes.

18 Q. Okay. So do you recall -- well, let me ask this. Do  
19 you see in the first paragraph the case,  
20 Haywood vs. American River Fire Protection is referenced?

21 A. Yes, ma'am.

22 Q. Do you also see the case Smith vs. City of Napa is  
23 referenced?

24 A. Yes.

25 Q. And the precedential decision of Vandergoot is also

1 referenced; is that correct?

2 A. Correct.

3 Q. All right. And then 30 days later from the receipt of  
4 that letter, you submitted your appeal; is that correct?

5 A. Yes, plus the statement of facts, correct.

6 Q. All right. Well, the first paragraph says, "I Sheldon  
7 Kyle Scarber, Respondent, am hereby exercising my right to  
8 appeal." Do you see that?

9 A. Yes, which includes my statement of facts.

10 Q. Understood.

11 A. Okay.

12 Q. But this you understood to be an appeal of the  
13 determination that you did not qualify for disability  
14 retirement based on Haywood, Smith, and Vandergoot, correct?

15 A. Yes.

16 Q. Is your signature on the last page of this document?

17 A. Yes, ma'am.

18 Q. And do you recall writing it on or around  
19 May 14th, 2014?

20 A. Yes, ma'am.

21 Q. All right. You also presented a addendum to your  
22 appeal, which is Exhibit 8; is that correct?

23 A. Yes.

24 Q. And that's your signature at the bottom of this  
25 document, correct?

1 A. Yes, ma'am.

2 MS. YELLAND: Your Honor, for your documents, noticed  
3 that Mr. Scarber's phone number, e-mail, and address did not  
4 get redacted and it should have been off of Exhibit 8. So I  
5 would respectfully request that you line out his contact  
6 information at the bottom.

7 ADMINISTRATIVE LAW JUDGE WONG: Oh, the "P.S."?

8 MS. YELLAND: The P.S., yes.

9 ADMINISTRATIVE LAW JUDGE WONG: All right. Go ahead,  
10 thanks.

11 BY MS. YELLAND:

12 Q. All right. Let's turn then to Exhibit 10. Okay. Do  
13 you recall receiving a copy of this document, your notice of  
14 adverse action, on or around July 29, 2013?

15 A. It was after, but yes.

16 Q. You recognize this document?

17 A. Well, not line-by-line, paragraph-by-paragraph, but I  
18 know what a notice of adverse action in the subject line  
19 looked like, but I can't testify that this is the document  
20 that I had seen previously.

21 Q. Okay. Do you recall being served a notice of adverse  
22 action by the CHP?

23 A. I was away and I came home and there was some boxes  
24 sitting out in the driveway with this in it.

25 Q. Did you open the box?

1 A. I did not open it. I don't know who opened it, but I  
2 didn't. And I was told there were four binders in there.

3 Q. Have you seen this document before?

4 A. I'm going to say yes.

5 Q. All right. Going to number 11, do you recognize this  
6 document?

7 A. Yes.

8 Q. Is your signature found on one of the last pages, page  
9 six of this document?

10 A. Yes, ma'am.

11 Q. And you signed this document December 12th, 2013?

12 A. Yes, ma'am.

13 Q. Were you represented by counsel at the time?

14 A. He was there.

15 Q. Okay. That's not a "yes" or "no." Is Charles Miguel  
16 your representative in this settlement negotiation?

17 A. Yes.

18 Q. And he also signed this document December 12, 2013?

19 A. Yes, ma'am.

20 Q. And, to your knowledge, did the document, the  
21 stipulated settlement, Exhibit 11, then get presented to the  
22 SPB ALJ for decision approval or rejecting the stipulated  
23 settlement?

24 A. Can you repeat that, please?

25 Q. Was the stipulated settlement submitted to the SPB for

1 approval, to your knowledge?

2 A. To my knowledge, yes, eventually.

3 Q. Okay. And the document that has been marked and  
4 admitted as Exhibit 12, is it your understanding that this  
5 decision approved the stipulated settlement?

6 A. Yes.

7 Q. And that was done on January 9th, 2014, correct? You  
8 have to look at Exhibit 12.

9 A. Yes.

10 MS. YELLAND: That's all I have, Your Honor.

11 ADMINISTRATIVE LAW JUDGE WONG: Okay. Anything  
12 further on redirect, Mr. Scarber?

13 THE WITNESS: Yes, sir.

14 REDIRECT EXAMINATION

15 THE WITNESS: On Exhibit 6, she questioned me about  
16 April 14th, 2014, that said, "Dear Mr. Scarber, we have  
17 received your application for industrial disability  
18 retirement" --

19 ADMINISTRATIVE LAW JUDGE WONG: Wait, hang on a  
20 second. I'm on the wrong Exhibit. So Exhibit 6. Okay. So  
21 what -- you don't need to read them -- read the letter into  
22 the record. What is your question about Exhibit 6?

23 THE WITNESS: Why I received it.

24 ADMINISTRATIVE LAW JUDGE WONG: Or, not your question,  
25 but what you wanted to testify about.



1 THE WITNESS: I received the letter March 11th, 2013,  
2 from CalPERS stating the same thing. This is to acknowledge  
3 receipt of application for industrial disability retirement.

4 And there was a question about a February submission,  
5 number three. Did we talk about number three?

6 MS. YELLAND: Yes.

7 THE WITNESS: Okay. One is missing the front page.  
8 As I recall, in February, my doctors told me that I was  
9 not -- or January, whatever it was -- I was never to return  
10 to an occupation in law enforcement, California Highway  
11 Patrol. I filed for disability retirement based on  
12 supporting documentation and sit down with CalPERS here.

13 I never heard anything after repeated phone calls. I  
14 did speak with one gentleman who said, "Yes," he received it  
15 and it will be determined very, very shortly. I never  
16 received it and nobody would tell me anything other than it's  
17 potentially lost and at that time, I filed -- I came into  
18 CalPERS and explained it to them and they said I could file a  
19 service retirement and put industrial disability retirement  
20 on there and proceed that way. And I said okay. I think  
21 that's where the other date is, but I'm confused on the dates  
22 because February 27 was when I filed the disability. I  
23 didn't hear anything, I didn't know where to go, wasn't  
24 getting answers. So I went in and filed for service  
25 retirement.

1           And we talked about Exhibit 10, the notice. This I  
2 disagree with this because of due process. And in that  
3 document also, it again talks about voluntarily resigning for  
4 personal reasons and Appellant's voluntary resignation for  
5 personal reasons, but it still was not finalized until  
6 reviewed by California State Personnel Board. And in their  
7 submission to the administrative law judge, there was no  
8 discussion about termination. It was agreed on by the board  
9 that there was no determination that it was a resignation for  
10 personal reasons only. On January the 9th, so ...

11           ADMINISTRATIVE LAW JUDGE WONG: Anything else?

12           THE WITNESS: No, sir. I think that's the only  
13 documents we talked about.

14           ADMINISTRATIVE LAW JUDGE WONG: Anything further on  
15 recross?

16           MS. YELLAND: No, Your Honor.

17           ADMINISTRATIVE LAW JUDGE WONG: Mr. Scarber, you are  
18 excused as a witness. Do you have any other evidence you  
19 would like to present?

20           MR. SCARBER: Well, I wanted to look for that May the  
21 14th letter. Mine says the March 11, 2013.

22           ADMINISTRATIVE LAW JUDGE WONG: What letter are you  
23 talking about?

24           MR. SCARBER: The one she asked me about certified  
25 mail receipt request --

1 ADMINISTRATIVE LAW JUDGE WONG: Okay. Well --

2 MR. SCARBBER: -- and that they received my industrial  
3 disability retirement on April 14th, 2014.

4 ADMINISTRATIVE LAW JUDGE WONG: What's the importance  
5 of the letter you're looking for?

6 MR. SCARBBER: Well, the other one says they received  
7 my application for industrial disability on March the 11th.

8 ADMINISTRATIVE LAW JUDGE WONG: So what? Why is that  
9 important?

10 MR. SCARBBER: It's almost a year different, Your  
11 Honor.

12 ADMINISTRATIVE LAW JUDGE WONG: Why is that important?

13 MR. SCARBBER: Well, when did they receive it? Or  
14 where -- where -- why the delay?

15 ADMINISTRATIVE LAW JUDGE WONG: Why is it important?  
16 What is it relevant to the outcome of this decision?

17 MR. SCARBBER: What was the --

18 ADMINISTRATIVE LAW JUDGE WONG: This isn't a general  
19 inquiry just to find out what happened in, you know, in the  
20 world.

21 MR. SCARBBER: Why the delay in rendering a decision?

22 ADMINISTRATIVE LAW JUDGE WONG: What's the relevance  
23 of any delay?

24 MR. SCARBBER: Because the -- to me, it appears based  
25 on the dates and documentation and the extensive timeframe,

1 that is abnormal to the best of my knowledge in reading and  
2 research that it takes two to three years to even begin to  
3 process an industrial disability retirement. So was the, in  
4 my opinion, was the application for industrial disability  
5 retirement put off until the department made a decision?

6 Or ...

7 ADMINISTRATIVE LAW JUDGE WONG: What's the relevance  
8 of the timing?

9 MR. SCARBBER: Because I think if it would have been  
10 processed in a timely manner, my denial for application for  
11 industrial disability would have been reprovved because there  
12 was no, to the best of my knowledge, investigation completed.  
13 At the timeframe that they should have used or should have  
14 conducted the inquiry to determine the application for  
15 approval for application for industrial disability  
16 retirement.

17 ADMINISTRATIVE LAW JUDGE WONG: So what letter is it  
18 that you want to introduce?

19 MR. SCARBBER: Well, I think I did, Your Honor.

20 ADMINISTRATIVE LAW JUDGE WONG: Well, if it's in, it's  
21 in.

22 MR. SCARBBER: And we did talk about Exhibit 7 and I  
23 draw my attention to page two.

24 ADMINISTRATIVE LAW JUDGE WONG: Okay. You don't have  
25 to talk about everything she talked about. It's only if it's

1 relevant. So are you still wanting to testify, so you were  
2 dismissed as a witness. Are you wanting to provide  
3 additional testimony?

4 MR. SCARBBER: Yes, sir, regarding this document, I  
5 will.

6 ADMINISTRATIVE LAW JUDGE WONG: What document?

7 MR. SCARBBER: Exhibit number 7.

8 ADMINISTRATIVE LAW JUDGE WONG: Okay. What is it that  
9 you -- don't tell me what you're going to say, basically give  
10 me an idea of what you're going to talk about. What is it  
11 that you want to talk about?

12 MR. SCARBBER: Paragraph number five.

13 ADMINISTRATIVE LAW JUDGE WONG: All right. So you  
14 could be recalled as a witness and I remind you that you're  
15 still under oath. What is that you want to talk about on  
16 paragraph five in Exhibit 7?

17 REDIRECT EXAMINATION

18 THE WITNESS: Well, I think it's unfair in due  
19 process, and it's trickery in corroboration --

20 ADMINISTRATIVE LAW JUDGE WONG: That's argument.

21 THE WITNESS: Okay. I was asked to -- statement -- I  
22 was asked to provide a letter from my treating medical --  
23 primary doctor that I could not participate in an  
24 administrative interrogation. I was asked if I had  
25 participated in an administrative interrogation and the

1 response was no, I had not. I didn't think I was ever going  
2 to be --

3 ADMINISTRATIVE LAW JUDGE WONG: What is the relevance  
4 of any of this?

5 THE WITNESS: Because, Your Honor, an opportunity to  
6 explain myself and -- which has a deciding factor.

7 ADMINISTRATIVE LAW JUDGE WONG: We're not here to  
8 relitigate the department action. The -- your adverse  
9 action. That's not what we're here to do.

10 THE WITNESS: Okay.

11 ADMINISTRATIVE LAW JUDGE WONG: Remember, as I  
12 mentioned earlier, the sole issue is whether you are  
13 precluded by Haywood from filing an application for  
14 disability retirement. The issue is very, very narrow.

15 THE WITNESS: Paragraph five is -- well, in my  
16 opinion, because I was -- I was set up to not participate and  
17 to have charges brought against me, which --

18 ADMINISTRATIVE LAW JUDGE WONG: Again, it's not  
19 relevant. We are not relitigating the employment termination  
20 issue. It's not relevant. That matter has been determined.

21 THE WITNESS: Okay. Okay.

22 ADMINISTRATIVE LAW JUDGE WONG: Is there any other  
23 relevant testimony you want to offer?

24 THE WITNESS: No, sir.

25 ADMINISTRATIVE LAW JUDGE WONG: Ms. Yelland, anything

1 you want to follow-up on?

2 MS. YELLAND: No, Your Honor.

3 ADMINISTRATIVE LAW JUDGE WONG: Okay. So you're  
4 dismissed as a witness. Is there any other evidence you want  
5 to offer, Mr. Scarber?

6 MR. SCARBER: No, sir.

7 ADMINISTRATIVE LAW JUDGE WONG: Okay. So do you rest  
8 your case, Mr. Scarber?

9 MR. SCARBER: Oh, I'm sorry. Yes.

10 ADMINISTRATIVE LAW JUDGE WONG: All right.

11 Ms. Yelland, anything rebuttal?

12 MS. YELLAND: No, Your Honor.

13 ADMINISTRATIVE LAW JUDGE WONG: All right. So,  
14 Mr. Scarber, are you still wanting closing argument -- or  
15 written closing argument, or do you want to make an oral  
16 closing argument?

17 MR. SCARBER: I would rather make a written one,  
18 please, sir.

19 ADMINISTRATIVE LAW JUDGE WONG: Any objection,  
20 Ms. Yelland?

21 MS. YELLAND: No, Your Honor.

22 ADMINISTRATIVE LAW JUDGE WONG: All right. Let's go  
23 ahead and go off the record so we can talk about this.

24 (Pause in proceedings.)

25 ADMINISTRATIVE LAW JUDGE WONG: So we talked about

1 doing one round of simultaneous closing briefs, which will be  
2 due 5:00 p.m. Monday, October 17th, 2016, and then the  
3 matter -- the record will be closed after that and the matter  
4 is submitted for decision. And I advised the parties to  
5 submit their briefs to OAH by either e-mail to sacfilings or  
6 facsimile to the fax number and then also I provided a  
7 landline in case there is any problems with that. And then,  
8 again, Mr. Scarber, make sure you serve a copy on Ms. Yelland  
9 and she'll do the same on you.

10 And is there anything else for the record,  
11 Ms. Yelland?

12 MS. YELLAND: The only thing, Your Honor, is that I  
13 have had you withdraw our closing brief out of the binder.

14 ADMINISTRATIVE LAW JUDGE WONG: Yes, thank you. So  
15 that was previously marked as Exhibit 17 for the record, so  
16 we'll go ahead and withdraw that at this time and then when  
17 it is submitted on the 17th, we'll go ahead and add that  
18 back. Thank you for reminding me. Anything else?

19 MS. YELLAND: No, Your Honor.

20 ADMINISTRATIVE LAW JUDGE WONG: Mr. Scarber, anything  
21 else for the record?

22 MR. SCARBBER: No, sir. Thank you for your time.

23 ADMINISTRATIVE LAW JUDGE WONG: Thank you. And we're  
24 off the record.

25 (Proceedings concluded.)



1 COURT REPORTER'S CERTIFICATE

2  
3 I, KELLI A. DIAZ, hereby certify that I am a Certified  
4 Shorthand Reporter and that I recorded verbatim in shorthand  
5 the proceedings had Thursday, September 15, 2016, in the  
6 matter of SHELDON KYLE SCARBER, RESPONDENT, versus CALIFORNIA  
7 PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Case Number 2015-0243  
8 completely and correctly to the best of my ability; that I  
9 have caused said shorthand to be transcribed into typewriting  
10 and the foregoing pages, 1 through 89, constitute a complete  
11 and accurate transcript of said shorthand writing taken in  
12 the above-mentioned proceedings.

13 California Government Code 69954(d): Any court, party,  
14 or person who has purchased a transcript may, without paying  
15 a further fee to the reporter, reproduce a copy or portion  
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18 or copies to any other party or person.

19 Dated at Fresno, California, this 28 day of December,  
20 2016.

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25 KELLI A. DIAZ CSR No. 13930