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Employees' Retirement System

BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

AGENCY CASE NO. 2015-0243  
OAH NO.

SHELDON K. SCARBER,

STATEMENT OF ISSUES

Respondent,

Hearing Date:

And

Hearing Location: Fresno, CA

CALIFORNIA HIGHWAY PATROL,

Prehearing Conf.: None Scheduled

Respondent.

Settlement Conf.: None Scheduled

California Public Employees' Retirement System (CalPERS) states:

I

CalPERS makes and files this Statement of Issues in its official capacity as such  
and not otherwise.

II

Respondent Sheldon K. Scarber (respondent Scarber) was employed by  
respondent California Highway Patrol (respondent CHP) as Assistant Chief. By virtue

-1-

STATEMENT OF ISSUES

In Re the Matter of the Cancellation of the Application for Industrial Disability Retirement  
Sheldon K. Scarber

PENICAD 800-631-6089

STATE'S  
EXHIBIT

1 of this employment, respondent Scarber became a local safety member of CalPERS  
2 subject to Government Code sections 21154 and 21156.

3 III

4 On or about December 21, 2012, respondent CHP served respondent Scarber  
5 with a CHP 51, Memorandum, Notice of Removal of Peace Officer Powers and  
6 Administrative Reassignment.

7 IV

8 On or about February 27, 2013, respondent Scarber signed an application for  
9 industrial disability retirement, which was received by CalPERS on February 27, 2013.  
10 In filing the application, disability was claimed on the basis of a cardio, epilepsy,  
11 anxiety, hypertension condition.

12 On or about July 9, 2013, respondent Scarber signed an application for service  
13 retirement. Respondent Scarber retired for service effective October 31, 2013, and  
14 has been receiving his retirement allowance from that date.

15 V

16 On or about July 29, 2013, respondent CHP served respondent Scarber with a  
17 Notice of Adverse Action terminating his employment effective August 29, 2013, due to  
18 inexcusable neglect of duty, insubordination, dishonesty, discourteous treatment of the  
19 public or other employees, willful disobedience, misuse of state property, violation of  
20 the prohibitions set forth in accordance with Section 19990 and other failure of good  
21 behavior either during or outside of duty hours which is of such a nature that it causes  
22 discredit to the appointing authority or the person's employment. Respondent Scarber  
23 appealed his termination.

1 On or about August 15, 2013 a hearing was conducted, respondent Scarber  
2 requested a stay and an Administrative Interrogation and reasonable accommodation,  
3 the request was denied, respondent Scarber appealed to the State Personnel Board  
4 (SPB).

5 Respondent Scarber and respondent CHP with the remedial authority of the  
6 SPB, granted respondent Scarber's offer of resignation and removing the internal  
7 investigation from respondent's personnel folder.

## 8 VI

9 The following provisions of the Government Code were in effect at all times  
10 pertinent to this appeal:

11 Section 21152 provides in part:

12 Application to the board for retirement of a member for  
13 disability may be made by: [¶] . . . [¶]

14 (d) The member or any person in his or her behalf.

15 Section 21154 provides:

16 The application shall be made only (a) while the member is  
17 in state service, or (b) while the member for whom  
18 contributions will be made under Section 20997, is absent  
19 on military service, or (c) within four months after the  
20 discontinuance of the state service of the member, or while  
21 on an approved leave of absence, or (d) while the member  
22 is physically or mentally incapacitated to perform duties  
23 from the date of discontinuance of state service to the time  
24 of application or motion. On receipt of an application for  
25 disability retirement of a member, other than a local safety  
member with the exception of a school safety member, the  
board shall, or of its own motion it may, order a medical  
examination of a member who is otherwise eligible to retire  
for disability to determine whether the member is  
incapacitated for the performance of duty. On receipt of the  
application with respect to a local safety member other than  
a school safety member, the board shall request the

### STATEMENT OF ISSUES

In Re the Matter of the Cancellation of the Application for Industrial Disability Retirement of  
Sheldon K. Scarber

governing body of the contracting agency employing the member to make the determination.

Section 21156 provides:

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

(2) In determining whether a member is eligible to retire for disability, **the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.**

(b)(1) **The governing body of a contracting agency, upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated.**

(2) **The local safety member may appeal the determination of the governing body.** Appeal hearings shall be conducted by an administrative law judge of the Office of Administrative Hearings pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of this title. (Emphasis added.)

Section 21157 provides:

The governing body of a contracting agency shall make its determination within six months of the date of the receipt by the contracting agency of the request by the board pursuant to Section 21154 for a determination with respect to a local safety member.

1 A local safety member may waive the requirements of this  
2 section.

3 VII

4 After review of respondent Scarber's employment status with respondent CHP,  
5 CalPERS has determined that respondent Scarber is ineligible to apply for industrial  
6 disability retirement.

7 VIII

8 By letter dated April 14, 2014, respondent Scarber was notified of CalPERS'  
9 determination to cancel his industrial disability retirement application based on  
10 termination by respondent CHP. CalPERS' determination is not changed by the  
11 stipulation for settlement between respondent Scarber and respondent CHP.

12 IX

13 By letter dated May 14, 2013 (received by CalPERS on May 29, 2013),  
14 respondent Scarber, filed an appeal and has requested an administrative hearing.

15 X

16 CalPERS reviewed the case of *Haywood v. American River Fire Protection*  
17 *District* (1998) 67 Cal.App.4th 1292, and determined that respondent Scarber was  
18 terminated for cause and that the discharge was neither the ultimate result of a  
19 disabling medical condition nor preemptive of an otherwise valid claim for disability  
20 retirement. The court "reject[ed] a construction of section 21154 that would establish  
21 eligibility for disability retirement whenever a timely application is submitted."  
22 (*Haywood, supra*, 67 Cal.App.4th 1292 at 1307). The court noted that:

23 Section 21154 specifies that, when a timely application is  
24 filed, the employee must be both 'otherwise eligible to retire

1 for disability' and 'incapacitated for the performance of duty'  
2 in order to be granted disability retirement. In this respect,  
3 the section provides a procedural time limit within which an  
4 application for disability retirement must be filed, but does  
5 not provide for substantive eligibility whenever a timely  
6 application is filed. (*Ibid.*)

7 Since the termination of the employment relationship renders the employee  
8 ineligible for disability retirement regardless of whether a timely application is filed,  
9 respondent Scarber is barred from any entitlement to a CalPERS disability retirement.

10 XIII

11 This appeal is limited to the issue of whether respondent Scarber may file an  
12 application for industrial disability retirement based on a cardio, epilepsy, anxiety,  
13 hypertension condition, or whether his application and eligibility for industrial disability  
14 retirement is precluded by operation of *Haywood v. American River Fire Protection*  
15 *District* (1998) 67 Cal.App.4th 1292.

16 BOARD OF ADMINISTRATION, CALIFORNIA  
17 PUBLIC EMPLOYEES' RETIREMENT SYSTEM

18 Dated: APR 19 2016 BY

19   
20 ANTHONY SUINE, Chief  
21 Benefit Services Division