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Sheldon Kyle Scarber

May 14, 2014

California Public Employees' Retirement System  
Benefit Services Division  
P O Box 2796  
Sacramento, CA 95812-2796

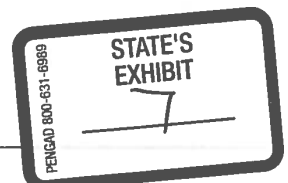
Re Appeal of Industrial Disability Retirement Benefits Claim 

Dear California Public Employees' Retirement System

I, Sheldon Kyle Scarber (Respondent), am hereby exercising my right to appeal a recent CalPLRS decision of denial of my application for industrial disability, case number [redacted]. This appeal is in accordance with sections 555-555.4, Title 2, California Code of Regulations

#### STATEMENT OF FACTS

- 1 Respondent was employed as an Officer for the California Highway Patrol beginning February 16, 1989, until August 29, 2013, at which time he had risen to the rank of Assistant Chief. By virtue of his employment, respondent was a state safety member of CalPERS.
- 2 Respondent was placed off duty by his predesignated treating physician and unable to perform the critical tasks required of his position from December 20, 2012, through current date. Respondent has yet to be medically released to obtain employment due to current and ongoing medical condition(s). Respondent filed a workers compensation claim for cumulative injuries due to hypertension and cardiovascular health matters through his employer.
- 3 On February 27, 2012, respondent filed a disability retirement/industrial disability retirement application with CalPERS, via the Fresno Field office.



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4 On July 24, 2013, respondent filed a workers compensation claim for cumulative injuries to his back and a skull lesion through his employer Respondent submitted, to CalPERS, his State Compensation Insurance Fund's (SCIF) appointed Qualified Medical Examiner's (QME) examination and findings that was conducted The examination was conducted by Doctors M Bernhard and Subia

5 On July 5, 2013, respondent through his worker's compensation attorney was presented the following offer presented by State Compensation Insurance Fund (SCIF) attorney, Christopher Devereux, Esq et al Additionally, Mr Devereux asked for a letter stating Respondent not be subject to any interrogation or interview This letter was provided to the SCIF and the California Highway Patrol

6 On August 26, 2013, respondent filed a Service Retirement application based on CalPERS significant delay of the disability retirement/industrial disability application

7 On October 31, 2013, respondent began receiving his service retirement benefits Within 120 days of beginning his service retirement benefits,

8 Appellant was served a Notice of Adverse Action, with a penalty of dismissal, effective August 29, 2013 The appointing power cited violation of Government Code Section 19572 subsections (d) Inexcusable neglect of duty, (e) Insubordination, (f) Dishonesty, (m) Discourteous treatment of the public or other employees, (o) Willful disobedience, (p) Misuse of state property, (r) Violation of the prohibitions set forth in accordance with Section 19990, and (t) Other failure of good behavior either during or outside of duty hours which is of such a nature that is causes discredit to the appointing power or the person's employment He had until August 19, 2013, at 1700 hours to present a response regarding the Notice of Adverse Action (complaint)

9 The Predisciplinary Hearing was conducted on August 15, 2013, at 10 00 am Respondent requested a stay based on the California Highway Patrol violating due process, and violation of State Personnel Board Rule 52 6 Respondent requested to participate in an Administrative Interrogation, and reasonable accommodation, however, his requests were denied

10 Respondent filed an appeal with the California State Personnel Board (SPB) The California Highway Patrol (CHP) and respondent, with the remedial authority of the SPB, granted the CHPs offer of resignation, removing the internal investigation from respondent's personnel folder

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11 Respondent utilized his accumulated annual leave and accumulated sick leave from December 20, 2012, through August 29, 2013

**LEGAL AUTHORITIES (LAW FORMING BASIS OF APPEAL)**

*Haywood v American River Fire Protection District (1988) 67 Cal App 4th 1292, 79 Cal Rptr 2d 749* holds that where "an employee is terminated for cause and the discharge is neither the disability retirement, the termination of employment relationship renders the employee ineligible for disability retirement

Respondent modified his application and requested industrial disability benefits and not a disability retirement

CalPERS citing of *Haywood v American River Fire Protection District (1988)* is not applicable in Respondent's case Haywood filed a claim for depression caused by discipline After termination, he filed timely DR application claiming stress of discipline caused depression and permanent incapacity Haywood was fired for unwillingness to do his job Additionally, Haywood held that an employee terminated for cause is ineligible to apply for disability retirement benefits Lastly, Haywood held that an employee terminated for cause is ineligible to apply for disability retirement benefits, provided Termination was not the result of a disabling medical condition, or Termination did not preempt an otherwise valid claim for DR benefits

In Respondent's case, Respondent had no knowledge of discipline prior to filing a workers compensation claim(s) with his employer and filed an application for benefits prior to any notice and or knowledge of possible termination

Respondent had an impending ruling on a claim for a CalPERS industrial disability and his application for industrial disability was unduly delayed through no fault of Respondent As such, the actions by the CHP preempted CalPERS decision of respondent's valid claim for industrial disability benefits As such, equity principles in this case requires a different result

CalPERS nor Respondent's employing agency complied with Government Code Sections 21154 and 21192 in determining Respondent's eligibility for continued employment

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Respondent submitted medical documentation from his predesignated treating physician and a SCIF ordered Qualified Medical Examination to show unequivocally that Respondent could not return to work

CalPERS also cited *Smith v City of Napu (2004) 120 Cal App 4th 194* and the matter of *Application for Disability Retirement of Robert C. Vandergoot and California Department of Forestry and Fire Protection (2013)* and Respondents file to deny his application. As argued above in *Haywood v American River Fire Protection District (1988)* these cases suffer significant differences with Respondent's case and therefore are not applicable

Disability retirement/industrial disability retirement was set forth based upon cumulative illness/injury based on hypertension, cardiovascular, back and a skull lesion. No medical opinion has been rendered for the hypertension/cardiovascular. Furthermore, Respondent was directed by his predesignated treating physician that he could not return to his previous position. Additionally a QME findings, conducted at the request of SCIF, by Dr M. Bernhard and Subia for his back indicate the Respondent is permanent and stationary and can never return to his former position.

The Respondent is eligible for the industrial disability benefits based on the following facts

Claims or Applications filed by Respondent were filed prior to any knowledge of disciplinary action, not a result of.

Respondent had an impending ruling on a claim for a CalPERS industrial disability and his application for industrial disability was unduly delayed through no fault of Respondent. The actions by the CHP preempted CalPERS decision of Respondent's valid claim for industrial disability benefits,

The Respondent was terminated to defeat a valid claim for disability retirement based on the significant lapse in time between his filing and the findings by CalPERS.

Respondent's entitlement to industrial disability benefits did not have the ability to "mature" prior to the date of his separation from service based on an unduly delay through no fault of Respondent

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Case law presented by CalPERS differentiates significantly from Respondent's case. As such, equity principles in this case requires a different result


### DISCOVERY

In accordance with the Civil Discovery Act, Code of Civil Procedure Section 2017.010, et seq. Respondent requests discovery of (materials and/or information) in possession of and/or known to CalPERS which enabled them to determine a ruling (finding) in Respondent's claim the identity and location of persons having knowledge of any discoverable matter, as well as the existence, description, nature, custody, condition, and location of any document, electronically stored information, or tangible thing not provided with this discovery request. If an objection is made to any discovery material/information requested, in accordance with CCP 2031.240, the responding party must identify the document withheld and the basis for the objection, both with sufficient particularity that the requesting party has enough information to test the validity of the objection.

Admissibility is not the test for purposes of discovery. *Davies v Superior Court* 36 Cal 3d 291 (1984). Rather, material falls within the broad definition of "relevant to the subject matter" under CCP Section 2017.010, and is thus discoverable, "if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement." *People v Gonzalez* 33 Cal App 4th 1539 (1995). The rules are to be applied liberally in favor of granting discovery, even "fishing expeditions" are allowed. *Greyhound Corp v Superior Court* 56 Cal 2d 355 (1951).

Respondent, in accordance with CCP 2031.210(a), requests a sworn statement that CalPERS, et al has produced all documents requested, or an explanation if they cannot produce the requested documents, or an objection if they choose not to produce a document they have.

Dated May 14 2014



Sheldon 'Kyle' Starber  
(Respondent)

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