

ATTACHMENT C
RESPONDENT'S ARGUMENT

1 RICHARD E. ELDER, JR., SBN: 46685
 2 Elder Berg Concord
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 4 Concord, CA 94519
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 Attorneys for Respondent



6 **BEFORE THE BOARD OF ADMINISTRATION**
 7 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

8 In the Matter of the Application for
 Reinstatement From IDR,

OAH No.: 2015080601

9 CALIFORNIA PUBLIC EMPLOYEES'
 10 RETIREMENT SYSTEM,

Agency No.2013-0092

11 Petitioner,

Respondent's Objection To Proposed

12 v.

Decision, Request for Rejection of

13 CAREY E. KELLY, AND CALIFORNIA

CalPERS Petition to Reinstate, or Vacation

14 HIGHWAY PATROL ,

of Proposed Decision and Board Action to

15 Respondents.

Review/Notice of Petition To Reopen

16 _____ /
 17
 18 Respondent, Carey E. Kelly, retired California Highway Patrol Traffic Officer; through her
 19 counsel hereby objects to the Proposed Decision dated December 19, 2016.

20 We assert that the Proposed Decision misstates the evidence and the law.

21 Generally, the Proposed Decision, unfairly ignores ample objective evidence, such as
 22 Radiology imaging and other evidence, then focuses upon perceived "flaws" in Respondent's
 23 evidence but ignores or glosses over evidence which "cures" and explains any perceived "flaw".

24 Conversely and unfairly, the Proposed Decision "glosses over" and ignores fatal flaws and absences
 25 in Petitioner's evidence. Carey Kelly asserts Petitioners' have not carried their burden.

26 Unlike an action when an employee seeks a disability retirement and thus carries the burden,
 27 here the law passes the Burden of Proof to Petitioner in this "Reinstatement" action. The Proposed
 28 Decision pays only "lip service" to the high burden required of Petitioner. Also, the Proposed

1 Decision ignores the special high standard of physical capability required of California Highway
2 Patrol Officers and the Critical Tasks they must be able to perform.

3 This case is different from the "normal" retirement action because it involves forced
4 "Reinstatement" which gives CalPERS the burden and because this case involves very unusual high
5 physical standards for California Highway Patrol Traffic Officers. The Proposed Decision does not
6 properly address these matters.


7 The Proposed Decision contains these and other errors of law and fact which must be
8 addressed by reference to the full record.

9 WHEREFORE, Respondent, Carey E. Kelly objects to the Proposed Decision of December
10 19, 2016 and asks that the Proposed Decision be rejected and that a Decision finding that Petitioner
11 California Public Employees' Retirement System has NOT carried the burden of proving that Carey
12 Kelly is no longer incapacitated within the meaning of the law and thus that the Petition for
13 Reinstatement from IDR should be denied, OR in the alternative that the Board vacate the Proposed
14 Decision, obtain proper argument, obtain the full record and consider an independent decision by
15 the Board of CalPERS.

16 NOTICE: In a separate Petition To Reopen to be filed February 3, Respondent Kelly, asks
17 that this matter be Reopened to Consider Newly Discovered Evidence of testing for, and operative
18 procedure and follow up care which took place during and after December, 2016, after her
19 November, 2016 trial. Attorney for Ms. Kelly knows that the instant "Respondent's Objection To
20 Proposed Decision..." is not to be served upon the parties by Attorney but rather by the Board.
21 Attorney for Ms. Kelly believes the Petition To Reopen for Newly Discovered Evidence is relevant
22 to the CalPERS Board deliberations here, so we mention the Petition To Reopen which will be filed
23 February 3, 2016. Attorney believes he should serve the Petition To Reopen on the parties,
24 separate from this "Objection".

25 Dated: 2/2/2016

26 Respectfully submitted

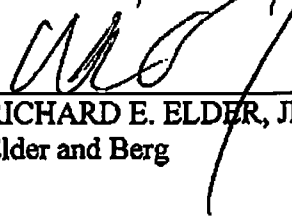

27 RICHARD E. ELDER, JR.
28 Attorney for Respondent

1 STATE OF CALIFORNIA)
 2 COUNTY OF CONTRA COSTA) ss.
 3

4 I am the attorney for in the above-entitled action; I have read the foregoing Respondent's
 5 Objection To Proposed Decision, Request for Rejection of CalPERS Petition to Reinstate, or
 6 Vacation of Proposed Decision and Board Action to Review/Notice of Petition To Reopen and
 7 know the contents thereof; and I certify that the same is true of my own knowledge, except to those
 8 matters which are therein stated upon my information or belief, and as to those matters I believe it
 9 to be true.

10 I declare under penalty of perjury that the foregoing is true and correct.

11 Executed on Feb 2, 2017 at Concord, California.

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 13 _____
 14 RICHARD E. ELDER, JR.
 Elder and Berg

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PROOF OF SERVICE BY MAIL

I, the undersigned, am employed in the County of Contra Costa; I am over 18 years of age, and I am not a party to the within action; my business address is: Elder Berg Concord, 3107 Clayton Rd , Concord, CA. On February 2, 2017 I served the within:

Respondent's Objection To Proposed Decision, Request for Rejection of CalPERS Petition to Reinstate, or Vacation of Proposed Decision and Board Action to Review/Notice of Petition To Reopen

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

Cheree Swedensky, Assistant to Board
CalPERS Executive Office
PO Box 942701
Sacramento, CA 94229-2701
VIA FAX TO (916) 795-3972

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

Executed on February 2, 2017 at Concord, CA.

