

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for  
Disability Retirement of:

RHODA K. MCCORMICK,

Respondent.

and

SAN BERNARDINO CITY UNIFIED  
SCHOOL DISTRICT,

Respondent.

Case No. 2016-0113

OAH No. 2016031200

**PROPOSED DECISION**

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California on October 25, 2016.

Charles Glauberman, Senior Staff Attorney, represented Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System.

There was no appearance by or on behalf of Rhoda K. McCormick.

There was no appearance by or on behalf of San Bernardino City Unified School District. Complainant established that this respondent received the Statement of Issues and Notice of Hearing.

The matter was submitted on November 22, 2016.<sup>1</sup>

<sup>1</sup> Complainant served respondents with the Statement of Issues and Notice of Hearing. During the hearing, complainant established that respondent Rhoda M. McCormick was properly served but was unable to establish that respondent San Bernardino City Unified School District was properly served with the Statement of Issues and Notice of Hearing. Complainant requested until November 2, 2016 to file proof of service. Though complainant

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED December 22, 2016

## FACTUAL FINDINGS

### *Jurisdiction*

1. Since 1995 San Bernardino City Unified School District (respondent San Bernardino City Unified School District) has employed Rhoda McCormick (respondent McCormick) as an Attendance Technician. Because of her employment, respondent McCormick is a local miscellaneous member of CalPERS subject to Government Code<sup>2</sup> section 21151.

2. On March 18, 2015, respondent McCormick signed an application for service pending disability retirement with California Public Employees' Retirement System (CalPERS). In filing the application, respondent McCormick claimed disability based on an orthopedic (neck and back) condition. Effective November 13, 2014, respondent McCormick retired for service and has been receiving her retirement allowance since that date.

3. CalPERS obtained medical reports concerning respondent McCormick's orthopedic (neck and back) condition from competent medical professionals. After review of these reports, CalPERS determined respondent McCormick was not permanently disabled or incapacitated from performance of her duties as Attendance Technician at the time she filed the application for service retirement pending disability retirement.

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contacted respondent San Bernardino City Unified School District, complainant did not receive a response from this respondent by November 2, 2016.

On November 2, 2016, complainant filed a request for a continuance to November 10, 2016 to provide proof of service. He anticipated that he would be able to do so by November 10, 2016. By order, dated November 4, 2016, the administrative law judge granted complainant's motion.

On November 10, 2016, complainant filed a second motion for a continuance to November 18, 2016 to provide proof of service, or, in the alternative that respondent San Bernardino City Unified School District waived the right to hearing because complainant had received no response from this respondent. By order, dated November 16, 2016, the administrative law judge granted complainant's motion but stated that it was the last continuance and stated alternatives to providing proof of service.

On November 22, 2016, complainant confirmed service of respondent San Bernardino City Unified School District.

On November 22, 2016, the record was closed, and the matter was submitted.

<sup>2</sup> Hereinafter all reference is to the Government Code unless otherwise stated.

4. On August 19, 2015, CalPERS notified respondent McCormick of the determination and advised of her appeal rights.

5. By letter, dated September 12, 2015, respondent McCormick filed a timely appeal and requested a hearing.

6. Anthony Suine, filed Statement of Issues, Case No. 2016-0113, in his official capacity as Chief of the Benefit Services Division of CalPERS.

7. The appeal is limited to the issue of whether, at the time of the application, respondent McCormick was permanently disabled or incapacitated from performance of her duties, based on orthopedic (neck and back) conditions, as Attendance Technician employed by respondent San Bernardino City Unified School District.

*Duties and Physical Requirements of the Attendance Technician*

8. The duties and physical requirements of the position are set forth in documents provided as exhibits by CalPERS and in the report from Donald D. Kim, M.D., the independent medical evaluator retained by CalPERS. As part of his evaluation, Dr. Kim reviewed the related exhibits and discussed the duties and physical requirements with respondent McCormick. On that basis, the duties and physical requirements of the position were ascertained.

9. Respondent McCormick last worked at Cajon High School on April 28, 2014, and performed duties related to recording and reporting attendance for 3,000 students, prepared Average Daily Attendance records for the district and performed other clerical functions as needed.

10. In the CalPERS document, the physical requirements are described by how frequently a task is required to be performed. "Constantly" is over six hours; "frequently" is three to six hours; "occasionally" is up to three hours.

The Attendance Technician is required to sit, twist (neck) repetitively use hands, use the keyboard or mouse constantly. She is required to bend (neck), perform fine manipulation, drive and be exposed to noise frequently. She is required to stand, walk, kneel, squat, bend (waist), reach (above shoulder) reach (below shoulder), push and pull, power grasping, simple grasping, lifting (up to 25 pounds), and walking on uneven ground occasionally.

At Dr. Kim's initial assessment, respondent McCormick reported that the lifting requirement was occasionally up to 20 pounds, three to four times daily and up to 50 pounds, one to two times daily. She bent five to six times a day and occasionally stooped. She squatted three to four times a day and knelt two to three times a day. She never climbed ladders or stairs.

After Dr. Kim submitted his first report, CalPERS requested that Dr. Kim review additional documents, including a job analysis for an attendance technician from WestStar. A copy of the job analysis was not submitted as an exhibit in this case. No evidence was offered to establish what type of organization WestStar is, the qualifications of its staff to perform a job analysis or the relevance of the document reviewed by Dr. Kim. As such, the physical requirements described by Dr. Kim, based on his analysis of the WestStar document, are disregarded.

### *Medical Evidence*

11. The medical evidence in this case included an independent medical evaluation performed by Dr. Kim, who was retained by CalPERS, to determine whether respondent McCormick was substantially incapacitated for the performance of her usual duties as an Attendance Technician. Dr. Kim is licensed to practice medicine in the State of California, is a board certified orthopedic surgeon and has practiced more than 20 years in this specialty. He understood the criteria for determining whether respondent McCormick qualified for a CalPERS disability retirement benefit. As such he was qualified to render his opinion.

Dr. Kim has performed independent medical examinations (IMEs) on behalf of CalPERS previously. He has found more applicants to be disabled than not.

There is no evidence in the record to establish that Dr. Kim was biased or to justify questioning the credibility of his opinion.

12. Dr. Kim performed his assessment of respondent McCormick on July 18, 2015 and thereafter issued a report. He testified as a witness in this hearing.

Dr. Kim's IME included taking a history, performing a physical examination, reviewing available medical records as well as the duties and physical requirements of the position. Thereafter, he responded to questions posed by CalPERS.

13. Dr. Kim described respondent McCormick as a 57-year-old, African-American female who has a robust frame; she came into his office with a cane; she had a depressive effect with a slight hint of anxiety.

Dr. Kim reported respondent McCormick's chief complaints; regarding her neck, she stated that she had constant severe excruciating pain which was present all the time; regarding the upper/lower back, she stated that she had constant excruciating pain that was present in her entire spine; she could not sit or stand for a long time.

14. Respondent McCormick reported that she had an acute onset of severe pain when she woke up on April 28, 2014. When asked about the mechanism of trauma, respondent McCormick described a vice-principal at her school. She reported that the vice-principal had been forced out of the school after multiple employees signed a petition. However, when the vice-principal returned, those involved in forcing out the vice-principal

**moved to other schools except respondent McCormick, who had no place to go. Respondent McCormick reported that she was subjected to significant harassment, including being moved to a smaller office.**

**In April 2014, respondent McCormick reported that she was getting ready for a state audit; the administrator came into the office, sabotaged her work and caused respondent McCormick a great deal of stress; when she woke up on April 28, 2014, respondent McCormick experienced severe stress, and her body was twisted as if she had a stroke.**

**Respondent McCormick underwent treatment and saw a psychiatrist until she lost her health insurance. Thereafter she filed a workers' compensation claim and received treatment from Amir Freedman, M.D. At the time of Dr. Kim's evaluation, respondent had undergone 16 physical therapy sessions. She has gone to pain therapy. She had had magnetic resonance imaging scans which showed a herniated disc. She has been prescribed Norco (pain medication) and Cymbalta (anti-depressant medication).**

**15. Among other things, Dr. Kim's physical examination included taking vital signs and evaluating respondent McCormick's cervical (neck) and thoracolumbar spine (below the neck).**

**16. Dr. Kim reported his assessment as follows:**

- Chronic myofascial pain involving the neck and back with no significant evidence of physical trauma either acute or on a cumulative trauma basis.**
- Major depressive disorder and general anxiety disorder diagnosed by a psychiatrist.**
- MRI cervical spine finding of early disc desiccation throughout the cervical spine on November 12, 2014, without disc herniation.**

**17. Dr. Kim explained his findings. He noted that respondent McCormick was a 57-year-old woman who had been an Attendance Technician since 1995. She developed an acute pain throughout her body around April 30, 2014. There were no pre-existing symptoms, but the onset of symptoms was quite severe and appeared to be associated with one person, the vice-principal.**

**Respondent McCormick's MRI showed minimal degenerative changes, consistent with her age. There is no disc herniation. Her subjective complaints are very severe excruciating constant pain.**

**In Dr. Kim's opinion, based on her history, objective findings and diagnostic studies, there is no evidence of orthopedic trauma or orthopedic impairment.**

In Dr. Kim's opinion, respondent McCormick "may have been exaggerating her subjective complaints from an orthopedic point of view." For example, she complained of pain all over her body; most people localize the pain; in addition, she walked with a cane; based on the physical examination, he saw no reason for her to do so. Finally, she did not appear to be making her best efforts on the physical examination.

18. Dr. Kim noted that respondent McCormick's symptoms are more likely than not psychosomatic symptoms. "Psychosomatic pain does not constitute malingering, but rather it indicates her somatic and physical symptoms are related to her underlying psychological conditions." He acknowledged that, as an orthopedist, he was not qualified to render the foregoing opinion but stated she "may be better served by psychiatry or psychology QME to determine if she has sustained industrial stressors that have resulted in psychiatric injury."

19. As part of his evaluation, Dr. Kim reviewed medical records: (1) dated March 18, 2012, (2) between April 30, 2014 and December 2014, and (3) June 23, 2015.

20. In Dr. Kim's opinion, from an orthopedic point of view, respondent is able to perform her usual duties based on her physical condition.

21. After he issued his report, dated July 24, 2015, CalPERS requested that Dr. Kim review additional medical records. The medical records included reports, dated October 9, 2014, and May 7, 2015. Regarding these records, Dr. Kim stated, in part:

... There are no physical activities that would have been injurious to her neck and lower back based on her formal job analysis. There are no significant injuries that are reported on physical therapy progress reports of October 9, 2014 and May 7, 2015. Therefore, based on the formal job analysis, there is no indication that applicant has sustained orthopedic injury based on cumulative trauma based on her formal job analysis and my medical opinion as provided on July 18, 2015, remains unchanged.

22. There was no appearance by or on behalf of respondent McCormick. As such no evidence was offered contrary to CalPERS's evidence of the duties, physical requirements or contrary to Dr. Kim's medical opinion.

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## LEGAL CONCLUSIONS

### *Burden of Proof*

1. CalPERS determined that respondent McCormick is not eligible for industrial disability retirement. She appealed, and she is the moving party. Respondent McCormick has the burden of proof.

2. The appeal is controlled by the provisions of the Administrative Procedure Act and relevant case law.

Code section 20060 provides: "Retirement means the granting of a retirement allowance under this part."

Code section 20123 states: "Subject to this part and its rules, the board shall determine and may modify benefits for service and disability."

California Code of Regulations, title 2, section 555, states in part, the Executive Officer is authorized to act on any application for "retirement for disability or service". The Executive Officer is "authorized and empowered to delegate to his subordinates authority to take any such action on his behalf."

California Code of Regulations, title 2, section 555.1 states, in part: Any applicant dissatisfied with the action of the Executive Officer on his application may appeal such action to the Board by filing a written notice of such appeal within 30 days of the date of the mailing to him by the Executive Officer. An appeal shall contain a statement of the facts and law forming the basis of the appeal.

In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, the Court of Appeal considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found, as follows:

**As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including the initial burden of going forward and the burden of persuasion by a preponderance of the evidence.**

**In the absence of a statutory provision to the contrary, the applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed government or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed (1 Cal. Public Agency Practice, sec. 3903[9]; see also, *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.).**



CalPERS, a governmental agency, exercised its official duty in responding to respondent McCormick's application for disability retirement and made the determination that she did not qualify. CalPERS is entitled to the presumption that its official duty was regularly performed, which placed the burden to rebut this presumption on respondent McCormick. (See Evid. Code section 664; *Roelfsema v. DMV* (1995) 41 Cal.App.4<sup>th</sup> 871; *Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006) 139 Cal.App.4<sup>th</sup> 471, 476.)

For the foregoing reasons, respondent McCormick had the burden of proof, including both the initial burden of going forward and the burden of persuasion by the preponderance of the evidence.

3. Respondent McCormick, a miscellaneous member of CalPERS, seeks disability retirement pursuant to Code sections 20026 and 21150.

Code section 20026 states:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board, . . . on the basis of competent medical evidence.

Code section 21150 states, in part:

A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service regardless of age, unless the person has elected to become subject to Section 21076 or 21077 . . .

4. The following are sections of the Government Code relevant to this case.

Code section 21152, subdivision (d), states that application to the board for retirement of a member for disability may be made by the member or any person on her behalf.

Code section 21153 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731

Code section 21154 provides, in part:

The application shall be made only (a) while the member is in state service, or (b) . . . , or (c) . . . , or (d) . . . . On receipt of an application for disability retirement of a 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. . . .

Code section 21156, subdivision (a)(1) provides, in part:

If the medical examination and other available information show to the satisfaction of the board . . . 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, . . .

5. The sole issue in this proceeding is whether respondent McCormick is “incapacitated for the performance of her usual job duty.”

6. For more than 40 years, California Courts have consistently and uniformly held “incapacitated for the performance of duty” requires “substantial inability” to perform the applicant’s “usual duties” as opposed to mere discomfort or difficulty.

7. In 1970, the Court of Appeal held that to be “incapacitated for the performance of duty” within Code section 21022 (now section 21151) means “the substantial inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.)

In *Mansperger*, the Court found that while his disability incapacitated him from lifting or carrying heavy objects, Mansperger was not disabled for retirement purposes because he could *substantially* perform most of his *usual* duties. (*Ibid.*) The Court established a crucial distinction between a person who suffers some impairment and one who suffers the substantial impairment required to qualify for disability retirement.

Substantial inability to perform one’s usual duties must be measured by considering the applicant’s present abilities; disability cannot be prospective or speculative. (*Hosford v. Board of Administration of the Public Employees’ Retirement System* (1978) 77 Cal.App.3d 854, 863.) The fact that an activity might bother a person does not mean, in fact, she cannot do that activity. In *Hosford*, the Court of Appeal reasoned that the fact that Hosford testified to having to perform several of the duties described as only “occasional” and did those tasks without reporting any injury represented further evidence of Hosford’s ability to perform the more strenuous aspects of his work. (*Ibid.*)

As evidenced by *Mansperger* and *Hosford*, and numerous subsequent cases that followed, mere difficulty in performing certain tasks is not enough to support a finding of disability. (See, e.g., *Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689; *Cransdale v. Board of Administration* (1976) 59 Cal.App.3d 656; *Bowman v. Board of Administration* (1984) 155 Cal.App.3d 937.) A person must be substantially incapacitated from performing her duties.

8. In *Hosford, supra*, the Court held that, in determining whether an individual was substantially incapacitated from performing his/her "usual duties," it is necessary to examine the duties usually performed by the individual, not just the individual's job description. The Court held that neither the job description prepared by the State Personnel Board nor the list of job demands prepared by the employer was the exclusive standard for determining the "usual job duties." (*Hosford, supra*, 77 Cal.App.3d at 860-861.)

Thus, in determining eligibility for disability retirement, the applicant's *actual* and *usual* duties must be the criteria against which any impairment is judged. Generalized job descriptions and physical standards are not controlling nor are infrequently performed duties considered to be the standard.

9. Having considered the actual and usual duties of a Attendance Technician for respondent San Bernardino City Unified School District, the position held by respondent McCormick, the physical requirements of the position and the medical evidence, insufficient competent medical evidence was offered to establish that her orthopedic (neck and back) conditions prevented respondent McCormick from performing the usual duties of an Attendance Clerk employed by respondent San Bernardino City Unified School District.

10. Respondent McCormick is not substantially incapacitated from performing her duties as an Attendance Technician employed by respondent San Bernardino City Unified School District based on orthopedic (neck and back) conditions.

#### ORDER

1. The decision of Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, is affirmed.
2. The application for disability retirement of Rhoda K. McCormick is denied.

DATED: December 21, 2016

DocuSigned by:  
*Vallera J. Johnson*  
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VALLERA J. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings