ATTACHMENT A

THE PROPOSED DECISION

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

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| In the Matter of the Statement of Issues of:<br><br>AARON S. QUARLES,<br><br>Respondent,<br><br>and<br><br>CALIFORNIA STATE POLYTECHNIC UNIVERSITY AT SAN LUIS OBISPO,<br><br>Respondent. | Case No. 2016-1060<br><br>OAH No. 2016120347 |

**PROPOSED DECISION**

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in San Luis Obispo, California, on May 31, 2017.

Austa Wakily, Senior Staff Counsel, represented Complainant Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Aaron S. Quarles (Respondent) represented himself.

California State Polytechnic University at San Luis Obispo (Respondent Cal Poly) did not appear at the hearing.

Complainant seeks to deny Respondent's disability retirement application on grounds that the medical evidence does not support his claim of disability based on his orthopedic (low back) condition. Respondent asserts that he is disabled for the performance of his duties.

Oral and documentary evidence and argument was received at the hearing and the matter was submitted for decision on May 31, 2017.

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## FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity.

2. Complainant served the Statement of Issues, the Notice of Hearing, and all other required documents on Respondent Cal Poly.

3. At the time Respondent filed his application for disability retirement, he was employed by Respondent Cal Poly as a custodian. By virtue of his employment, Respondent is a state miscellaneous member of CalPERS.

4. As a custodian, Respondent was responsible for cleaning and maintaining student housing areas at Respondent Cal Poly. His duties included dusting and cleaning all surfaces; mopping, vacuuming, polishing, and waxing carpeted and hard surfaces; removing trash; replenishing supplies; responding to cleaning emergencies; and providing general housing support, such as reporting needed repairs and checking fire extinguishers for proper functioning.

5. A "Physical Requirements of Position/Occupational Title" form states that a custodian is required to stand, bend (neck and waist), twist (neck and waist), push and pull, engage in simple grasping, use the hands repetitively, and lift up to 10 pounds "constantly," which is defined as more than six hours in a workday. Custodians are required to reach above the shoulder, perform fine manipulation, and lift between 11 and 50 pounds on a frequent basis, or between three and six hours during their workday. Occasionally, or less than three hours per day, custodians are required to walk, kneel, climb, squat, engage in power grasping, and use a keyboard or mouse. The document establishes the physical requirements of the position, as it was received into evidence without objection and its information was not disputed.

6. Respondent filed a Disability Retirement Election Application (Application) on February 29, 2016. He described his specific disability as "Protruded Disc in lower back." (Exh. 3, at p. 2.)

7. In the CalPERS "Physician's Report on Disability" form, Steven Goodman, M.D. (Goodman), Respondent's family physician, sets forth a diagnosis of lumbar disc disease. He refers to a magnetic resonance imaging study (MRI) as providing objective evidence of Respondent's condition. Dr. Goodman concluded that Respondent was incapacitated for the performance of duty. In Dr. Goodman's opinion, Respondent was unable to lift more than 20 pounds and was unable to engage in repetitive bending or twisting.

8. On April 9, 2012, Respondent hurt his back while bending over to pick up a mop at work. He received conservative treatment, pain management, and physical therapy, at Med Stop Clinic, a clinic used by his employer to treat work-related injuries. He was subsequently referred to Anthony W. Sheplay, M.D. (Sheplay), an orthopedic surgeon. Dr. Sheplay obtained an MRI, which showed a L5/S1 disc protrusion. On September 4, 2012, Dr. Shipley administered an epidural steroid injection, which produced good results.

9. a. On August 31, 2012, Steven W. Pearson, M.D. (Pearson), performed a Qualified Medical Evaluation in connection with the then pending workers' compensation claim. Respondent complained of pain on the right side of the lumbar spine, which did not radiate to the lower extremities. On examination, Dr. Pearson noted some muscle spasm and tenderness around the paraspinal musculature on the right side of Respondent's lumbar spine. Respondent's lumbosacral spine, hip, knees, and ankle range of motion were all normal. Dr. Pearson wrote: "I reviewed the MRI report from 6-5-12 with some early L5-S1 disc degeneration." (Exh. D, at p. 3.) The MRI report was not introduced into evidence.

b. Dr. Pearson diagnosed Respondent with lumbar disc disease at L5-S1, and concluded that Respondent had reached a medically stable status. In Dr. Pearson's opinion, Respondent could return to work to his usual duties as a custodian. Dr. Pearson did not place any restrictions on Respondent's ability to return to work.

10. a. Respondent submitted a February 9, 2016 "Primary Treating Physician's Permanent and Stationary Report" from Dr. Sheplay. Dr. Sheplay noted that upon his return to work, Respondent was placed on a light duty assignment for a period of time but was eventually sent home due to the absence of light duty assignments. Dr. Sheplay examined Respondent's lumbar spine and noted moderate tenderness at L5-S1. Dr. Sheplay referred to Respondent's "painful" flexion and extension, but did not write any specific range of motion values. Dr. Sheplay also cited the June 5, 2012 MRI, and described its result as a "Small central L5/S1 disc protrusion with high intensity zone but minimal stenosis." (Exh. C, at p. 4.)

b. Dr. Sheplay diagnosed Respondent with lumbar disc displacement, lumbar disc degeneration, and lumbosacral spondylosis. Dr. Sheplay concluded that Respondent could frequently or, with respect to kneeling and crawling, occasionally perform all the physical activities of his job. With respect to lifting weight, Dr. Sheplay concluded that Respondent could frequently lift and/or carry up to 30 pounds and occasionally lift and/or carry 50 or more pounds. In Dr. Sheplay's opinion, Respondent was able to return to his usual occupation.

11. As set forth in a "Notice of Permanent Work Restrictions," Respondent Cal Poly concluded that Respondent had permanent restrictions of "maximally lift and carry 20 lbs; occasionally lift and carry 20 pounds; frequently lift and carry 10 lbs" and that Respondent Cal Poly was unable to determine if permanent accommodations of these restrictions was possible. Respondent Cal Poly terminated Respondent's employment and assisted him in completing the Application. It is unknown where Respondent Cal Poly derived the stated limitations, which are actually contrary to the opinions of Drs. Pearson and Sheplay, and the basis for such limitations was not established at the hearing.

12. a. On May 11, 2016, Brendan V. McAdams, Jr., M.D. (McAdams), an orthopedic surgeon contracted by CalPERS, conducted an evaluation to ascertain whether Respondent was disabled by reason of his orthopedic condition. Dr. McAdams obtained pertinent medical and other history, examined Respondent, and reviewed pertinent medical records.

b. Respondent complained of low back pain, which did not go into his legs. He did not report numbness or tingling of his legs. Respondent discussed the incident that triggered the pain and his subsequent treatment. He had stopped working in September 2015. Respondent was taking opioids for pain, two tablets of hydrocodone per day and one tablet of methadone about once per week.

c. The physical examination, which included observations of Respondent's movements, was essentially normal. Thus, Respondent stood erect and walked without any discomfort or limp. He was able to squat down and come back up without assistance. He was able to walk with his heels and toes without difficulty. He sat through the interview, appearing comfortable. He was able to remove his shirt over his head. He was able to bend over from a sitting position and take off his shoes on without any difficulty. He put his shoes on without difficulty.

Range of motion was limited due to complaints of pain. Respondent was able to flex to a point where his fingerprints came to within 12 inches of the floor. He was able to extend, or lean back, five to ten degrees. He was able to bend laterally 40 degrees in both directions. Dr. McAdams discounted these limitations because Respondent was able to perform other tasks which should have yielded similar restrictions or complaints of pain. For instance, while on a seated position Respondent was able to fully extend his legs without complaint of lumbar pain or sudden responsive move. Pinwheel testing of both lower extremities revealed intact sensation. In brief, Dr. McAdams found no objective evidence to support Respondent's complaints of disabling pain.

d. Dr. McAdams diagnosed Respondent condition as a lumbosacral strain, with no evidence it was impacting the extremities.

e. With specific reference to the CalPERS criteria for disability, Dr. McAdams concluded that Respondent was not incapacitated for the performance of his usual duties. In his opinion, there were no specific duties of the custodian position that Respondent could not perform.

13. Respondent testified that he continues to experience pain in his back. He regularly takes pain medication, including prescription hydrocodone, which he takes at bedtime as needed. Respondent further testified that his back pain prevents him from engaging in certain physical activities with his sons. He is working in a fishing supplies warehouse where he boxes and ships the items. The boxes typically weigh between half-a-pound and ten pounds, and he can get help with heavier boxes.

14. The credible medical evidence and opinion establishes that Respondent is not incapacitated for the performance of duty by reason of a low back orthopedic condition. Dr. McAdams presented the only direct evidence of Respondent's condition. He was the only examiner who testified at the hearing. His testimony is sufficient to establish that Respondent is not disabled. Significantly, Dr. McAdams' testimony and opinions are corroborated by the findings and opinions of Drs. Pearson and Sheplay, both of whom concluded Respondent was

able to perform the duties of his position. The limitations recommended by Dr. Sheplay, i.e., frequently lifting and/or carrying up to 30 pounds and occasionally lifting and/or carrying 50 or more pounds, were within the requirements of the position, and, as Dr. Sheplay concluded, did not prevent Respondent from performing his job.

## LEGAL CONCLUSIONS

1. Government Code section 20026 defines the following relevant terms: "'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 opinion."

2. Government Code section 21156 provides, in pertinent 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. . . ."

3. Respondent did not establish that he is incapacitated for the performance of duty within the meaning of Government Code sections 20026 and 21156, by reason of factual finding numbers 4 through 14. On the contrary, the competent medical evidence received at the hearing shows that he is not disabled by reason of an orthopedic condition related to his lower back.

## ORDER

The application for disability retirement of Respondent Aaron S. Quarles is denied.

DATED: 6/26/07

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings