ATTACHMENT A

RESPONDENT HENDEE’S PETITION FOR RECONSIDERATION

RESPONDENT CSUSB’S PETITION FOR RECONSIDERATION
November 30, 2017

Cheree Swendesky, Assistant to the Board
Executive Office
California Public Employees' retirement System
PO BOX 942701
Sacramento, CA 94229

Re: Petition for Reconsideration
Ref No.2015-1226

Ms. Swendesky,

I would like to file a Petition for Reconsideration regarding the matter of my Reinstatement from Industrial Disability Retirement. It is my understanding from CALPERS correspondence regarding their initial acceptance of the proposed decision that I had to file this request prior to December 1, 2017.

I would ask the board to weigh the evidence I presented in the form of med-legal opinions from both an Medical Doctor and Doctor of Chiropractic medicine that treated me for 9 months, as opposed to a 20-minute evaluation conducted by the IME chosen by CALPERS. I further ask the board to reconsider and set aside my reinstatement from IDR and allow me to remain on IDR.

If the board does affirm their previous decision, I also request the Board require the California State University to immediately reinstate me as required in Government Code Section 21193. The CSU has made claims of my employment status that contained only partial, or incomplete facts as it related to my employment status. I had been an employee, as a police office, with the CSU from August 1999 through my release from probation on December 31, 2010. I transferred from the Fullerton campus to the San Bernardino campus in November of 2009, with no break in service. One day I was at the Fullerton campus, the next day I was at the San Bernardino campus. Additionally, probation with the CSU lasts 12-months unless notified of probation extension. I had exceeded my 12-month probation period under the terms of the Collective Bargaining Agreement, and I was not released for cause, nor had any pending disciplinary issues, or active internal affairs investigations pending adjudication. If a trier of fact would have determined the CSU was legally allowed to reject me during probation I would have had retreat rights under the Collective Bargaining Agreement between the CSU and the State University Police Association, as I had cleared my initial probationary period, as well as probationary periods for the ranks for Corporal and Sergeant, my previous position should have been made available to me.

The CSU also makes reference of the date I applied for IDR in their petition for reconsideration, and eludes in strengthens their argument. The facts was that I was following the mandated Grievance process as outlined in the CBA, and it is a lengthy, multi-leveled process. I was never legally terminated from my employment with the CSU, but my successful application to IDR status made further legal enforcement of the CBA moot.

Respectfully Submitted

Justin Hendee
Petition for Reconsideration
Case No. 2015-1226
ATTACHMENT A

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Reinstatement from Case No. 2015-1226
Industrial Disability Retirement of: OAH No. 2016080762

Justin Z. Hendee, CSU'S PETITION FOR
Respondent, RECONSIDERATION

and

California State University, San
Respondent.
Bernardino,

TO ALL PARTIES AND ATTORNEYS OF RECORD:

Respondent Board of Trustees of the California State University ("CSU"), through its
California State University, San Bernardino campus (CSUSB), hereby submits the following Petition
for Reconsideration to the Decision in the Matter of the Reinstatement from Industrial Disability
Retirement of Justin Z. Hendee ("Respondent"), adopted by the Board of Administration of the
California Public Employee's Retirement System on November 15, 2017, and submitted by
Administrative Law Judge Adam L. Berg. CSUSB respectfully requests that the Board reconsider that
part of the order that requires CSUSB to reinstate Respondent to his former position.

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I. INTRODUCTION

This matter arises from an application for industrial disability retirement submitted by Respondent on July 5, 2011. Respondent was a probationary police officer for CSUSB Police Department from November 2, 2009 until December 31, 2010. Respondent did not obtain permanency in his position as a police officer, and was rejected from employment during probation on December 31, 2010.

While a probationary officer, Respondent was involved in a single vehicle traffic collision while on duty on or about July 30, 2009. After this collision, Respondent was served with notice of rejection during probation on December 14, 2010, with an effective date of December 31, 2010. As a result, Respondent was separated from employment with CSUSB.

On July 5, 2011, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (back, neck, and left shoulder) condition. Respondent filed the application over five (5) months after Respondent was separated from employment with CSUSB. CalPERS granted the application for industrial disability retirement and Respondent was retired from disability effective January 1, 2011. Respondent was not an employee of CSUSB on January 1, 2011 and his separation from employment was not due to retirement.

CSUSB contends that Government Code section 21193 does not apply in this matter. Respondent was not an employee at the time he applied for industrial disability retirement or at the time CalPERS made the industrial disability retirement effective. Accordingly, CalPERS erred by ordering CSUSB to reinstate Respondent to his former position.

II. ARGUMENT

A. The Decision Improperly Applied Government Code Section 21193.

The Decision improperly applied Government Code Section 21193 in determining that CSUSB should reinstate Respondent to his former position. Government Code Section 21193 states, in pertinent part: "If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position." (Emphasis added.) Here, Respondent did not hold a position of employment when retired
for disability. Government Code Section 21193 does not apply where the employee was already separated from his position at the time of retirement.

Respondent was a probationary employee who was rejected during probation on December 31, 2010. He did not apply for industrial disability retirement until July 5, 2011, over five months after being separated from employment. Respondent did not obtain permanency to his former position. He was permanently separated from employment with CSUSB and did not have a vested right to his position as a probationary police officer. CalPERS made the industrial disability retirement effective as of January 1, 2011, which is also after Respondent was separated from employment.

The Decision appears to penalize CSUSB for not opposing Respondent's application for industrial disability retirement. CSUSB did not oppose the application for industrial disability retirement because it was undisputed that Respondent was involved in a single vehicle traffic collision while on duty. CalPERS has the authority to determine whether Respondent was qualified for industrial disability retirement, and CSUSB believed CalPERS would properly analyze whether the applicant was entitled to industrial disability retirement under Government Code Section 21151. The Decision places the burden on the employer to contest the application, and then penalizes the employer. However, the Decision fails to cite to any legal authority that mandates an employer must oppose an application for industrial disability where the applicant was injured on duty, but subsequently separated from employment prior to applying for industrial disability.

The Decision cites to California Department of Justice v. Bd. Of Administration of California Public Employees' Retirement System (2015) 242 Cal.App.4th 133 for the proposition that an employee found not to be incapacitated for duty must be reinstated without conditions. This is a correct statement of the law, where the employee had a position at the time of the retirement.

The facts in Department of Justice are significantly different from the facts here, and that case never addressed the issue of an employee who was already separated from his position at the time of retirement. In that case, a peace officer employed by the Department of Justice (DOJ) was injured on the job. She received an industrial disability retirement and there was no claim that she was separated from employment prior to that retirement. The officer applied to CalPERS for reinstatement. CalPERS informed her that she was eligible for reinstatement. DOJ offered to reinstate the officer on
the condition that she complete medical and psychological evaluations and a background investigation.

The holding in *Department of Justice* was merely that DOJ could not condition reinstatement on these
additional parameters. Once the employee was cleared for the condition that led to her disability
retirement, she was entitled to reinstatement. *Department of Justice* never addressed the question of
whether a separated employee is entitled to reinstatement. This was never at issue in the case.

Indeed, it makes no sense that an employee would be entitled to reinstatement to a position he
had already lost. The purpose of Government Code Section 21193 is to make an employee whole by
putting him back into the same place he would have been had he not been injured. The purpose is not
to grant a windfall to an employee who was already separated from the employer at the time of the
retirement.

Moreover, a plain reading of Government Code Section 21193 makes it apparent that
Respondent is not entitled to his former position. This section repeatedly refers to reinstatement rights
in connection with "the position held when retired for disability." A person cannot be reinstated to a
position he did not hold when retired for disability.

The evidence is clear that Respondent was not an employee under Government Code Section
21193 when the application was submitted or became effective. He had no position with CSUSB at
the time retirement was granted. CalPERS is ordering the employer to take back a person who was
rejected from probation, had not obtained permanency, and had no vested right to his former position.
The Board should amend the Decision to state that Respondent is not entitled to reinstatement since he
was not an employee of CSUSB when he applied for and was granted industrial disability retirement or
when the industrial disability retirement became effective.

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PETITION FOR RECONSIDERATION
III. CONCLUSION

Based on the foregoing, Respondent CSUSB respectfully submits this Petition for Reconsideration to the Decision dated November 15, 2017. The Decision improperly orders CSUSB to reinstate Respondent to his former position when he was not an employee. The Board should reissue the decision to properly reflect that Respondent does not have a right to reinstate to his former position from which he was already separated at the time of his application and retirement.

Dated: November 29, 2017

[Signature]

César Portillo, on behalf of California State University, San Bernardino
4823-1835-6813, v. 1
I, Cesar Portillo, declare as follows:

I am employed in the County of San Bernardino, State of California. I am at least 18 years old, and not a party to this action. I am an employee of or agent for California State University, San Bernardino, whose business address is 5500 University Parkway, San Bernardino, CA 92407-2393.

On November 29, 2017, I served the document described as CSU'S PETITION FOR RECONSIDERATION on the interested parties in this proceeding as follows:

Cheree Swedensky, Assistant to the Board  Justin Z. Hendee
Executive Office                           California Public Employees’ Retirement System
California Public Employees' Retirement System  [REDACTED]
P.O. Box 942701  
Sacramento, CA  94229-2701

Office of Administrative Hearings 1350 Front Street, Suite 3005
San Diego, CA  92101

BY MAIL—COLLECTION BOX: I placed each document in a sealed envelope with postage fully prepaid, in California State University, San Bernardino’s mail collection box in San Bernardino, California, so that following ordinary business practices, the envelope would be collected and mailed on this date. I am readily familiar with this office's business practice for collection and processing of mail. In the ordinary course of business, each document would be deposited with the United States Postal Service on that same day.

BY MAIL—PERSONAL DEPOSIT: I placed each document in a sealed envelope with postage fully prepaid and then deposited the envelope in a mail box regularly maintained by the United States Postal Service in San Bernardino, California.

BY PERSONAL SERVICE: I delivered each document in sealed envelope by hand to each addressee above.

BY OVERNIGHT DELIVERY: I placed each document in a sealed envelope with delivery fees fully prepaid. I am readily familiar with this office's practice for collection and processing of documents for overnight delivery and know that in the ordinary course of California State University Office of Human Resources' business practice the envelope will be picked up by FedEx on the same date it is placed at California State University, San Bernardino for collection.

BY FACSIMILE: By use of facsimile machine number (562) 951-4956 [4959], on November 29, 2017, at Long Beach, California, I served each document on the parties by transmitting each document to each facsimile numbers above, which are the facsimile machine telephone numbers last given by those parties. Each transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine. A copy is attached, and shows the actual time of transmission.
And on that same date, I served the same document on the interested party in this proceeding as follows:

Matthew G. Jacobs
General Counsel
California Public Employees’ Retirement System
Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707
^: (916) 795-3675
FAX: (916) 795-3659

BY MAIL—COLLECTION BOX: I placed each document in a sealed envelope with postage fully prepaid, in California State University, San Bernardino’s mail collection box in San Bernardino, California, so that following ordinary business practices, the envelope would be collected and mailed on this date. I am readily familiar with this office’s business practice for collection and processing of mail. In the ordinary course of business, each document would be deposited with the United States Postal Service on that same day.

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BY FACSIMILE: By use of facsimile machine number (909) 537-3100, on November 29, 2017, at Long Beach, California, I served each document on the parties by transmitting each document to each facsimile numbers above, which are the facsimile machine telephone numbers last given by those parties. Each transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine. A copy is attached, and shows the actual time of transmission.

Signed on November 29, 2017, at San Bernardino, California. I declare under penalty of perjury under the laws of the State of California that this declaration is true and correct.

CESAR PORTILLO