ATTACHMENT A

THE PROPOSED DECISION
BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Industrial Disability Retirement of:

GENE JOSEPH LOMBARDI,
Respondent,

and

OAKLAND UNIFIED SCHOOL DISTRICT,
Respondent.

Case No. 2017-1149
OAH No. 2018040530

PROPOSED DECISION

Administrative Law Judge Diane Schneider, State of California, Office of Administrative Hearings, heard this matter on October 25, 2018, in Oakland, California.

Senior Attorney Rory J. Coffey represented petitioner California Public Employees’ Retirement System.

Christopher H. Dahms, Attorney at Law, Law Offices of Linda Joanne Brown, represented respondent Gene Joseph Lombardi, who was present.

There was no appearance on behalf of respondent Oakland Unified School District.

The matter was submitted for decision on October 25, 2018.
FACTUAL FINDINGS

Procedural history

1. Respondent¹ Gene Joseph Lombardi was employed by Oakland Unified School District (OUSD) as a School Police Officer II. By virtue of his employment, respondent is a state safety member of the California Public Employees' Retirement System (CalPERS) and is subject to Government Code section 21151, subdivision (a), which provides that state safety members who are "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . . .”

2. On May 26, 2017, respondent submitted an application for industrial disability retirement based upon an orthopedic (back) condition.

3. CalPERS obtained and reviewed medical reports regarding respondent's orthopedic condition. It determined that respondent was not permanently disabled or incapacitated from performance of his duties as a School Police Officer at the time he filed his application.

4. Respondent was notified of CalPERS' decision denying his application and was advised of his appeal rights by letter dated October 9, 2017. Respondent filed a timely appeal on November 8, 2017.

Job duties

5. School Police Officer II's are required to patrol OUSD's property, including the residential areas surrounding the schools, respond to crime-in-progress calls from the police radio, and perform law enforcement and crime prevention functions, which may include interviewing, detaining and arresting suspects. The CalPERS Physical Requirements Information for respondent's position include frequent² sitting, standing, walking, bending and twisting of the neck and waist, and carrying up to 25 pounds; and occasional³ running and carrying over 100 pounds.

6. OUSD has 120 campuses. Respondent's last assignment was in the "tactical unit," for the entire area of East Oakland. Because respondent's job included maintaining safety in the areas surrounding the schools, most of his contacts were with the general public rather than with students. He regularly made traffic stops to alleviate drug problems; and, he investigated other crimes, such as robberies, shootings, assaults and other violent crimes.

¹ Although Gene Joseph Lombardi and Oakland Unified School District are identified as respondents in the caption, as used herein, respondent refers to Lombardi.

² Frequent is defined as three to six hours per shift.

³ Occasional is defined as up to three hours per shift.
Respondent also worked at school sporting events, which he described as tending to “get volatile.” Respondent also provided backup support for the Oakland Police Department.

7. During respondent’s last year of work, between 2014 and 2015, he was required to restrain someone once or twice each week. The reasons for the restraints included preventing suspects from fleeing and breaking up fights.

8. Anthony Fregoso has been employed as a sergeant for OUSD since 2012, and before that, he worked as an OUSD patrol officer. At hearing, he explained that while OUSD police officers attempt to avoid physical confrontations with citizens, a school police officer must possess the ability to physically restrain an individual. Restraint is not only used to deter criminal activity, it is also used to help teachers with students who are developmentally disabled and require redirection. Sergeant Fregoso recounted that when he worked as a school officer, he fractured his leg while struggling with an uncooperative suspect.

Respondent’s background and employment at OUSD

9. Respondent has had a long career in law enforcement. Between 2001 and 2006, respondent was employed as an Alameda County Deputy Sheriff. He left this job to move back home to Arkansas to care for his ailing father. Respondent returned to California, and on March 2, 2009, began working as a School Police Officer II for OUSD. Respondent loved working in law enforcement. In his words, “no other line of work compares to being a police officer.”

10. Sergeant Fregoso was respondent’s supervisor for about three years, beginning in 2012. Between 2009 and 2012, before Sergeant Fregoso’s promotion, he worked as a school officer, and policed the area of East Oakland with respondent. Sergeant Fregoso describes respondent as a “great officer”: respondent was calm, knowledgeable, reliable, respected by others, and “highly enthusiastic.” As respondent’s supervisor, Sergeant Fregoso valued respondent for his abilities to work independently and support and motivate other officers.

Back injury

11. On November 21, 2015, respondent, who is six feet, two inches tall, and weighs about 295 pounds, injured his back when he picked up an injured player while coaching his son’s football team. At the time of the injury he felt a burning sensation in his low back. Respondent coached through the game with pain, but later that evening discovered he could not get up from his chair.

12. Respondent sought medical treatment from his personal physician at Palo Alto Medical Foundation (PAMF), Andal V. Kadambi, M.D., who placed respondent on light duty work (no bending, stooping, heavy lifting, or carrying in excess of five pounds), and prescribed medication. Respondent was referred to Shirley Wu, M.D., a pain management
specialist with PAMF, in January 2016. Dr. Wu ordered a lumbar spine MRI in January 2016, which revealed bilateral pars interarticularis defects at L5 with grade 1 spondylolisthesis at L5-S1; foraminal stenosis (moderate on the left and mild on the right); a probable small annular tear along the left posterior margin; and mild circumferential disc bulging at L2-L3. Dr. Wu continued respondent on light duty work. Respondent was treated with physical therapy and took anti-inflammatory medication. In her report dated January 25, 2016, Dr. Wu recommended that respondent restrict himself to desk work duties that did not require him to be involved in “fighting” or “carrying heavy armory.”

13. In a report dated February 10, 2017, Dr. Wu noted that she had completed respondent’s disability form. She wrote that respondent could perform light duty desk work if offered by his employer, but that he could not “handle” police patrolling work, which requires “heavy armory” and potential physical altercations. In her report, Dr. Wu also opined that a physical altercation can place respondent or his partner in danger because his “pars defect may cause sudden loss of muscle power potentially.” In a report dated May 16, 2017, Dr. Wu reiterated her recommendation that respondent not return to full duty police work. She added work restrictions that included no running, bending, twisting, crawling, or climbing with 35-pound armory belt.

14. Respondent did not return to full duty work as a School Police Officer II after his injury on November 21, 2015. Respondent performed light duty work until he was informed by his employer that such work was no longer available. Respondent has not been employed since completing his light duty assignment. Sergeant Fregoso noticed a change in respondent after he was taken off of full duty work and placed on light duty. He described respondent as “more detached.” Sergeant Fregoso was present at a meeting with a human resources representative from OUSD, when respondent was informed that OUSD could not accommodate respondent’s light duty restrictions on a long-term basis. Sergeant Fregoso would like respondent to return to work if he were physically able to do so.

15. Beginning in 2013 or 2014, prior to respondent’s injury, he had experienced lower back spasms. He thought that the pain was caused by his work, and from his wearing a duty belt.

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4 The date of this meeting was not established by the record. Sergeant Fregoso and respondent thought that the light duty position lasted for about a year, but Dr. Wu’s medical report dated February 10, 2017, states that respondent stopped working in his light duty position in May 2016, after being informed by his employer that light duty was no longer available.

5 The record was not clear as to the date that respondent’s lower back pain began.
Respondent's post-injury back spasms and level of functioning

16. Respondent testified, with credibility and candor, regarding his pain and debilitating back spasms. Even when he was performing light duty work for OUSD, at times his pain was so great that he could not work. He was counseled regarding his absences on light duty.

17. Respondent’s back spasms typically occur when he bends over. Respondent recounted that he has experienced spasms and debilitating pain a number of times, such as when he was washing his feet in the shower; bent over to pick up a branch on the ground; bent down to dry his feet; and, bent down to pick up a baseball. When such spasms occur, respondent falls to the ground and cannot get up without assistance. He responds to the back spasms by staying in bed for one to three days, and then gradually moving about. Respondent also experienced a back spasm when he coughed as he was driving to perform light duty work at OUSD. He pulled over, called his family for help, and spent one day in bed.

18. During the 12 to 18 months following his injury, respondent experienced his back "going out" due to spasms, at least every other week, and sometimes weekly. Currently, respondent experiences back spasms every four to six weeks. When these spasms occur, respondent must stay in bed and rest, sometimes for several days. Respondent uses a “clamp,” which enables him to pick up objects he needs, without bending over.

19. Respondent is married and has three sons, ages 23, 16, and 14 years old. He has always coached his sons’ sports teams. His back spasms, however, have forced him to cancel practice or have another person take over coaching for him. Respondent reluctantly came to terms with the fact that he can no longer coach team sports.

20. Respondent is 42 years old. He was shocked and devastated to learn from Dr. Wu that he could not return to full duty police work. After hearing this news, he fell into a depression. Respondent tearfully explained how the loss of his beloved profession has been extremely painful for him.

21. Respondent believes that he is not physically capable of performing full duty police work. He explained that if he tried to restrain someone, his back would lock up and he would be unable to stand, placing himself, his partner and the public at risk. Respondent also explained that he cannot perform full duty police work because he cannot bend down or get in and out of his car “twenty times” each day.

22. Respondent would like to continue to serve young people. He has decided to do so by pursuing education with the goal of obtaining his teaching credential. He plans to start school next semester.
Expert testimony

23. Respondent’s expert, James B. Stark, M.D., and CalPERS’ expert, Howard Sturtz, M.D., evaluated respondent, issued written reports, and testified at hearing. Both experts reviewed respondent’s job description and the physical requirements of his job; they also reviewed respondent’s medical records and physically examined him. The tests they performed were similar, as were their physical findings. Both experts diagnosed respondent with grade I lumbrosacral spondylolisthesis.6 In spite of these similarities, they arrived at opposing conclusions as to whether or not respondent’s back condition rendered him substantially unable to perform his duties as a School Police Officer II for the OUSD.

RESPONDENT’S EXPERT

24. Dr. Stark is a board-certified physiatrist who has been licensed to practice medicine since 1976. He has been in private practice for about 39 years. Dr. Stark has a clinical practice and also works as a medical-legal evaluator. Dr. Stark has extensive experience in assessing injured workers, particularly police officers, to see if they can continue working. He works almost entirely as an agreed medical evaluator. Dr. Stark authored a chapter of a widely-used police officer training manual,7 which contains diagnostic tests for non-specialist doctors to perform on officers who have lower back and knee conditions.

25. At the request of respondent, Dr. Stark examined respondent on July 2, 2018, regarding respondent’s application for industrial disability retirement. Respondent complained of lower back pain in varying intensity and reported that he had difficulty kneeling, bending, and squatting. Additionally, he found it difficult to sit and stand for prolonged periods of time. Respondent expressed serious concerns about his ability to engage in physical confrontations and perform heavy lifting. He also reported difficulty wearing his duty belt for his entire shift, which was about eight to 10 hours. Dr. Stark found respondent’s back condition symptomatic based upon respondent’s complaints.

26. Dr. Stark diagnosed respondent with symptomatic grade I lumbosacral spondylolisthesis. Spondylolisthesis occurs when there are fractures in a portion of the vertebrae, in addition to slippage. Dr. Stark described this condition as “an activity limiting condition precluding high-level training.” Respondent’s fractures are located in the PARS interarticularis. In respondent’s case, Dr. Stark found 25 percent forward slippage of L5, which accounts for the designation of grade 1. Dr. Stark explained that according to “all learned treatises,” grade I lumbosacral spondylolisthesis is classified as a “spinal instability.”

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6 Dr. Stark, however, described respondent’s condition as symptomatic, while Dr. Sturtz described the condition as asymptomatic.

7 The police officers’ standards and training manual was also referred to as “post-standards.”
Dr. Stark believes that the results of his physical examination of respondent support his conclusion that respondent’s spine is unstable.

27. According to Dr. Stark, respondent’s back condition can cause small nerves to become irritated, which, in turn, can cause back spasms and what he termed a “cascade of pain,” leading to respondent’s sudden incapacitation. This is what he believes has happened to respondent on a chronic basis. Dr. Stark explained that back spasms such as the ones experienced by respondent can be triggered by activities as simple as picking something off of the ground. Dr. Stark noted that when an individual with spondylolisthesis experiences back spasms, the treatment is to modify activities. On the more invasive end of treatment, lumbar spine fusion surgery is available, but the odds of improvement are 50 to 60 percent. Respondent declined to undergo this surgery because many who do fail to improve.

28. Dr. Stark strongly believes that as a result of respondent’s spinal instability, stemming from spondylolisthesis, respondent is permanently incapacitated from performing the essential duties required for his job as a school police officer for OUSD. By reason of respondent’s condition, Dr. Stark opined that respondent is precluded from a host of activities, including running, jumping, climbing, bending, or physically restraining suspects; and, he cannot sit or stand for a prolonged period of time without placing himself at risk of sudden incapacitation. Although respondent’s back condition is variable, meaning that respondent may be in less pain and have a greater range of motion on some days, Dr. Stark noted that spinal instability is associated with recurrent episodes of cascading back pain during certain movements, especially bending.

29. Dr. Stark’s opinion that respondent is unable to perform full duty work as a school police officer by reason of his back condition, was supported by the reports submitted by qualified medical evaluator Behzad Emad, M.D., as well as the reports of Dr. Wu. Dr. Emad evaluated respondent on October 3, 2016. In his written report on the same day, Dr. Emad concludes that respondent could return to work with restrictions including, avoid lifting and carrying items that weigh more than 10 pounds and are between three and six feet tall, for no more than one hour per day.

CalPERS’ Expert

30. Dr. Sturtz is a board-certified orthopedist who has been practicing medicine for over 50 years. He treated patients until last year. Dr. Sturtz has extensive experience in evaluating orthopedic injuries: he currently performs medical evaluations in cases involving workers’ compensation, CalPERS, the Department of Defense, the Department of Labor, and the National Football League.

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8 Dr. Stark referred to the portion of his examination relating to respondent’s ability to perform lateral and prone extensions.

9 See Factual Findings 12 and 13.
31. Dr. Sturtz examined respondent on September 14, 2017. On the day of his visit, respondent reported that he had periodic back low pain; his range of motion was "okay"; he can stand and walk for 45 minutes; he can bend but has to be "careful"; and he does not do any lifting. He also told Dr. Sturtz that he does not suffer from radiating pain; he feels numbness in his thighs, more in his left thigh; and, he has difficulty walking but he does not limp.

32. When Dr. Sturtz examined respondent, he thought that respondent had "minimal symptoms." He acknowledged that the exam could have occurred on a "good day" for respondent. Dr. Sturtz found "no evidence of abnormality in respondent’s lumbar spine" when he physically examined respondent, and described respondent’s performance as "basically normal.” Dr. Sturtz diagnosed respondent with grade I lumbosacral spondylolisthesis, but opined that the condition was asymptomatic.

33. Dr. Sturtz opined that based upon his examination, there "were no specific job duties that respondent was unable to perform." In his view, the diagnosis of grade I lumbosacral spondylolisthesis, on its own, does not “equate with substantial disability,” or produce pain without additional objective findings. While Dr. Sturtz acknowledged that respondent might be incapacitated from performing his job duties as a school police officer when his back "goes out," he did not note the presence of objective findings or an underlying condition that would explain respondent’s complaints. He postulated that when a patient with spondylolisthesis experiences pain, there has to be something else causing the pain, such as pinched nerves. He disagreed with Dr. Stark that spondylolisthesis could produce episodes of a person’s back “going out,” in a manner similar to that described by respondent. He theorized that respondent’s back pain stemmed from short-lived episodes of acute lumbar sacral pain.

34. Dr. Sturtz concluded that because respondent’s back condition did not preclude him from performing his duties as a school police officer for the OUSD, respondent was not substantially incapacitated for the performance of duty.

ANALYSIS OF EXPERT TESTIMONY AND DETERMINATION OF DISABILITY

35. The central difference between the experts’ opinions is that Dr. Sturtz does not believe that respondent’s subjective complaints of back spasms and debilitating pain are supported by the condition of grade I lumbosacral spondylolisthesis. He also does not believe that respondent suffers from spinal instability by reason of this condition. Instead, Dr. Sturtz believes that respondent’s debilitating episodes stem from acute back strain that is not necessarily long-standing.

Dr. Stark opined otherwise. Dr. Stark explained that grade I lumbosacral spondylolisthesis is a known disabling condition associated with spinal instability. In Dr. Stark’s view, respondent’s back spasms and debilitating pain stem from this condition. Although Dr. Stark agrees with Dr. Sturtz that respondent does not suffer from lumbar radiculopathy, Dr. Stark opines that when respondent makes certain movements, as a result
of his back condition, the small nerves affecting posterior elements of the spine can set off a "cascade of pain." This pain can cause respondent to be "suddenly incapacitated"; and, it is the risk of sudden incapacitation that renders respondent substantially unable to perform his job as a School Police Officer II.

36. The testimony of Dr. Stark explaining why respondent's complaints were supported by objective medical evidence and his explanation for his difference of opinion with Dr. Sturtz is found to be more persuasive than that of Dr. Sturtz. Therefore, it is found that competent and persuasive medical evidence established that applicant's back condition renders him substantially unable to perform the usual duties of his position as a School Police Officer II for OUSD; and, his disability is permanent and was present at the time he submitted his application for disability retirement with CalPERS.

In finding Dr. Stark's conclusions persuasive, it is noted that Dr. Stark's opinion is supported by the findings of Dr. Wu and Dr. Emad. Additionally, the record was devoid of any evidence that might undermine the credibility of respondent's complaints: he clearly loved his job, was utterly devastated by his inability to continue with his career in law enforcement, and was a highly valued and respected member of the OUSD police force.

LEGAL CONCLUSIONS

1. The sole issue in this proceeding is whether respondent is permanently incapacitated for the performance of his duties as a School Police Officer II for OUSD. The question of whether the alleged incapacity has an industrial causation was determined by the Workers' Compensation Appeals Board in a different proceeding. (Gov. Code, § 21166.)

2. Pursuant to Government Code section 21151, subdivision (a), a local safety member of CalPERS "incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability . . . ." The term "incapacitated for performance of duty" is defined under the California Public Employees' Retirement Law as a "disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) As interpreted by case law, an applicant is "incapacitated for performance of duty" if he or she is substantially unable to perform the usual duties of his or her position. (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876; accord Hosford v. Board of Administration (1978) 77 Cal.App.3d 854, 859-860.) It is respondent's burden to prove by a preponderance of the evidence that he is incapacitated for the performance of his duties. (Rau v. Sacramento County Ret. Bd. (1966) 247 Cal.App.2d 234, 238.) Petitioner argues that Dr. Stark's opinion was based on his concern regarding future risks associated with respondent's back condition rather than current impairments; and that respondent is not substantially disabled from performing his usual duties as a police officer. These arguments have been considered and found to be without merit.
3. Based upon the matters set forth in Factual Findings 24 through 29, and 35 to 36, it was established by competent medical evidence that respondent is incapacitated for the performance of his duties as a School Police Officer II with OUSD, and his disability is permanent.

DETERMINATION OF ISSUES

Respondent Gene Joseph Lombardi is incapacitated for the performance of duty as a School Police Officer II with the Oakland Unified School District; and his disability is permanent.

ORDER

The Determination of Issues is hereby certified to the Board of Administration of the California Public Employees' Retirement System.

DATED: November 8, 2018

DIANE SCHNEIDER
Administrative Law Judge
Office of Administrative Hearings