ATTACHMENT E

THE PROPOSED DECISION
In the Matter of the Reinstatement from Disability Retirement of:

TRACY A. FOLAU,

Respondent,

and

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondent.

Case No. 2018-0439
OAH No. 2018060119

PROPOSED DECISION

Marion Vomhof, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 25, 2018, and November 6, 2018,1 in San Diego, California.

John Shipley, Senior Staff Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees’ Retirement System, State of California (CalPERS).

Tracy A. Folau, respondent, represented herself.

No appearance was made by or on behalf of respondent, California Department of Corrections and Rehabilitation (department). Having established satisfactory service, the matter proceeded against the department as a default pursuant to Government Code section 11520.

The matter was submitted on November 6, 2018.2

1 Prior to the conclusion of the first day of hearing, complainant asked to continue the hearing for a second day and respondent did not oppose the motion. An order granting the motion was issued and the hearing was continued to November 6, 2018, at 9:00 a.m.
ISSUE

Is Ms. Folau, who was granted a disability retirement in 2014, now recovered from her psychological condition such that she is no longer substantially disabled or incapacitated from performing the usual and customary duties of a sales representative, prison industries?

FACTUAL FINDINGS

Background

1. Ms. Folau was employed as a sales representative, prison industries with department. By reason of her employment, Ms. Folau was a state safety member of CalPERS.

2. On July 14, 2014, Ms. Folau submitted an application for disability retirement on the basis of a psychological (depression, anxiety, and post-traumatic stress disorder (PTSD)) condition.

3. CalPERS approved the application and Ms. Folau was retired for disability effective September 4, 2014.

4. Government Code section 21192 authorizes CalPERS to re-evaluate members who are under the minimum age for voluntary retirement to determine if they remain eligible for a disability retirement. If CalPERS determines that the member is no longer incapacitated or permanently disabled, it may cancel the disability retirement allowance and seek to have the member reinstated.

5. On August 23, 2017, CalPERS notified Ms. Folau that her disability retirement benefits were under review pursuant to Government Code section 21192. As part of its review CalPERS referred her to Matthew F. Carroll, M.D. a board-certified psychiatrist in order to have Dr. Carroll evaluate her to determine if she remains incapacitated and unable to return to work. As discussed below, Dr. Carroll evaluated Ms. Folau and reviewed relevant medical records and prepared a report.

6. On March 7, 2018, CalPERS notified Ms. Folau that, after completing its reevaluation of her, it had determined that she was no longer disabled or incapacitated from performance of her duties as a sales representative, prison industries with department.

2 Personal identifying information, including Ms. Folau’s date of birth and social security number, were redacted from exhibits after submission.

3 Respondent testified that she was actually employed by California Prison Industry Authority (CalPIA) rather than directly by the department. She explained that CalPIA is a self-supported agency that does work inside the prisons, with a “dotted line” to Operations on the department’s organization chart.
CalPERS advised Ms. Folau to contact the personnel office to arrange her return to employment. Ms. Folau timely appealed that determination and this hearing ensued.

Independent Medical Evaluation and Testimony of Dr. Matthew F. Carroll

7. CalPERS provided Dr. Carroll with Ms. Folau's medical records and documents and requested that he perform an independent medical evaluation. After graduating from medical school in 1989, Dr. Carroll completed his internship and residency in psychiatry and became board-certified in psychiatry. Dr. Carroll also completed a year of training in forensic psychiatry and became board-certified in forensic psychiatry. Dr. Carroll is currently a staff psychiatrist at San Diego County Psychiatric Hospital and maintains a private practice in forensic psychiatry.

Dr. Carroll has worked with CalPERS for about four to five years and estimates he performs about four independent medical evaluations per year for that agency. He does not have a contract with CalPERS but when they contact him regarding an evaluation, he is free to accept or deny a case. For each evaluation he conducts, CalPERS provides him with medical records and the essential job functions (EJFs), as well as specific questions they want him to answer.

Prior to meeting with Ms. Folau, Dr. Carroll reviewed the records supplied by CalPERS, and he later summarized these records in his written report. Included in the documents he reviewed was a duty statement for the position of "sales representative prison industries," which listed the essential functions of this position. The duty statement had an effective date of May 31, 2012, and respondent confirmed the document contained her signature and was signed on July 6, 2012.

Dr. Carroll conducted a psychiatric evaluation of Ms. Folau on December 11, 2017. He began his interview by asking Ms. Folau questions about her background and then her work history. Per his report, Ms. Folau was 49 years old at the time of the evaluation. She grew up in Ohio and was raised by her grandmother after her mother died of cancer when Ms. Folau was seven. After graduating from high school, she began working for a temporary agency and then moved to Sacramento when she was 21. In late 1999, Ms. Folau began working for the State of California as a part-time office assistant, and then began working full-time for the Department of Rehabilitation.

In 2007 Ms. Folau accepted a position as a human resources manager at Richard J. Donovan Correctional Facility (Donovan) and moved to San Diego. During the first few months in this position she noticed malfeasance at work, including two individuals manipulating payroll, employees renting homes to other employees, and an individual named John Gardner who visited the prison in violation of his parole. She testified prison authorities were aware of this but did nothing. Ms. Folau reported the malfeasance to the Bureau of State Audits. She was then treated unfairly and harassed at work, and when it became too stressful, she went out on workers' compensation. She told Dr. Carroll that prison cars would follow her to places like the grocery store and would show up at her...
daughter's school. Her supervisor had threatened to kill her, and multiple times told her that they would cut the brake lines of her car.

Ms. Folau advised Dr. Carroll that she started seeing a psychiatrist in 2010 due to her difficulties at Donovan. She was seeing a doctor at Kaiser; she was also seeing a Kaiser social worker, "Simon," about every two weeks. Ms. Folau advised that she had filed a lawsuit against Donovan and received a $100,000 settlement. She had had no prior workers' compensation claims. Ms. Folau was cooperative during their meeting, and Dr. Carroll did not observe any psychotic issues. He did observe that she felt she was treated unfairly at Donovan. He had no knowledge as to what happened there apart from what she told him but said her feelings about how she was treated did affect her to the point that she was tearful and appeared anxious talking about it. After she left Donovan, she had a temporary job with the CalPIA. In this position she was primarily working from home but had difficulty when she would have to go to other prisons and she suffered from anxiety and was unable to concentrate.

Dr. Carroll opined, "I do not see evidence that she suffers from post-traumatic stress disorder." According to Dr. Carroll, a diagnosis of PTSD requires a documented traumatic event, such as a physical attack, robbery, exposure to war in combat, sexual abuse, or kidnapping, resulting in symptoms that may affect the individual on a regular basis and may include nightmares, fear of going anywhere, depression, and anxiety. When Dr. Carroll asked Ms. Folau what incident she experienced that she believed may have caused PTSD, she responded that there were large men who would walk by and intimidate her, and she was being stalked in the community. She had also said her life was threatened and if her life was in fact threatened, Dr. Carroll believed this could cause PTSD. However, he concluded that in all the records he received from CalPERS there were no records to confirm that the events she claimed happened actually happened. "I can't say that they didn't but I certainly cannot verify them to the point that I could diagnose someone with PTSD."

Based on their interview and his review of her records, Dr. Carroll's diagnosis was that Ms. Folau suffered from a major depressive disorder. He explained that this occurs when an individual suffers from depression, with associated symptoms such as problems with eating, sleeping, concentration, energy level, and difficulty enjoying life. Ms. Folau's medical records reflected that one doctor had diagnosed an anxiety disorder, but depression and anxiety often go together, and Dr. Carroll believed her anxiety was part of her depression.

From Dr. Carroll's written report dated December 18, 2017, the following are his responses, in pertinent part, to two questions from CalPERS:

1. Based on your objective findings, are there specific job duties that you feel the member is unable to perform due to her anxiety, depression, and post-traumatic stress condition?
As noted, there are not [sic] objective findings that she suffers from post-traumatic stress disorder in this case. In terms of job duties related to anxiety and depression, she reports being harassed significantly at Donovan State Prison. She reports that she was a whistleblower and was retaliated for such. In my opinion, assuming this is true, she would not be able to continue to work at Donovan State Prison.

Based on the essential functions of her job listed in the job description, in my opinion she would be able to perform these essential functions if she so desired.

Although she may not desire to have any future work with any members of the prison system, the only specific job duties that show [sic] could not perform would be working with individuals who previously harassed her.

2. In your professional opinion is the member presently substantially incapacitated for the performance of her duties?

No, in my opinion she is not substantially incapacitated for the performance of these duties. She does not desire to work with the prison system due to perceived maltreatment by others. However, this does not make her substantially incapacitated to perform the listed essential functions of her job.

After submitting his December 18, 2017, written report, Dr. Carroll received a letter from CalPERS dated December 19, 2017, consisting of 54 pages of Ms. Folau's medical records from Kaiser Medical that CalPERS had not provided previously. Dr. Carroll reviewed the additional documents and issued a subsequent report to CalPERS dated January 24, 2018. Dr. Carroll noted that the records reflected a diagnosis of general anxiety disorder or major depressive disorder, but not PTSD. In February 2017, a Kaiser licensed clinical social worker noted the reason for respondent's visit was to seek services for ADD/ADHD testing after she complained of "issues at work," an inability to concentrate on completing simple tasks, and trouble getting to work. In March 2017, a Kaiser physician noted that "[S]he is dissatisfied with her job (I am losing the passion for HR)." Dr. Carroll agreed she is dissatisfied with her job but stated that job dissatisfaction and the inability to perform the essential functions of a job are two different things. The lack of wanting to do the job or not liking it does not translate to an inability to do so.

At the conclusion of his January 24, 2018, supplemental report, Dr. Carroll opined as follows:

These additional documents do not change my previous opinion. The additional Kaiser documents note that she has had difficulty
working in a variety of work situations. The records from Kaiser do not note a diagnosis of post-traumatic stress disorder. In my opinion she is not substantially incapacitated from the performance of her duties.

Ms. Folau said that "based on a stipulated agreement" she was not allowed to provide "additional documents" for Dr. Carroll's review, and she questioned whether his opinion may have been different had he been able to review these documents. Dr. Carroll responded that his opinions were based on the documentation he received and reviewed, and he could not speculate on the effect of other documentation that he had not been given and had not reviewed. Dr. Carroll confirmed that he reviewed and considered the medical reports and documentation he had been given and had summarized these in his written report.

Ms. Folau's Testimony and Evidence

8. Ms. Folau began working for the State of California in 1999 and for the department in Sacramento in 2000. She began as an office assistant and "tried to work my way up." In 2007, she moved to San Diego to take a job at Donovan, which "was a challenge." From the moment she began working at Donovan she noticed that several departmental policies and procedures were carried out inconsistently and were not being upheld by management. She reported these issues to her supervisor and then to upper management, but her requests for outside audits and investigations were ignored.

On August 9, 2010, she submitted a three-page memorandum to the Bureau of State Audits (BSA) and the Office of Inspector General (OIG), stating that "[T]his information/complaint is being provided to you in a minimized/bullet format, per direction and previous discussion(s) with your office." In the memo she summarized various issues and situations that had occurred, stating she believed the "corruption inside this (facility)" is "deeply" embedded. She said she had been subjected to "blatant retaliation" and requested the BSA and/or OIG's immediate attention. She testified that submitting this letter is what led to her "demise" and subsequent retirement.

On March 22, 2011, she filed a Whistleblower Retaliation Complaint, alleging discrimination/retribution and denial of her request for reasonable accommodation following a disability leave.

Through a settlement conference, she began working with CalPIA. "I said I used to work with CalPIA in Sacramento, would you at least try" to talk with them because "I can't

4 This document was not dated but respondent testified that the date of this document is March 22, 2011.

5 No testimony was provided as to events following the filing of the complaint in March 2011 and leading up to this "settlement conference." Respondent provided no date for the conference or additional details. As to respondent's legal history, Dr. Carroll wrote in
afford not to work just don’t want to work for corrections.” She wanted to keep working but did not want to work for “corrections.” She had previously worked with CalPIA in Sacramento. The department created a position for her with CalPIA as a sales representative for prison industries, and as she was “on loan” for the first year she did not have to go to the prisons. The department agreed to fund the position for one year and at the end of that year, CalPIA required that she apply for the position. She applied and was hired and “put back in the prisons.” It was at this time that she filed for disability retirement.

Ms. Folau signed a duty statement with CalPIA in connection with the position of “sales representative prison industries” on July 6, 2012. The effective day was listed as May 31, 2012. The duty statement provided the “essential functions” and the “marginal functions” of this position, listing the duties and responsibilities plus the percentage of time required for each. Ms. Folau acknowledged that she did sign this duty statement but said that it was not an accurate description of her duties or the time required for each. The duty statement provided that the marginal functions required only five percent (5%) of her time and one of those functions was to conduct “factory tours.” Ms. Folau explained that this included touring institutions and as she was assigned to southern California, it included Donovan. She testified that the five percent time listed was not accurate. “You need to go to the factories” and a “majority” of her time was spent talking to the institutions as “that is where the money is.”

Ms. Folau provided a copy of a document from the California Department of Human Resources that lists the California State Personnel Board Specification for the position of sales representative, prison industries. This document provides that the specifications were established in 1947 and revised in 1983 and gives no percentages of time required for the various duties. Ms. Folau testified that the essential functions listed in the duty statement are created from this document and this document contains a “more accurate reflection” of the duties of a sales representative.

She was required to travel to Donovan once per month in this position, and the time she spent there varies. Ms. Folau later said “[s]howing up at Donovan once a month is an issue but not all the issue”. She explained that she would have to “communicate with the prisons” and it is “not ok to have to continue to work with people who were aware” of her history. CalPIA is a small community and “I just don’t want to be looked at.” After working in human resources, she knows how easy it is for people to look at her records. “I can’t take the scrutiny.”

She believes part of the reason for the review of her retirement disability is that she was only a few months from age 50. She understands “that based on some rules they are allowed to do” this, but she believes it was not handled correctly. Ms. Folau is upset that CalPERS moved ahead with its own re-evaluation process after her Kaiser psychiatrist

his report “[S]he did have a lawsuit against Donovan and received about $100,000 in a settlement.” Dr. Carroll testified that respondent had informed him about this lawsuit.
completed a form stating that respondent suffered from generalized anxiety disorder and major depressive disorder and would be disabled for at least 12 months.

Ms. Folau had a “perfect outstanding record” and “suddenly they” wanted her to be gone. “I was naïve at first but didn’t want to give up, and because I didn’t want to give up it caused all this.” Ms. Folau said she is “mad and angry, I just wanted those people to be fired.” “I will go back if I have to. I tried. I sent them an email, I said they said I need to come back, but nobody has called so I don’t think they want me back anyway. You go from being a great employee to nothing, I just feel hopeless. I want to work, I do. I just don’t want to be looked at. I worked in HR and know people can look at my records.”

Letter in Support of Respondent

9. Ms. Folau provided a letter, dated May 18, 2011, written by Patrick Cowan in her support. Mr. Cowan was employed as associate warden at Donovan at the time she retired, and Ms. Folau had worked with him from 2007 until he retired in 2010. Mr. Cowan wrote that Ms. Folau was instrumental in turning around the personnel office at Donovan, and that she is clearly recognized as a leader within the organization. Mr. Cowan concluded his letter with the following: “Ms. Folau has always been honest and forthright and it appears she became a victim of a management team exerting their displeasure with her presence at the institution.” Ms. Folau did not request that Mr. Cowan write this letter.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Evidence Code section 500 provides that, except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting.

2. Evidence Code section 115 defines “burden of proof” as a party’s obligation “to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.” Unless specified, the burden of proof requires proof by a preponderance of the evidence.

3. In this proceeding, CalPERS had the burden of proving by a preponderance of the evidence that circumstances had changed, that Ms. Folau was no longer substantially incapacitated from performing the duties of a sales representative, that Ms. Folau was capable of returning to work, and that Ms. Folau should be reinstated to her former employment as a sales representative, prison industries.
Applicable Statutes

4. Government Code section 20026 defines the terms “disability” and “incapacity for performance of duty,” when used as a basis for retirement, to mean a “disability of permanent or extended and uncertain duration” that is based on “competent medical opinion.”

5. Government Code section 21060, subdivision (a), provides that a member shall be retired for service upon his or her application to the board if he or she has attained age 50 and is credited with five years of state service.

6. Government Code section 21156, subdivision (a) (1), provides that if the evidence demonstrates that the member 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. The determination of incapacitation shall be based on competent medical opinion.

7. Government Code section 21192 provides that recipients of a disability retirement allowance under the minimum age for voluntary retirement for service may be required to undergo a medical examination. Based on the results of that examination, CalPERS shall determine whether or not the member is still incapacitated from performing his or her job duties.

8. Government Code section 21193 provides that if the member is determined to no longer be eligible for a disability retirement, it shall be canceled and the member shall be reinstated.

Eligibility for a Disability Retirement

9. “Incapacitated for the performance of duty” means the substantial inability of the applicant to perform his or her usual duties. An employee who is incapacitated only to a limited extent is not entitled to disability retirement. (Mansperger v. Public Employees' Retirement System (1979) 6 Cal.App.3d 873, 875-877.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (Hosford v. Bd. of Administration (1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (Id. at 863.)

Evaluation and Conclusion

10. CalPERS has met its burden and proved by a preponderance of the evidence that Ms. Folau is no longer substantially incapacitated from performing her duties as a sales representative, prison industries.
Ms. Folau testified that the duty statement was inaccurate as to the essential functions and that the time spent visiting prisons (which was listed in the duty statement as a "marginal function") was much more than the five percent listed. However, Ms. Folau herself testified that she was required to visit Donovan only once per month and that the time for each visit varied. According to the documentation reviewed by Dr. Carroll, monthly visits to Donovan are not an essential function of her duties in this position.

Dr. Carroll's report and testimony was credible and persuasive that Ms. Folau is no longer substantially incapacitated from performing the essential functions of this job. Although Ms. Folau disputed Dr. Carroll's findings, she failed to provide sufficient evidence to rebut Dr. Carroll's well-founded opinions.

After reviewing her medical records and conducting his own evaluation, Dr. Carroll testified that he does not believe Ms. Folau suffers from PTSD. With regard to her anxiety and depression and taking into account her testimony that she was a whistleblower and was harassed to the point that her life was threatened, Dr. Carroll acknowledged that Ms. Folau "would have difficulty returning to work at Donovan." He concluded that "outside of Donovan," he could see no reason why she could not perform the essential functions of her job.

ORDER

Ms. Folau's appeal from CalPERS's determination that she is no longer eligible for a disability retirement is denied. Ms. Folau is no longer substantially disabled or incapacitated from performing the usual and customary duties of a sales representative, prison industries and shall be reinstated to her former position. CalPERS's determination is affirmed.

DATED: December 6, 2018

[Signature]

MARION VOMHOF
Administrative Law Judge
Office of Administrative Hearings