

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

2019/09/04 11:46:45 SB 4796



California Public Employees' Retirement System
Legal Office
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Attachment C

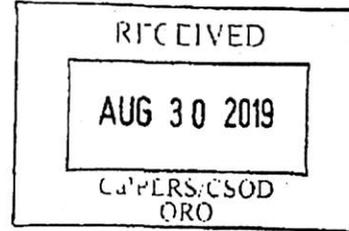
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July 18, 2019

Ref No 2018-0806



Certified Mail – Return Receipt Requested

Joseph A Bonofiglio
[Redacted]
[Redacted]

Subject In the Matter of the Reinstatement from Disability Retirement of JOSEPH A BONOFILGIO, Respondent, and DEPARTMENT OF DEVELOPMENTAL SERVICES FAIRVIEW STATE HOSPITAL, Respondent

Dear Mr Bonofiglio

This is to forward a photocopy of the Proposed Decision of the Administrative Law Judge in the above named matter. In accordance with the Administrative Procedure Act, it has no force or effect until the Board of Administration (Board) of the California Public Employees' Retirement System (CalPERS) takes formal action to either adopt it, remand it, or decline to adopt it in favor of its own decision.

Your appeal has been calendared for consideration by the Board at its regular meeting on September 18, 2019. **Although oral argument is not allowed, the parties may submit written argument for or against the Proposed Decision.**

As part of this argument, you may also ask the Board to designate the decision as **precedent**, in whole or in part, if it is adopted. The purpose of designating precedent is to provide guidance to the Board and other parties in future appeals, where the disputed law and issues are the same. This designation has no effect on the binding outcome of your appeal. CalPERS staff routinely submits written argument, and may make this same request of the Board. Or, the Board may choose to designate a given decision as precedent, on its own motion. For this reason, although you are not required to take a position, if you have a preference against precedential status you should explain why in your written argument to the Board.

In deciding whether to designate precedent, the Board will always consider *Does the decision contain a significant legal or policy determination of general application that is likely to recur? Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied?*

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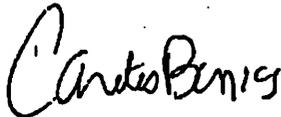
All precedential decisions will be published with a cumulative index, and made available free of charge on the CalPERS website ([http //www calpers ca gov](http://www.calpers.ca.gov)) They will also be available in "hard copy" upon written request to this office Any precedential decision may be de-published at the request of an interested party, after an opportunity for public comment and at the sole discretion of the Board

Your written argument should be no longer than six pages, and must be received by CalPERS no later than September 4, 2019 Please note, even if you miss this deadline the Board will still act on the Proposed Decision All written argument will be included in the agenda item, and mailed simultaneously to the Board and all parties Your argument will not be disclosed to the attorney assigned to this matter until then Please redact personal information, as Respondent's Arguments become a public document when included in the agenda item As mentioned earlier, parties will not be allowed to orally respond to the Board on the merits of written argument Please title your submission as "Respondent's Argument" and send it to

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P O Box 942701
Sacramento, CA 94229-2701
Fax (916) 795-3972

If you have any questions about this procedure, you may contact Kevin Kreutz, Senior Attorney, at (916) 795-2473

Sincerely,



Caritas Banks
Legal Support Supervisor I
Legal Office

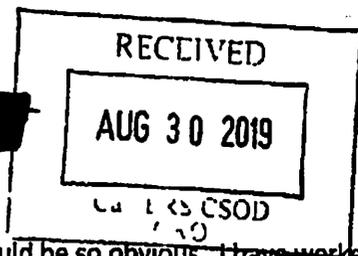
CKB

Enclosure

cc Personnel Officer, Department of Developmental Services, Fairview State Hospital

2019/09/04 11:46:46 SB 4798

CID # [REDACTED]



Dear Cal Pers,

I do not understand why I am fighting so hard for something that should be so obvious. I have worked hard serving our special needs population for 18 years and my body has paid the price, especially most recently in 2014 when a client kicked me in the back and neck several times while I was helpless on the ground

You have my first appeal. Then, I defended myself in court whereby I did not have the means to have an attorney nor the money to subpoena my Dr Nickolescu (whereby you have the paperwork where he has put me on limited duty, stating clearly that I will not be allowed in the classroom with my former student population, this paperwork was given to Senior Attorney Kevin Kreutz and Judge Mary Agnes Matyszewski) I lost the case because I did not have my doctor present at the hearing as a result of not having the means to do so. That is not a just system. The judge was simply following the law. However, what is right, just and fair is the following. Either we try this case again and I am given the means to have my doctor subpoenaed or the means to hire A doctor that specializes in cases like this so I can fight a fair battle. Or just use common sense to understand that I am not capable of performing my job as a special Ed Teacher. Unfortunately, common sense is difficult in this case because basically it is my word against yours. It is for this reason that if my letter can be used as precedent for future individuals that do not have the means to defend themselves properly but are obviously incapable of performing their job duties, then please use it! Please bear with me as I have to reiterate the fact that I did not have the money to subpoena my doctor or hire another doctor to refute the doctor that was hired by Cal Pers. This is not a fair fight obviously. So now it is my word that you should trust me and the five witnesses that I produced at my hearing. One might, in your position, argue that we had a doctor that appeared at the hearing, who testified that, "I should be able to perform the duties. "This is true, however, given the fact that this was one man's opinion, the fact that my doctor's opinion was submitted as hearsay due to the fact that I did not have the means for him to be present at the hearing, and the fact of how I cross examined Dr Realyvasquez's testimony, I do not believe in good conscience, this decision be enforced. The wording of the DR Realyvasquez itself, demonstrates his lack of confidence and doubt. The bottom of page 4 through the top of page 5 demonstrate this in the PROPOSED DECISION report that I received from the Judge (please refer). As quoted above, the doctor stated that I SHOULD be able to perform the job duties. It is clear that he does not know and neither does this committee. However, I do. There is no possible way I can perform these job duties which I will get into more detail later.

Referring to the PROPOSESD DECISION report provided by the Judge page 5 # 11, the Judge states, "While his report was extremely detailed and his opinions well explained, he made a fair to poor witness while testifying, because at times his (Dr Realyvasquez) testimony was rambling and difficult to follow." It is my argument that, it is the testimony that the judge was interested in because without this testimony it would merely be a report and considered hearsay as was my Doctor's report. This shows a lack of continuity as a side note. Furthermore, Dr Realyvasquez stated that he was retired and it was so clear that he was very confused during his testimony and not consistent. Further down on page 5 #11 written by the Judge, it states, "Several of Mr Bonofiglio's past pain complaints appeared to have been resolved based on the records reviewed and 'or the physical examination performed during the IME, so Dr Realyvasquez could not find the causes for pain complaints." There are many ALARMING issues with this statement. First off, the language used again, namely the word "appeared," communicates a lack of surety. But even more important, what records are being referred to here??? Is it Dr Nickolescus's

records? Because I assure you that that is not the case? Records that I previously made available to your attorney Is it the IME report 3 years ago that determined that I was NOT capable of performing my job duties that actually lead to me receiving my benefits that I am currently on? That cannot be the case because that obviously runs contrary to what Cal Pers offered me from the beginning and is what I am currently receiving Or is the one-hour visit from Dr Realyvasquez, the report that is being referred to Which is the report I am arguing to begin with The one report that is in opposition to all the others The one report that lacked surety based on language quoted above, and the report itself that lacked surety based on language evaluated by the Judge that was quoted above If so, this is a cyclical argument But if it relates to the prior IME, than the report that once helped me is now hurting me That is a problem in and of itself Also, please keep in mind that all previous doctors including my current DR Nickolescu have spent countless hours for years with me Dr Realyvasquez spent one hour with me total Most of that time was spent talking whereby he was giving me counseling advice and only 20 minutes max was spent on testing which I stated in court

Further down page 5 #11, it states, " At first there were spasms during active testing that required Mr Bonofiglio's cooperation, but the spasms disappeared during passive testing where his cooperation was not key, signifying that Mr Bonofiglio was holding his back muscles tense while performing the testing " First of all, it stands to reason that spasms come and go which makes this opinion weak in explaining and implying that I was trying to make my pain appear notable I am offended by this accusation and it brings tears to my eyes that my pain is so harsh day to day and A doctor is basically calling me a faker in so many words But more importantly this is once again not the point, yes I have pain everyday which prevents my ability to perform the simplest of tasks such as bathing, jogging, vacuuming, and other ADLs(Activities of Daily Living) I E I cannot do these activities without help However, pain, as stated in writing to me by The Senior ATTORNEY is not the issue here This issue is whether I can perform the job duties period Which I cannot This is why every doctor in the past and my current Dr Nickolescu has used an MRI to gather their information An MRI was key to everyone to make their assessments except Dr Rellyvasquez This is a big red flag that I hope and pray that this committee will take into consideration for my potential future students that I must be able to protect

It also states on page 5 #11, "Dr Realyvasquez did not find anything on the MRIs to explain the limited ranges of motion " Yet it was these same MRIs that deemed me incapable of performing my job 3 and 4 and 5 years ago? Because Dr Realyvasquez did not take a new MRI He said that he did not need a new MRI in court It was this same older MRI that more than four doctors used to determine that I was incapable of performing the job duties All of which your attorney, the Judge, and hopefully you have access to If it is a matter of getting the opportunity to look at these documents again, please allow more time to retrieve them How can this Dr Rrealvasquez use the very same MRIs that are older against me, when it was these MRIs that CalPers and the other doctors used to enable me to receive my benefits? I believe he/we need a new MRI

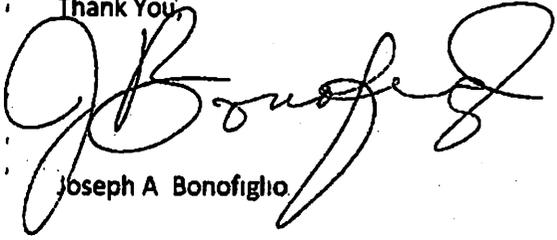
The Judge had to abide by the law For her it was simple One side produced a doctor and the other side did not For Cal pers, this decision is not so easy You do not have a license to protect and in your heart of hearts you know that what I am saying is true Many cases in court turn out to be wrong due to procedure, precedence, money, power, new evidence etc As I argued in my first appeal, I have to pose the following question again If I was capable of performing these skills that I did for 18 years, why would I subject myself to this lifestyle of living where I make only a small fraction of what I am capable? I am not asking for something that is not already given to those in need Moreover, I was given this

benefit because I was in need and I am in need now Does it stand to reason that as I get older, that I would heal when I was under an enormous amount of therapy from 2014 – 2016 which did not help and at that time I was determined by Cal Pers to receive disability retirement? Now, does it stand to reason, that these past couple of years, without the therapy, I am ready to physically confront and perform the job duties that were so eloquently explained by my witnesses at the hearing? No, this is not logical! As I explained at the hearing, my job is first and foremost to protect the individuals at FDC, because they are a danger to themselves and others I would have to run, and put myself and my body in harm's way to protect these individuals from acts of aggression on a daily basis These are highly aggressive assaultive and unpredictable individuals And if I am reinstated to this position, I will definitely attempt to protect them But I cannot imagine any scenario where I will be able to do that The fact is that if the job has not changed, which the testimony of witnesses made clear that the job indeed remains the same I will attempt and I will fail to prevent harm from happening to my clients I know this because I know the job and my witnesses who still work the job, understand the job and testified to such And I know what I am capable of now which I attempt and fall short These ADLs (activities of daily living) that I have previously referred to are simple everyday things More examples of these things in addition to bathing etc are walking for extended periods of times, sitting for extended periods of times I cannot do either I cannot physically stand for more than 30 minutes for example I cannot hold a conversation for more than a few minutes I cannot wash the dishes for more than five minutes As previously stated, I cannot jog How am I going to run after an AWOL client? How am I going to administer 5 point restraints or chair restraints? How am I going to lift body weight of very large individuals at times, while even the lighter ones are still on average 150lbs How am I going to withstand the physical acts of aggression while performing these duties and keep my body upright and in alignment which I cannot do when these things are not happening to me? The list goes on and on I was never tested by Dr Realyvasquez for these things? At the hearing/court Dr Realyvasquez had no clue of where I worked and mentioned his own daughter that is considered special needs in comparison to my students This was so offensive and unfair for someone that was supposed to evaluate what I was going to have to do in performing my job Please let it be noted that my witnesses that still work at FDC refuted the 15 to 25lbs that need to be lifted as the written standards It is their testimony as well as mine that we definitely must support dead body weight that be in excess of 100lbs But even still, I cannot even lift 15lbs that is stationary, let alone a human life that is in rage and kicking, spitting, hitting and manipulating his/her body which is what I will deal with on a daily basis

I have not even jogged for more than 5 seconds in the last several years since the accident without breaking down and falling to the floor I am in pain every day and have to take breaks performing the simplest of ADLs I have attempted to lift 10 to 15 lbs and I cannot perform the task because I literally drop the weight It is not logical or humane to take away my disability retirement and return me to the classroom for all parties involved without giving me the means to have my physician present at another hearing I attempted to have him there telephonically, but he declined It takes money which I do not have to have made this a fair hearing I am frustrated out of fear and an unjust system and having to beg to not allow me to go back and put people in danger I am afraid of that and I feel sorry for all involved and I implore you with compassion and empathy to reconsider the whole picture and rule in my favor It also must be noted that I am currently on medication from my own psychiatrist for depression as well as sleeping aids I was embarrassed to bring this up at the hearing I also believe I failed to mention my constant headaches that have continually persisted since my injury in 2014 At minimum there is much doubt here and in the judicial system it is known that things must be proven beyond a

shadow of a doubt I know I am right 100% but if necessary, at least allow me to have a fair trial/hearing where I can be given funds to hire my own doctor or have my doctor subpoenaed

Thank You,



8-30-19

Joseph A Bonofiglio

AUG 30 2019

CALIFERS CSOD

the duties mentioned in the job description and duty statement. Mr. Bonofiglio did suffer significant trauma during the 2014 Fairview incident and received extensive treatment. Mr. Bonofiglio had multiple consultations with physicians and surgery was mentioned only once as documented in the records but Dr. Realyvasquez opined that surgery was not required at this time. Dr. Realyvasquez opined the findings of his physical evaluation at this time show that he should be able to perform his duties. Dr. Realyvasquez did not believe Mr. Bonofiglio was substantially incapacitated to perform further performance of his duties [sic]. He believed that Mr. Bonofiglio was cooperative during the IME, although at times he did exaggerate his symptoms and objective findings.

11 Dr. Realyvasquez testified in a manner consistent with the opinions expressed in his report. However, while his report was extremely detailed and his opinions well explained, he made a fair to poor witness while testifying because at times his testimony was rambling and difficult to follow. Dr. Realyvasquez wears hearing aids and referenced his hearing difficulty when testifying so his presentation at hearing may be explained by his trouble hearing questions posed to him. On balance his opinions were supported by the records he reviewed and summarized in his report, by the physical examination he performed and documented, and no competent medical opinions were presented to refute his testimony.

Several of Mr. Bonofiglio's past pain complaints appeared to have been resolved based on the records reviewed and/or the physical examination performed during the IME so Dr. Realyvasquez could not find causes for the pain complaints Mr. Bonofiglio claimed he had at the IME. Further, Dr. Realyvasquez concluded that many of the tests performed during the IME were negative while others indicated Mr. Bonofiglio was voluntarily causing the areas to spasm which further supported Dr. Realyvasquez's opinions. For example, when performing lumbar spine tests, at first there was spasm during the active testing that required Mr. Bonofiglio's cooperation but the spasm disappeared during passive testing where his cooperation was not key, signifying that Mr. Bonofiglio was holding his back muscles tense while performing the testing.

Dr. Realyvasquez could not find any irritation of the nerve roots of the lumbar spine despite Mr. Bonofiglio's limited ranges of motion on testing. Dr. Realyvasquez found no atrophy of the muscles which occurs with loss of use, suggesting there has been no loss of function in those muscles. Also, he could not find any pain complaints that would prevent Mr. Bonofiglio from using his muscles; the physical examination did not show any areas that Mr. Bonofiglio could not use. Dr. Realyvasquez did not find anything on the MRIs to explain the limited ranges of motion.

In addition to the records he reviewed and the physical examination findings, Dr. Realyvasquez considered his interview with Mr. Bonofiglio and the way Mr. Bonofiglio looked when discussing his injury, his whole interaction with Mr. Bonofiglio at the IME, the way Mr. Bonofiglio told his story, the way Mr. Bonofiglio explained how his injury affected his ability to perform his activities of daily living and how it affected his ability to perform his work. Taking all of that into account, Dr. Realyvasquez concluded that Mr. Bonofiglio