

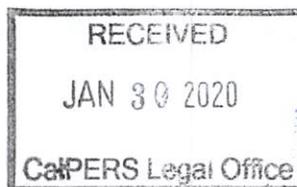
ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)

Sheldon "Kyle" Scarber

[REDACTED]
[REDACTED]

January 25, 2020



JAN 30 2020

CalPERS Board
CalPERS Executive Office
Attention: Cheree Swedensky, Assistant to the Board
P.O. Box 942701
Sacramento, CA 94229-2701

Ref. No. 2018-0538

Subject: Respondent's arguments to adopt the Proposed Decision, as proposed by the Administrative Law Judge, the Honorable Judge Danette C. Brown, Office of Administrative Hearings, the Industrial Disability Retirement (IDR) benefits, on behalf of Sheldon K. Scarber.

Dear CalPERS Board:

INTRODUCTION

To the honorary members of the Board of CalPERS, individually, collectively and respectively; I Sheldon "Kyle" Scarber, (hereafter referred to as "Respondent"), former Assistant Chief, California Highway Patrol, do respectfully request the Board to adopt the Proposed Decision (twice reviewed) by the same Administrative Law Judge, the Honorable Judge Brown, and render a final decision awarding Respondent IDR benefits, without further deliberation, retroactive to Respondent's effective retirement date. This similar matter was previously before the Board; whereas, the Board voted in favor granting Respondent IDR benefits. Additionally, Respondent respectfully requests this present matter be designated as **precedent**, whole or in part, if adopted.

BACKGROUND

Respondent was employed as an Officer for the California Highway Patrol beginning February 16, 1989, until August 29, 2013, at which time he had risen to the rank of Assistant Chief. By virtue of his employment, respondent was a state safety member of CalPERS. Respondent began receiving service retirement benefits effective October 31, 2013, upon obtaining age 50.

Respondent was placed off duty by his predesignated, treating physician and unable to perform the critical tasks required of his position from December 20, 2012, through current date. Respondent has yet to be medically released to obtain employment due to current and ongoing medical condition(s), which have culminated into a life-long, debilitating disease diagnosed as Arachnoiditis¹; resulting in paralysis from the waist down,

¹ Arachnoiditis is a pain disorder caused by the inflammation of the arachnoid, one of the membranes that surrounds and protects the nerves of the spinal cord. It is characterized by severe stinging, burning pain, and neurological problems.

approximately two months of hospitalization, to including a live-in physical rehabilitation hospital and the aid of a walking device and acquisition of a service animal.

Previous and Relevant Matter: On February 27, 2012, respondent filed a disability retirement/industrial disability retirement application with CalPERS, via the Fresno Field office.

On July 24, 2013, respondent filed a workers compensation claim for cumulative injuries to his back and a skull lesion through his employer. Respondent submitted, to CalPERS, his State Compensation Insurance Fund's (SCIF) appointed Qualified Medical Examiner's (QME) examination and findings that was conducted. The examination was conducted by Doctors M. Bernhard and Subia.

On August 26, 2013, respondent filed a Service Retirement application based on CalPERS significant delay of his Application Industrial Disability Retirement (IDR).

On October 31, 2013, respondent began receiving his service retirement benefits. Within 120 days of beginning his service retirement benefits,

Appellant was served a Notice of Adverse Action, with a penalty of dismissal, effective August 29, 2013. The appointing power cited violation of Government Code Section 19572 subsections (d) Inexcusable neglect of duty; (e) Insubordination; (f) Dishonesty; (m) Discourteous treatment of the public or other employees; (o) Willful disobedience; (p) Misuse of state property; (r) Violation of the prohibitions set forth in accordance with Section 19990, and (t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing power or the person's employment. He had until August 19, 2013, at 1700 hours to present a response regarding the Notice of Adverse Action (complaint only).

The Predisciplinary Hearing was conducted on August 15, 2013, at 10:00 am. Respondent requested a stay based on the California Highway Patrol violating due process; and violation of State Personnel Board Rule 52.6, and medical diagnosis. Respondent requested to participate in an Administrative Interrogation; and reasonable accommodation; however, his requests were denied and he was not able to voluntarily participate in an Administrative Interrogation.

Arachnoiditis has no consistent pattern of symptoms, but in many people it affects the nerves connecting to the lower back and legs. The most common symptom is pain, but Arachnoiditis can also cause:

Tingling, numbness, or weakness in the legs;

Sensations that may feel like insects crawling on the skin or water trickling down the leg;

Severe shooting pain that can be similar to an electric shock sensation;

Muscle cramps, spasms and uncontrollable twitching; and

Bladder, bowel and sexual problems.

As the disease progresses, symptoms may become more severe or even permanent. Many people with Arachnoiditis are unable to work and suffer significant disability because they are in constant pain.

<https://www.webmd.com/pain-management/guide/pain-management-arachnoiditis#1>. Accessed January 21, 2020.

Respondent filed a timely appeal with the California State Personnel Board (SPB). The California Highway Patrol (CHP) and respondent, with the remedial authority of the SPB, granted the CHP's offer of resignation, removing the internal investigation from Respondent's personnel folder.

Respondent utilized his accumulated annual leave and accumulated sick leave from December 20, 2012, through August 29, 2013.

On April 14, 2014, CalPERS notified Respondent of the denial of his IDR benefits citing *Haywood v. American River Fire Protection District (1988)*, and its progeny, *Smith v. City of Napa (2004)*, and *Application for Disability Retirement of Robert C. Vandergoot and California Department of Forestry and Fire Protection (2013)*.

In Respondent's case, Respondent had no knowledge of discipline prior to filing claim(s) with his employer and filed an application for benefits prior to any notice and or knowledge of possible findings.

Respondent had an impending ruling on a claim for a CalPERS industrial disability and his application for industrial disability was unduly delayed through no fault of Respondent. As such, the actions by the CHP preempted CalPERS decision of respondent's valid claim for industrial disability benefits. As such, equity principles in this case requires a different result.

CalPERS nor Respondent's employing agency complied with Government Code Sections 21154 and 21192 in determining Respondent's eligibility for continued employment.

Respondent submitted medical documentation from his predesignated treating physician and a SCIF ordered Qualified Medical Examination to show unequivocally that Respondent could not return to work.

Disability retirement/industrial disability retirement was set forth based upon cumulative illness/injury. Furthermore, Respondent was directed by his predesignated treating physician that he could not return to his previous position. Additionally, a QME findings, conducted, at the request of SCIF, by Dr M. Bernhard and Dr. Subia for his back indicate the Respondent is permanent and stationary and could never return to his former position.

Respondent had an impending ruling on a claim for a CalPERS industrial disability and his application for industrial disability was unduly delayed through no fault of Respondent.

On May 14, 2014, Respondent timely appealed the denial of his Application for IDR to CalPERS, with an addendum to the appeal dated March 11, 2015. CalPERS was represented by Elizabeth Yelland, Esq.

On May 15, 2016, a formal Hearing was conducted in Fresno, CA, before an ALJ, Honorable Judge Coren Wong, presiding, regarding whether Respondent could file for Application of IDR benefits. Honorable Judge Wong concluded Respondent was entitled to file an Application for IDR.

A formal Hearing was held before the Board and respondent was granted the right to apply for IDR pursuant to the CalPER Board Final Decision dated March 15, 2018. On April 5, 2018, CalPERS approved respondent's IDR. Respondent received a letter from CalPERS stating, "*We find you are substantially incapacitated from the performance of your usual duties as an Assistant Chief with the Department of California Highway Patrol, based upon your orthopedic (back) condition.*" (CalPERS letter dated April 5, 2018.)

Relevant Matter Before the Board: Comes now before the Board is the Corrected Proposed Decision of Danette C. Brown, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, whom heard this matter on July 23, 2019, in Sacramento, California. Elizabeth Yelland, Senior Attorney for CalPERS represented CalPERS as in the previous matter, on behalf of CalPERS.

On August 30, 2018, and October 31, 2018, Respondent received a letters from CalPERS stating Respondent pled nolo contendere to Conspiracy on June 4, 2018, for felony conduct arising out of the performance of Respondent's official duties, and pursuant to Public Employees' Retirement Law (PERL); PERL §7522.72(b)(1), PERL §7522.72(c)(1), PERL §7522.72(d)(1), and Gov. Code §7522.72(b)(1). As such, Respondent's IDR had been cancelled. Beginning October 1, 2018, Respondent was placed back on service retirement with the same retirement date of October 31, 2013, with his allowance will be \$10,320.34. Within the same letters, CalPERS alleged that due to Respondent's felony conviction a portion of his retirement benefit was forfeited, resulting in an overpayment of retirement monies paid to Respondent in the amount of \$41,488.30. CalPERS also determined that .668 years of service credit must be forfeited from December 11, 2012, to August 29, 2013, decreasing total service credit from 25.123 years to 24.455 years and the final amount used to calculate benefits changed from \$14,533.62 to \$13, 951.72. Respondent was **NEVER convicted by a state or federal trial court under state or federal law for conduct arising out of or in the performance of his or her official duties** (PERL §7522.72(b)(1)). (Refer to Penal Code Sections 1170(h) and 17(b).

Ms. Yelland, on behalf of CalPERS, initiated revocation of Respondent's IDR benefits in a manner indicative of severe and prejudicial bad faith actions; a premature and drastic, inadequate and improper review and investigation of the facts, laws and outcome of Respondent's criminal matter. (A CalPERS witness (Truc Nguyen), testified before ALJ Judge Brown, he conducted a thorough review and investigation, without reviewing any final case materials or relevant laws; 1170 (h) and 17 (b) of the Penal Code.) CalPERS intentionally ignored proceedings and findings which were known or should have been known by CalPERS; and the fact CalPERS proceeded and revoked IDR benefits awarded to Respondent while purposely ignoring Superior Court Judge W. Kent Hamlin citing *that Respondent did NOT act in the performance of his duties*. A six-plus year personal and Machiavellian approach to deny and revoke Respondent's IDR benefits on behalf of CalPERS (Ms. Yelland) is unfathomable, unethical, and prejudicial while ignoring (playing ignorance), to the Rules of Law and the judicial procedure. Respondent submitted only partial transcripts of Judge Hamilton's citing instead of the 300 plus pages of transcripts which were later submitted as evidence.²

² Penal Code §17(b); is derived from Prop 47 on November 4, 2011,-Reclassification of Low Level Cases to Misdemeanors. The law is retroactive. Which means an individual can have a felony offense resentenced as a misdemeanor. "Wobbler Offense is defined a felony conviction for a "wobbler" offense and probation was granted, you are eligible to have your

On July 19, 2019, as Respondent's case was still proceeding, Superior Court Judge J. Gallagher, presiding, under the law and authority vested in him in accordance with Penal Code §1170(h), ruled the charge against Respondent a Misdemeanor per Penal Code §17(b), Nuc Pro Tunc, back to the plea that was entered, back to the date of June 4, 2018, date of violation December 11, 2012.

REQUEST TO RULE IN BEHALF OF RESPONDENT SCARBER AND DESIGNATE THE DECISION AS PRECEDENT

The guidelines of PERL and portions of the Gov. Code are in direct conflict with the California Penal Codes, the Gov. Codes and Legislative intents listed above. As in this matter, Respondent was simply charged with a felony, entered a not guilty plea, and later a nolo contendere plea, based on existing and current laws which prevail PERL and the Gov. Code. The Superior Court, in conjunction with the Office of Attorney General immediately initiated §1170 (h) and §17(b) of the Penal Code.

Penal Code §17(b) specifically states, "when a crime is punishable, in the discretion of the court...under the provisions of subdivision (h) of Section 1170, it is a misdemeanor ***FOR ALL PURPOSES...***" The proceedings and actions committed by CalPERS equivalently and directly fall within "for all purposes."

CalPERS citing any written documentation or mention of *Haywood v. American River Fire Prevention District (1998) 67 Cal.App.4th 1292 (Haywood)* and its progeny are Res Judicata and Collateral Estopped, and should have absolutely no relevance in this matter before the Board. The California Supreme Court states that "collateral estoppel is a distinct aspect to res judicata. "The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation between the same parties involving the

felony reduced to a misdemeanor. is derived from Prop 47 on November 4, 2011,-Reclassification of Low Level Cases to Misdemeanors. The law is retroactive. Which means an individual can have a felony offense resentenced as a misdemeanor.

same case of action. A prior judgment for the plaintiff results in a merger and supersedes the new action by a right of action on the judgment.

A prior judgment for the defendant on the same cause of action is a complete bar to the new action. (a 4 Watkin, Cal. Procedure (2d ed. 1971) Judgment, §§ 147-148, pp. 3292-3293.) Collateral estopped... involves a second action between the same parties on a different cause of action. The first action is not a complete merger or bar, but operates as an estoppel of conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action. (citations omitted.) (Rymer v. Hagler (1989) 211 Cal. App. 3d 1171.) (Murray v. Alaska Airlines, Inc. (2010) 50 Cal.4th 860).

Gov. Code, §7522.72. subds, (b)(1), (c) are irrelevant because Respondent did not perform any conduct arising from his official duties as noted by California Superior Court Judge, Honorable W. Kent Hamlin. As a matter of record, Respondent took any and every precaution from providing a nexus with the C.H.P.

Ms. Yelland falsified a statement before the ALJ Brown that “on November 29, 2018, CalPERS responded to Respondent’s request for discovery, via letter and 4,822 pages of documents (Exhibit 4 – letter only)” (CalPERS’ Opposition To Request for Continuance, page 2, lines 15-16). What Ms. Yelland failed to disclose was the pages consisted of medical reports).

CalPERS, as with Respondent’s case, and others, tend to put the cart before the horse and act prematurely concluding a CalPERS matter before a case has been properly and adequately adjudicated by the judicial system, which violates constitutional due process and the principles of equity. PERL should be revisited and include this fact.

Correspondence between CalPERS legal and Respondent(s), as such as in this case, are confusing and actions appear to be instituted at will. As an example, Respondent was instructed “written argument should be no longer than six pages, and must be received by CalPERS no later than February 5, 2020. If you have any questions about this procedure, you may contact Elizabeth Yelland, Senior Attorney, at (916)795-3675. Respondent received a subsequent letter stating written argument should be received by Cal PERS no later than January 29, 2020. Upon contacting Ms. Yelland as instructed, her reply was that she doesn’t know why the dates were changed and to take it up with the board unit.

In closing, Respondent respectfully and sincerely requests the Board to adopt the ALJ’s decision granting Respondent Scarber IDR benefits, order adjustment to his pay warrants retroactive to October 31, 2013, and return reimbursements to Respondent that was prematurely taken from Respondent.

Dated: January 25, 2020


Sheldon 'Kyle' Scarber
(Respondent – Pro Per)