



Board of Administration

## Agenda Item 9a6

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March 18, 2020

**Item Name:** Compliance with Superior Court Amended Interlocutory Order Remanding the Case to the CalPERS Board – In the Matter of Accepting the Application for Industrial Disability Retirement of CHARLES A. THERRIEN, Respondent, and CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION, Respondent.

**Program:** Disability and Survivor Benefits Division

**Item Type:** Action

### Parties' Positions

Comply with the Order of the Superior Court by adopting a resolution setting aside the prior Board Decision and remanding this matter to the OAH for hearing on one specific issue only.

The Superior Court Judge remanded the case to Office of Administrative Hearings (OAH), for OAH to consider "Exhibit F," a 2011 Settlement Agreement, and issue a Proposed Decision following the additional consideration.

### Strategic Plan

This item is not a specific product of either the Strategic or Annual Plans. The determination of administrative appeals is a power reserved to the Board of Administration.

### Procedural Summary

Respondent Therrien submitted an application for industrial disability retirement based on orthopedic (shoulder), cardiologic (heart stent) and neurological conditions. CalPERS determined that Respondent Therrien was ineligible for disability retirement because he was dismissed from his employment, pursuant to the legal precedent set forth in *Haywood v. American River Fire Protection District*. Respondent Therrien appealed this determination and the matter was heard by OAH on August 14, 2018. A Proposed Decision was issued on September 6, 2018, affirming CalPERS' determination and denying the appeal. The Board of Administration adopted the Proposed Decision as a Final Decision on November 20, 2018.

On January 18, 2019, Respondent Therrien filed a Petition for Writ of Mandamus. On June 27, 2019, CalPERS was served with Respondent Therrien's Petition of Writ of Mandamus pursuant to Code of Civil Procedure section 1094.5. On July 30, 2019, CalPERS answered the Petition. A writ hearing was calendared at the Sacramento County Superior Court.

On December 20, 2019, a hearing on the writ was completed at the Sacramento County Superior Court. Following the writ hearing, the Superior Court Judge ordered the Board to set aside its Final Decision, and remand the matter to OAH for taking additional evidence on one specific legal issue:

"When Therrien filed the writ action at bench, he attached several exhibits to his petition. One of the attachments appears to be an agreement that Therrien signed in 2011 (the '2011 Agreement') . . . The 2011 Agreement appears to memorialize the settlement of FEHA causes of action that Therrien leveled against CalFire and CalFire employees in Riverside County Superior Court in 2008. Therrien tendered the 2011 Agreement in the administrative proceedings giving rise to the case at bench, but only as evidence that workplace stress had rendered him disabled . . . The ALJ and the Board decided that the 2011 Agreement was irrelevant to the limited issues before them, and the 2011 Agreement was not admitted into the record.

Like the Board in the proceedings below, the parties initially approached this writ action without regard to the 2011 Agreement. When the court discovered the 2011 Agreement attached to the petition, however, it questioned whether the provisions precluding Therrien's reinstatement with CalFire might provide a straightforward basis on which to resolve the case. The court requested supplemental briefing, and the parties agreed in their submissions that the 2011 Agreement was properly before the court. Based on rules of contractual interpretation, Therrien nonetheless argued that provisions in the 2011 Agreement preserved his right to a disability retirement notwithstanding other provisions barring his reinstatement.

On December 19, 2019, the court posted a tentative ruling on the merits of Therrien's writ petition. For the first time at oral argument on December 19, 2019, Therrien's counsel asserted that the 2011 Agreement never took effect. Therrien's counsel referred to recently discovered information establishing that the 2011 Agreement was drafted for 'internal' purposes only. He tendered a witness to testify in this regard.

After an on-the-record discussion with counsel, the court proposed remanding the case to the ALJ/Board for additional findings about the validity and impact of the 2011 Agreement. Both sides agreed to the proposal.

Accordingly, the court REMANDS this matter to the Board to reconsider its Decision in light of the 2011 Agreement. The Board, or any ALJ assigned in the first instance, shall consider whether the 2011 Agreement ever took effect and, if so, any impact it has on Therrien's eligibility for an industrial disability retirement. Nothing in this order is otherwise intended to limit or control the Board's discretion." (Footnotes omitted.) (Attachment A.)

The OAH lacks jurisdiction to hold a hearing on remand or to take additional evidence, as ordered by the Sacramento Superior Court, until the CalPERS Board sets aside its prior Decision and remands the matter to OAH. Thus, CalPERS must file a Board Order to set aside the Final Decision in this matter and to remand the matter to OAH, pursuant to the Superior Court Order.

### **Alternatives**

- A. For use for the Board to remand the matter back to the OAH consistent with the Superior Court's order:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, hereby sets aside its prior Decision concerning the appeal of Charles A. Therrien and remands this matter to the Office of Administrative Hearings, in accordance with the Superior Court Amended Interlocutory Order Remanding the Case to the CalPERS Board on one specific issue only: 1) to consider whether the 2011 Agreement ever took effect and, if so, any impact it has on Therrien's eligibility for an industrial disability retirement.

**Budget and Fiscal Impacts:** Not applicable

### **Attachments**

Attachment A: Sacramento Superior Court Order

Attachment B: Final Decision (adopted by the Board on November 20, 2018)

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Anthony Suine  
Deputy Executive Officer  
Customer Services and Support