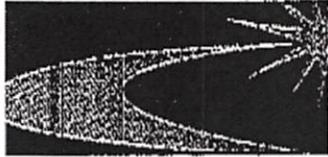


**ATTACHMENT C**

**RESPONDENT'S ARGUMENT**

**LOCAL 1000**



**SEIU**

**Stronger Together**

1808 14<sup>th</sup> Street  
Sacramento, CA 95811  
(916) 554-1279

FEB 27 2020

DATE: February 26, 2020

TO: Cheree Swedensky, Assistant to the Board  
CalPERS Executive Office

FAX: (916) 795-3972  
PHONE:

FROM: Nicole Heeder, Staff Attorney  
SEIU Local 1000 -- Legal Division

FAX: (916) 554-1292

PHONE: (916) 554-1279

NUMBER OF PAGES: 5 (to include fax cover)

RE: In the Matter of the Employer Originated Application for  
Disability Retirement of C.L. and California Department  
of Fish and Wildlife

**RESPONDENT'S REQUEST TO MAKE THE C.L.  
DECISION PRECEDENTIAL**

*If you do not receive a complete transmission, please call – Mary  
(916) 554-1279.*

**FAX**

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February 26, 2020

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

FEB 27 2020

Re: In the Matter of the Employer Originated Application for Disability Retirement of C.L.<sup>1</sup>, and California Department of Fish and Wildlife  
**RESPONDENT'S REQUEST TO MAKE THE C.L. DECISION PRECEDENTIAL**

YVONNE R. WALKER  
President

KEVIN MENAGER  
Vice President/  
Secretary-Treasurer

ANICA WALLS  
Vice President for  
Organizing/Representation

TONY OWENS  
Vice President for Bargaining

In general, making a Board Decision precedential gives it a "precedential effect," which in this context means:

- The decision may be officially cited in other administrative hearings and also in other court proceedings.
- The decision is considered "case-made" law, comparable to agency rule-making in its legal effect and may be applied broadly to other cases and the parties involved in other cases. The decision-maker in another administrative matter may expressly rely on the Precedential Decision to decide the matter, that is, give the law or policy in the Decision binding effect in a case involving the same issue as it affects other parties, unless the other case can be factually or legally distinguished.<sup>2</sup>

A Precedential Decision of the Board is not binding on the courts, which remain the final arbiters of the law; but a Board Precedential Decision, as the decision of the agency most knowledgeable and responsible for administering and making policy with respect to the PERL, is normally accorded great weight or given deference by the courts.<sup>3</sup> If a Board Decision is not designated as precedential, its effect is more limited. It may be referenced in other administrative matters or to a reviewing court to inform the judge regarding the Board's administration or interpretation of the PERL, but it has no precedential effect.<sup>4</sup>

SERVICE EMPLOYEES  
INTERNATIONAL UNION  
CTW, CLC

1808 17th Street  
Sacramento, CA 95811

866.471.SEIU (7348)  
www.seiui000.org

<sup>1</sup> Respondent requests that his name be redacted in all case documents and board items available to the public as Respondent will be seeking a *post hoc* protective order to maintain his medical privacy.

<sup>2</sup> See: Cal. Code. Regs., tit 12, §1290 (Office of Administrative Hearings regulation); official Calif. Law Revision Comments regarding APA section 11425.60, where it is stated that the statute "recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking" and "is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision." Also, see: *Pac. Legal Foundation v. Unemployment Insur. App. Board* (1991) 29 Cal.3d 101, 109.

<sup>3</sup> *City of Oakland v. Pub. Employees' Ret. System* (2002) 98 Cal.App.4th 29, 39; *Hudson v. Board of Administration of the Calif. Pub. Ret. Sys.* (1997) 59 Cal.App.4th 1310, 1324-1325.

<sup>4</sup> *City of Oakland, supra*, at p. 57.

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The Board's established policy regarding the designation of Precedential Decisions calls for consideration of the following two questions:

- A. Does the Decision contain a significant legal or policy determination of general application that is likely to recur?
- B. 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?

**A. The C.L. Decision Involves a "Significant legal or Policy Determination of General Application that is Likely to Recur"**

The significant legal and policy determination presented in the C.L. Decision is the explanation and application of the PERL's regulations regarding determining substantial incapacity by the consideration of competent medical evidence, and the level of certainty required to give weight to medical opinion. In the instant case, both the employer and CalPERS disregarded the opinions and medical reports of the Respondent's treating physician in favor of the medical opinion of other reputable medical professionals whose opinions reflected only speculation of future harm. CDFW and CalPERS relied on inconsistent medical opinion and reports generated prior to submission of the application for disability retirement and the long-term treating physician's most updated prognosis. The decision makes clear that competent medical evidence must be up to date and supported by facts relevant at the time of the application, not mere conjecture or generalized fear of injury and/or death. Employer originated disability retirement application cases commonly involve multiple medical opinions and conflicting data. It must be clear what constitutes competent medical evidence and how to determine which opinions carry more weight. Employers are not free to rely on the opinions that support their desired outcomes. The decision also makes clear that the inability to perform some of the duties of a position does not necessarily render one disabled for the purpose of disability retiring and that the employer must consider the frequency and import of those duties. Therefore, a Precedential Decision definitively providing analysis regarding consideration of competent medical evidence to establish substantial incapacity, will provide members, and employers with guidance and likely reduce the amount of future litigation.

**B. The C.L. Decision Includes a "Clear and Complete Analysis Sufficient for an Understanding of Why the Findings of Fact Were Made and How the Law Was Applied"**

The factual findings in the C.L. Decision are straightforward and easy to understand. The Decision describes how medical evidence is reviewed and the weight it is given in the context of the usual job duties the applicant is expected to perform. The C.L. decision applies the law as stated in *Hosford* and *Mansperger* to the underlying facts. Specifically, the C.L. decision sets forth that, under *Hosford*, merely prophylactic concerns are insufficient to support a finding of substantial incapacity for purposes of disability retirement. The C.L. decision also sets forth that, under *Mansperger*, incapacity for the performance of duty means the applicant's substantial inability to perform his usual duties," not solely the inability to perform some duties. Importantly, the C.L. Decision provides a detailed explanation reflecting that an employer may neither rely on the inability to perform infrequent duties to support a disability retirement

Cherree Swedensky, Assistant to the Board  
February 26, 2020  
Page 3

application nor rely on outdated medical evidence. Finally, the C.L. decision rejects the contention that Government Code section 20026 permits a finding of incapacity if the disability is expected to last 6-12 months, as opposed to at least 12 months authorized by the letter of the statute.

As described, the C.L. Decision is therefore constructed logically, and properly explains what evidence can be used in support for an employer originated application, how to weigh conflicting evidence, and what weight to give to a treating physician's up to date medical reports and prognosis. Respondent therefore believes that the findings and legal conclusions of the C.L. Decision, if the Decision is made precedential, will provide useful, specific rules for staff, members, retirees, and employers and likely reduce the amount of further litigation. Accordingly, Respondent requests the C.L. Decision be adopted as a Precedential Decision.

#### **Benefits/Risks**

The benefits to making the C.L. Decision precedential have been described in detail in the above Analysis section. In summary, there are no other Precedential Decisions of the Board addressing the credibility and weight of expert medical testimony and competent medical evidence, which are addressed in the C.L. Decision. Since these issues recur repeatedly in litigation before the Office of Administrative Hearings, a Precedential Decision regarding these matters would assist CalPERS staff in making these determinations, and likely reduce the number of unnecessary employer initiated disability applications and subsequent appeals filed by employees with disabilities who are still able to substantially perform their job duties. In addition, it will likely reduce the costs associated with these appeals and the need for CalPERS to retain experts. There is very little risk in adopting the C.L. Decision as precedential, as an agency's designation of a Decision as precedential is not subject to judicial review. If, in the future, the Precedential Decision becomes outdated by future developments in the law, there is a procedure by which the Board could remove the precedential designation.

#### **Alternatives**

- A. For use if the Board wants further argument on the issue of whether to designate its Decision, or parts of its Decision as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, requests the parties in this matter concerning the Respondent's appeal, as well as interested parties, to submit written comments regarding whether the Board's Decision in this matter, or parts of its Decision, should be designated as precedential, and that the Board will consider the issue whether to designate its Decision as precedential at a time to be determined.

- B. For use if the Board decides to designate its Decision as precedential, without further argument:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, hereby designates its Decision concerning the Respondent's appeal as a Precedential Decision of the Board, effective immediately.

Cheree Swedensky, Assistant to the Board  
February 26, 2020  
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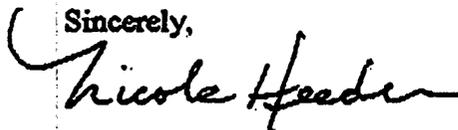
C. For use if the Board decides to designate certain parts of its Decision as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, hereby determines to designate the following parts of its Decision concerning Respondent's appeal as precedential, effective immediately: [Board to insert here a description of the parts to be designated as precedential].

D. For use if the Board decides that at this time it does not want to take further action with respect to its Decision:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code section 11425.60, hereby determines, at this time, to take no further action with respect to its Decision, as adopted on March 18, 2020.

Sincerely,



NICOLE HEEDER  
SEIU Local 1000  
for Respondent C.L.

NH:mw