

ATTACHMENT C

RESPONDENT'S ARGUMENT

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6 **BOARD OF ADMINISTRATION**

7 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

<p>8</p> <p>9 CHRISTOPHER CHUNG,</p> <p>10 Respondent,</p> <p>11 v.</p> <p>12 CALIFORNIA DEPARTMENT OF VETERANS AFFAIRS VETERANS HOME,</p> <p>13 Respondent.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>AGENCY CASE NO. 2022-0453</p> <p>OAH NO. 2022080673</p> <p>RESPONDENT, CHRISTOPHER CHUNG'S ARGUMENT AGAINST PROPOSED DECISION</p> <p>Board Hearing: March 15, 2023</p>
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15 **I. SUMMARY**

16 A Proposed Decision was issued February 9, 2023 (hereafter referred to as PD), which denied
17 Respondent Christopher Chung's application for Disability Retirement on the basis that Mr. Chung
18 "has not demonstrated by a preponderance of the evidence that he is substantially incapacitated from
19 performing his usual and customary duties as a dentist based on the basis of an orthopedic...
20 condition." (PD, pg. 11.) For the reasons herein, this decision should *not* be adopted by the Board.

21 Mr. Chung was hired by the State of California, Department of Veterans Affairs Veterans
22 Home in Yountville, California sometime in or around 2015 as a dentist on a part-time basis. Mr.
23 Chung continued to work at the Veterans Home in this capacity up until the present; *however*, since

1 sometime in or around April 2021, Mr. Chung has “taken three one-and-a-half month sabbaticals
2 from work” (PD, pg. 9) due his inability to perform the usual functions of his occupation due to an
3 orthopedic injury, which limits Mr. Chung’s ability to bend, twist, lift, and stand for any length of
4 time, including, but not limited to, while performing his usual duties as a dentist. Mr. Chung’s most
5 recent medical leave of an extended six-week duration ended in November 2022, with Mr. Chung
6 also needing to take time off on or around December 27, 2022 due to a flareup.

7 Mr. Chung’s usual functions as a dentist include, but are not limited to, the following:
8 constantly bending and frequently sitting, standing, and twisting (PD, pg. 3). Mr. Chung applied for
9 Disability Retirement from the California Public Employees’ Retirement System (CalPERS) and
10 submitted two Physician’s Reports on Disability that diagnosed Mr. Chung with right hip femoral
11 impingement syndrome and chronic lower back pain, which substantially incapacitated Mr. Chung
12 from the performance of the usual duties of his role as a dentist. (PD, pgs. 4-5, 7.) Indeed, his one
13 treating doctor, Dr. Peddi, stated that Mr. Chung should abstain from *any* bending. (PD pg. 5
14 (emphasis added).) The PD summarizes the reports and testimony of Dr. Don Williams, CalPERS’
15 doctor, as diagnosing Mr. Chung with “a lumbar strain and impingement of the right hip, with a
16 labral tear and early arthritis”; yet Dr. Williams concluded that Mr. Chung “ is not substantially
17 incapacitated from performing his usual and customary duties as a dentist”. (PD, pg. 6, 7.)

18 II. STANDARD

19 ““The test for determining whether an employee [in the CalPERS system]...is disabled is set
20 forth in ... [Cal. Gov’t. Code] section 21156.’ [Citation.] Under that statute, ‘[i]f the medical
21 examination and other available information show to the satisfaction of the [B]oard ... that the
22 member in the state service is incapacitated physically or mentally for the performance of his or her
23 duties and is eligible to retire for disability, the [B]oard *shall* immediately retire him or her for

1 disability.’ (§ 21156, subd. (a)(1); see § 20021 (emphasis added).) ““Disability” and “incapacity for
2 performance of duty” as a basis of retirement, mean disability of permanent or extended and
3 uncertain duration, as determined by the [B]oard ..., on the basis of competent medical opinion.’
4 (Former § 20026.) In turn, ‘incapacity for performance of duty’ has been interpreted ‘to mean “the
5 substantial inability of the applicant to perform his [or her] usual duties.”’ [Citation.]” *McCormick v.*
6 *Public Employees’ Retirement System* (2019) 41 Cal.App.5th 428, 435. Note, effective January 1,
7 2018, § 20026 was amended to clarify that a disability expected to last at least 12 months or result in
8 death qualifies as one of “extended duration”.

9 III. ARGUMENT

10 The PD to deny Mr. Chung Disability Retirement benefits seemingly rests entirely upon Dr.
11 Williams' unfavorable IME. (PD pg. 10). Dr. Williams' conclusion that Mr. Chung is not
12 substantially incapacitated from his usual job duties, however, does not take account of the extended
13 leaves that Mr. Chung has and will need to continue to take should he continue to work as a dentist
14 at the Veterans Home. Specifically, as the PD concedes under Factual Findings, Mr. Chung has and
15 will need to take multiple extended medical leaves of up to six *weeks* at a time once or twice per
16 year should he continue to be employed as a part-time dentist with the Veterans Home (PD pg. 7).
17 The PD confirms that Mr. Chung’s position only allows him 12 *days* of sick leave *per year*. (PD pg.
18 8.) In other words, the record shows that Mr. Chung has missed months of work over the past year
19 due to his orthopedic injury, and Mr. Chung’s treating doctor has certified that should he continue to
20 work as a dentist at the Veterans Home, it should be expected that Mr. Chung will miss between six
21 and twelve weeks, at a minimum, from work *each* year, yet he is only allowed three weeks of sick
22 leave per year. The PD fails to account for how this number of future-certain absences does not
23 necessarily render Mr. Chung *substantially unable* to perform his usual duties as a dentist at the

1 Veterans Home for at least the next 12 months. *McCormick*, at 435. For this reason alone, the PD's
2 denial of disability retirement benefits to Mr. Chung is inherently flawed and must be reversed. In
3 the alternative, at a minimum, this matter must be remanded to allow the administrative law judge to
4 reconcile this inherent discrepancy in his decision: how can Mr. Chung continue to be employed in
5 his present position when his medical condition will render him completely incapacitated for at least
6 six weeks per year, in excess of his allowed three weeks of sick leave by said position?

7 **IV. CONCLUSION**

8 Mr. Chung's treating physicians have certified in multiple statements and reports that
9 Mr. Chung's is unable to perform the usual functions of his occupation as a dentist at the
10 Veterans Home due to his orthopedic injury thus entitling Mr. Chung to Disability Retirement
11 Benefits. The PD concedes that Mr. Chung's physical disabilities will render him incapable of
12 performing his job as a dentist at the Veterans Home each year for a length of time in excess of
13 his allowed sick leave, therefore necessarily rendering Mr. Chung substantially incapacitated. "A
14 public employee has a fundamental vested right to a disability pension if he or she is in fact
15 disabled." *Beckley v. Board of Administration* (2013) 222 Cal.App.4th 691, 697. Accordingly,
16 the Board should not adopt the PD and grant Mr. Chung disability retirement benefits, to which
17 he has a fundamental vested right. At a minimum, this matter must be remanded to allow the
18 administrative law judge to reconcile the inherent discrepancy in the PD, as outlined above.

19 Date: February 23, 2023

Respectfully submitted,

20 UNRUH LAW, P.C.

21 /s/ John Robert Unruh

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PROOF OF SERVICE FORM

Delivery by Email and Facsimile:

I, JOHN ROBERT UNRUH, declare that I am over the age of eighteen years and not a party to the action. My address is UNRUH LAW, P.C., 100 PINE STREET, SUITE 1250, SAN FRANCISCO, CA 94111.

On, February 23, 2023, I served **RESPONDENT'S ARGUMENT IN
OPP. TO PROP. DECISION** by:

email to: Board@CalPERS.ca.gov
email to: Nhung.Dao@calpers.ca.gov
facsimile to: 916-795-3972

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 23, 2023 at Truckee, California.



John Robert Unruh
Attorney for Christopher Chung