ATTACHMENT A

THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for Disability Retirement of: HOLLY D. MASSIE, Respondent, and COUNTY OF BUTTE, Respondent.	Case No. 2015-0123 OAH No. 2015031005

PROPOSED DECISION

This matter was heard before Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, in Sacramento, California, on December 13, 2016.

Senior Staff Attorney Austa Wakily represented the California Public Employees' Retirement System (CalPERS).

Richard E. Elder, Attorney at Law, represented Holly D. Massie (respondent), who was present at the hearing.

CalPERS properly served the County of Butte (County) with the Notice of Hearing. The County made no appearance. This matter proceeded as a default against the County pursuant to Government Code section 11520.

Evidence was received, the record was closed and the matter submitted for decision on December 13, 2016.

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CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 1/13 20 17
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ISSUE

Is respondent permanently disabled or substantially incapacitated from the performance of her usual duties as a Behavioral Health Counselor II for the County, on the basis of orthopedic (back and hip) conditions?

FACTUAL FINDINGS

Respondent's Employment History

1. Respondent is 46 years old. She began working for the County in August 1989. She last worked for the County on December 2, 2014, as a Behavioral Health Counselor II, and is a local miscellaneous member of CalPERS subject to Government Code section 21150 with the minimum service credit to qualify for retirement.[1]

Respondent's Disability Retirement Application

2. On May 12, 2014, respondent filed a Disability Retirement Election Application (Application) with CalPERS. On the Application, respondent checked the box which indicated "Disability Retirement" as the Application Type. She specified her disability as "Severe degenerative disk disease, bursitis, recurrant [*sic*], in hips." In response to the question on the Application that asks when the disability occurred, respondent replied that she was "First diagnosed in 2008." In response to the question that asks how the disability occurred, respondent replied "Genetic."

3. Respondent described her limitations/preclusions due to her condition as, "Chronic pain. Inability to think clearly due to chronic pain. If I take pain medication I cannot drive county vehicle with clients or think clearly." In response to the question on the Application that asks how her condition has affected her ability to perform her job, respondent replied, "Yes. I have pain and cannot medicate to keep my pain controlled due to my job. And cannot work to standards due to pain. Cannot think clearly due to pain." She provided the following other information:

> [Job Duties] Assess clients who are reported to be unstable, danger to self, or others. Assist clients with medical clearance when they are a danger to self or others or gravely disabled and need to get hospitalized.

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[1] Government Code section 21150 provides: "Any member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 or Section 21077."

I assist these clients in their homes and in the community.
When they become out of control or threatening you can call for
help, but it is not always there.

4. On October 19, 2014, CalPERS notified respondent in writing that her Application had been denied. Respondent timely appealed from the denial.

Duties of a Behavioral Health Counselor II

5. As set forth in the County's job specification, a Behavioral Health Counselor II works independently to provide assessment, treatment, counseling and case management to at-risk, mentally ill, developmentally disabled, and substance abuse clients. The job specification, in part, provides that a Behavioral Health Counselor II performs the following essential job functions:

- Carries a caseload of individual clients and client groups who require intervention, testing, evaluation, counseling and guidance; services may be provided in a facility, private home, or clinic setting.
- Screens and evaluates mentally ill persons and persons experiencing life stress, interviews clients to collect personal history.
- Provides casework services to at-risk, mentally ill, developmentally disabled, and substance abuse clients; provides case management services for clients, families, and significant others.
- Provides individual and group rehabilitation counseling, develops and implements guidance, counseling and treatment plans, acts as an advocate for individual clients.
- Teaches socialization and coping skills; advises clients of community resources.
- Updates and maintains a variety of files, records, charts and other documents; gathers, compiles and synthesizes data for program evaluation and management purposes; maintains appropriate records and prepares reports. Documents all services provided within the client's medical record in accordance with Butte County Department of Behavioral Health's practice/policy.
- Provides information regarding the services of the Behavioral Health Department, provides mental health consultation services to specified target groups.
- Consults with professional staff members as needed to develop and implement treatment and guidance programs for individuals and groups.
- Participates in multi-disciplinary team meetings to review client caseload, treatment, concerns, and recommendations; prepares and presents progress reports.
- Provides training for co-workers, health staff, community groups, and other agencies, as requested.

6. The work environment for a Behavioral Health Counselor II includes various home and health clinic settings, and involves the potential for high stress levels and exposure to hostile situations. Incumbents work with a manipulative and clinically challenging client population, and must be able to maintain professional composure and clinical effectiveness.

7. As set forth in the CalPERS Physical Requirements of Position/Occupational Title Form (Revised)[2] (physical requirements form), the physical requirements for the Behavioral Health Counselor II position require occasional (up to three hours) standing, walking, bending and twisting (at the neck and waist), reaching (above shoulder), pushing and pulling, repetitive use of hands, keyboard and mouse use, lifting and carrying up to 10 pounds, and driving. The position also requires frequent (three to six hours) lifting, sitting, standing, carrying, reaching, pushing, pulling, twisting, climbing, bending, crouching, squatting, crawling, and simple grasping. A County Behavioral Health Counselor II is not required to engage in crawling, kneeling, climbing, reaching (above shoulder), fine manipulation or power grasping, or lifting or carrying 26 pounds or more. The revised physical requirements form also specifies the following:

- Sitting – There are days where [a Behavioral Health Counselor II] might sit more than "occasionally up to 3 hours," but those days are the exception not the norm.
- Running – Due to clientele handled by [a Behavioral Health Counselor II] on occasion the employee may need to run inside [a home or clinic] and call 911 for emergencies on very rare occasions.
- Lifting/Carrying – 11-25 pounds on rare occasions; 0-10 lbs. is the norm. Employee may assist moving items for clients two to three times a month though an entire team is available to assist as needed.

Respondent's Testimony

8. Respondent began experiencing back pain in 2008. She saw a neurosurgeon and was told that she had degenerative disc disease. Respondent engaged in a treatment plan that included physical therapy and steroidal epidural injections. She had back surgery in 2010 and returned to work about six weeks post-surgery. In 2013, respondent began working a reduced work schedule due to her condition. She testified that her reduced work schedule allowed her more time to recover from "a lack of REM sleep" due to pain, and the side effects of her pain treatment medication, prior to returning to work. Her modified schedule permitted her to occasionally work fewer days during the week and take an additional day off after the weekend for this purpose. Respondent's treating physician, James E. Carter, II,

[2] Respondent submitted a previous version of the Physical Requirements of Position/Occupational Title form to CalPERS on May 12, 2014, which was revised and resubmitted October 28, 2014.

M.D., prescribed her morphine for chronic pain in November 2014. Respondent was reluctant to take the morphine while working because it was making her lethargic. When she did not use the morphine, she took Tylenol with codeine, which did not provide enough relief for her to get sufficient sleep. Dr. Carter told respondent that regular use of the prescribed morphine would be necessary for her to obtain sufficient sleep. When respondent notified the County that her doctor recommended regular morphine use as part of her pain treatment regimen, she was directed to complete a fitness for duty examination. Respondent is currently prescribed morphine, Topamax, and anti-inflammatory medication.

9. Respondent testified that her duties included facilitating group therapy for clients. She would drive a County vehicle to pick up clients prior to group therapy and then return them to their homes afterwards. She asserted that she drove a County vehicle as part of her duties on a daily basis, driving approximately 30 to 60 miles a day. Respondent testified that her job can be dangerous because the clientele she works with can be volatile. She stated that her clients "would 5150" once or twice a month. She would generally have to call 911 for assistance approximately once every 60 days. Respondent added that because most of her clients were either bipolar or paranoid schizophrenics, they would occasionally arm themselves and come after her or other staff, because the clients perceived them as dangerous persons. As a result, she had to run from armed or otherwise dangerous clients approximately every 60 to 90 days. Because she often worked in rural areas, emergency responders were not usually nearby to provide timely assistance.

10. Respondent asserted that her physical limitations, as described in the Application, cause her pain and the medication she takes for pain makes it difficult for her to think clearly. She stated that she could not drive a County vehicle as part of her job duties because she "would be driving under the influence of drugs." Respondent testified that when she had two or more days off, she would take her morphine as prescribed for her pain. When she had less than two days off, she would take Tylenol with codeine for pain relief instead. She could not obtain sufficient relief when taking the Tylenol. As a result, she would fall asleep at her desk while working, and would also fall asleep at stop signs while driving for work.

11. Respondent testified that she has difficulty facilitating groups for the County, because it requires prolonged sitting, which causes pain in her hips and lower back. She also testified that standing and walking, as required for her position, causes pain and reduces her concentration. When she takes pain medication for relief, the effects of the medication makes it difficult for her to think clearly.

Fitness for Duty Evaluations by David W. McKinney, M.D.

12. On December 2, 2014, the County placed respondent on administrative leave due to her difficulties at work related to her pain and pain medication, and directed her to see David W. McKinney, M.D. for a fitness for duty evaluation. Dr. McKinney has been a licensed physician in California since 1985 and is board-certified in Occupational Medicine. He engages in private practice in the areas of Occupational Medicine, Independent Medical

Exams and Disability Management. Approximately 70 percent of his practice involves being the treating physician for workers' compensation claims. His clients include Butte County, the City of Chico, and the City of Oroville. Dr. McKinney also provides fitness for duty examinations, pre-employment physicals, and drug screenings for clients.

13. Dr. McKinney evaluated respondent on December 4, 2014, and prepared a four-page report. His evaluation of respondent included an interview, a physical examination, and a review of medical records. Respondent's physical examination results were largely normal, but specified that respondent has poor motion to the hips with limited hip flexion. As part of the evaluation, Dr. McKinney also had respondent complete an at-home sleep study. The results of the sleep study were inconclusive.

14. Respondent reported to Dr. McKinney that she has chronic severe lumbar pain and severe bilateral hip pain, resulting in limited mobility. She reported that her pain results in limited and dysfunctional sleeping. Respondent told Dr. McKinney that she falls asleep at her desk while working and that her job requires her to occasionally transport clients of the County. She reported that she took a variety of medications to deal with her pain and other ailments, including morphine, Xanax, atenolol, Lexapro, Topamax, Flexeril, tramadol, phentermine, Proair, Advair, Zyrtec, Lerora, and magnesium. At the time of her evaluation, respondent was prescribed 15 milligrams of Morphine MS every 12 hours. At the conclusion of this evaluation, Dr. McKinney's diagnostic impressions were as follows:

1. Multilevel degenerative lumbar disc disease, S/P 4 level laminectomy and fusion.

2. Chronic pain syndrome on moderate dose long acting opioid analgesic.

3. Chronic degenerative arthritis.

15. In his December 2014 evaluation report, Dr. McKinney opined that respondent was not able to perform her regular job. This opinion was based upon his exam findings and his review of respondent's prescribed medication. Dr. McKinney added that "[respondent's] ongoing medical problems are confirmed by her medical records. A copy of her sleep study, although not definitive, will be sent to her treating physician for follow up. ... If she were to return to work [as a Behavioral Health Counselor], re-evaluation would be necessary before clearance could be authorized."

16. Dr. McKinney completed a CalPERS Physician's Report on Disability, dated February 11, 2015, regarding respondent's condition. In this report he described respondent's condition as "severe cervical back pain/poor mobility; chronic pain requiring long acting morphine." The diagnosis in this report specified that respondent had "Lumbar disc disease S/P 4 level fusion. Loss of motion. Poor mobility. Hip Arthritis." In this report, Dr. McKinney described respondent as being currently substantially incapacitated

from performance of the usual job duties of her position. When asked to describe the specific job duties respondent could not perform, Dr. McKinney replied, as follows:

> Works as a Behavioral Health Counselor. An essential job function is driving clients. Based upon her exam findings and medications, she cannot perform this task.

17. On March 27, 2015, Dr. McKinney re-evaluated respondent at the County's request. At the conclusion of this evaluation, Dr. McKinney's diagnostic impressions were as follows:

> 1. Multilevel degenerative disc disease, S/P 4 level laminectomy, with limited spinal mobility.
> 2. Degenerative arthritis affecting the right hip.
> 3. Possible degenerative arthritis affecting the left hip.
> 4. Possible obstructive sleep apnea versus other sleep disorder.
> 5. Probable depression.
> 6. Chronic pain syndrome, moderate to severe.

18. In Dr. McKinney's report for his March 2015 evaluation, he recommended that respondent obtain x-rays of both the left and right hips and that she undergo a full sleep study in a sleep lab. He opined that respondent was unable to return to work as a Behavioral Health Counselor.

19. On April 25, 2016, Dr. McKinney again re-evaluated respondent at the County's request and prepared a five-page report. Dr. McKinney's diagnostic impressions were unchanged and his opinion remained that respondent was "disabled from returning to her position as a Behavioral Health Counselor [because] she has had significant disabling medical problems for several years and now has recommended surgical procedures as well as significant medications requirements. … [S]he can no longer meet the minimum requirements or perform the essential job functions [of her position.]"

20. On June 15, 2016, Dr. McKinney prepared a supplement to his previous evaluation report at the request of the County to clarify whether respondent was "precluded from all work," and whether respondent was "precluded from the job description as a Behavioral Health Counselor." In response, Dr. McKinney stated that "it is possible in the future that [respondent] could return to work in a capacity of light sedentary work with restricted hours," and responded "yes," to the question that asked whether she was "precluded from the job description as a Behavioral Health Counselor."

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21. Effective September 10, 2016, the County terminated respondent from employment because Dr. McKinney "indicated that [she was] unable to perform the essential functions of a Behavioral Health Counselor [and also] indicated that the duration of [her] condition is unknown… ."

Testimony of David W. McKinney, M.D.

22. Dr. McKinney testified at hearing. His testimony was consistent with his fitness for duty evaluation reports. During his review of respondent's medical records he noticed that she had been recently prescribed "a long acting dose of morphine" and was concerned with respondent's ability to drive while following this prescription. He added that respondent also takes Topomax, which may compound the negative effect of morphine. He testified that the combination could cause decreased concentration and delayed reaction times while driving.

23. Dr. McKinney testified that he did not believe respondent can perform her job, due to her physical limitations and the medication she takes to manage her pain. He opined that besides compromised driving abilities, respondent cannot perform certain other job duties. He testified that "to be on the safe side," respondent should avoid "handling violent clients, running away from violent clients, and defending herself from violent clients." Regarding respondent's ability to perform these functions, Dr. McKinney stated that he is "sure we would all do the best we can under those circumstances … but [respondent's] condition would not help her."

24. When Dr. McKinney re-evaluated respondent on March 27, 2015, he found that her condition had not changed. Dr. McKinney testified that his opinion remained that respondent is not fit for duty because her opioid pain medication reduces her concentration and because her back and hip conditions make it difficult for her to sit or stand for prolonged periods. He testified that her reduced concentration makes it unsafe for her to drive clients in County vehicles and makes her more susceptible to violent attacks from clients. Dr. McKinney added that respondent's reduced range of motion and tightness in her pelvis would "most likely" result in pain with prolonged uninterrupted sitting and standing. He testified that he performed "minimal examination on her hip." He had no recollection of ever reviewing any x-rays of respondent's hips to determine whether she had hip arthritis or not. He reviewed no x-rays of her back, but read reports regarding the results of an MRI on her back from March 2008.

25. He acknowledged that, although he performs many fitness for duty evaluations each year for a variety of employers, he has never evaluated a patient to determine whether they are permanently disable or substantially incapacitated as those terms relate to CalPERS disability retirement. Dr. McKinney stated that he is "not specifically" familiar with the CalPERS requirements for determining whether someone is disabled for disability retirement purposes. He testified that he has no opinion to offer regarding whether respondent qualifies for disability retirement under CalPERS disability requirements. Dr. McKinney also admitted that he did not review or consider the Physical Requirements of

Position/Occupational Title for respondent's position when reaching his opinion regarding respondent's fitness for duty. He did not see the physical job requirements form for respondent's position until the day before hearing. In reaching his determinations, Dr. McKinney considered the available medical records and the County job specification, which included a cover letter which specified that "occasionally transporting clients" was one of respondent's essential job functions. Dr. McKinney completed the February 2015 Physician's Report on Disability as he would a fitness for duty evaluation. In other words, he utilized a standard other than the CalPERS disability retirement standard. Dr. McKinney described his understanding of the phrase "substantially incapacitated" during his evaluation of respondent to mean that "she would be unable to perform her job based on an inability to perform one or more of the essential job functions."

Respondent's Other Medical Reports

26. At the hearing, respondent submitted additional medical records, which were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).[3]

27. Respondent submitted a patient contact note, dated November 13, 2014, which reflects her visit to Dr. Carter's office for "chronic pain." The patient note included the following information:

> [Respondent's] supervisors have not allowed her to take pain medication at work because "her doctor" has not told them she could (!). I pointed out again, that 5 or 6 years ago this month, the NEJM reported that long-acting or sustained release narcotics [are] not impairing after a week of steady use; not so for short-acting narcotics. [Respondent] is more impaired at work without [long-acting or sustained release narcotics because of] difficulty concentrating when her pain level is [high]. ... Consensus opinion suggests that [high] pain levels ... interfere with activities of daily living and concentration. [Respondent] ought to be allowed to take morphine sulfate [extended release twice] daily.[4]

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[3] Government Code section 11513, subdivision (d), in relevant part provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

[4] "NEJM," stands for New England Journal of Medicine.

28. Respondent submitted two CalPERS Physician's Reports on Disability completed by Dr. Carter, dated March 17, and June 30, 2014, regarding her condition. In these reports Dr. Carter diagnosed respondent as having "Post laminectomy Syndrome/Lumbar region," and "Degenerative Disc Disease." Dr. Carter did not specify within either report whether respondent was substantially incapacitated from performance of her usual job duties at the time. In response to a question that asked for a description of the specific job duties respondent could not perform, Dr. McKinney replied, as follows:

> Patient is unable to sit, stand or walk for long periods of time. Patient cannot take pain medications and drive. Pain levels are high and patient has a hard time thinking.

CalPERS's Expert

29. Arthur Auerbach, M.D., testified at hearing. Dr. Auerbach is a board-certified orthopedic surgeon and a certified Fellow of the American Academy of Orthopaedic Surgeons. On August 27, 2014, he performed an Independent Medical Evaluation (IME) on respondent. His evaluation included conducting a physical examination of respondent, and reviewing her job functions and medical records. Dr. Auerbach detailed his evaluation in a 10-page IME report.

30. As set forth in Dr. Auerbach's IME report, respondent complained of pain in her hips and back that began in 2008, and subsequent weakness in her lower extremities. Respondent reported that her symptoms increased in frequency and intensity over time. After evaluating respondent and reviewing her medical records, Dr. Auerbach diagnosed respondent as follows:

> History of chronic lumbar degenerative disc disease and spondylosis post December 2010 posterior lumbar laminectomy and discectomy at L2-5 with chronic bilateral lumbar radiculopathy intermittently and development of failed back operative syndrome in a somewhat overweight 44-year-old female on multiple medications.

31. The "Discussion" section of the IME report is comprised of the following single statement: "[t]he claimant's intermittent back problem into both lower extremities has essentially stabilized." In response to specific questions from CalPERS, Dr. Auerbach opined that "using the physical requirements sheet that was given to [him], there are no specific job duties that [respondent] is unable to perform because of her physical condition," and that respondent was not presently substantially incapacitated for the performance of her usual duties.

32. At CalPERS' request, Dr. Auerbach prepared two supplemental IME reports after receiving additional medical records and information for consideration. The additional records and information did not alter Dr. Auerbach's opinion that respondent was not substantially incapacitated for the performance of her duties as a Behavioral Health Counselor II for the County.

33. At hearing, Dr. Auerbach testified that his evaluation of respondent was based on the CalPERS medical requirements for disability retirement. CalPERS provided him with those requirements when they retained him. CalPERS also provided Dr. Auerbach with the Physical Requirements of Occupational/Title form for respondent's position. Dr. Auerbach reviewed those documents when considering the information he obtained during his evaluation and prior to reaching his opinions. He testified to respondent's medical history and stated that respondent had a history of back and hip pain dating back to 2008, without a specific history of injury. Dr. Auerbach determined that respondent developed degenerative disc disease, which was confirmed by a September 2008 x-ray and a June 2010 "cat scan." Dr. Auerbach described the variety of medications respondent was taking, and emphasized that he did not factor in respondent's medication use when reaching his opinions.

34. Dr. Auerbach felt the information available to him during the evaluation was incomplete. There were references to hip arthritis, but no records reflecting that any hip x-rays were completed. He also felt that respondent had "histrionic signs that did not match." He testified that respondent claimed she could not sit or stand for more than 15 minutes at a time, but had no muscle atrophy. Respondent claimed to have flexion at the waist of about 45 degrees during her examination, but exhibited significantly more flexibility at hearing, as she periodically stood upright and bent at the waist during the hearing, despite testifying that she had taken no pain medication. He also testified that respondent's response to palpation was exaggerated, considering the mobility she exhibited during her examination. Dr. Auerbach noted that respondent's job was largely sedentary and did not require significant or regular physical exertion. He felt that any limitations respondent had relating to the performance of her duties were largely iatrogenic, in that they were caused or exacerbated by narcotic dependency. He opined that respondent "is having trouble working because she is on narcotics—not because of an orthopedic condition" and stated that "she is not substantially incapacitated orthopedically."

Discussion

35. Dr. Auerbach's opinion that respondent is not substantially incapacitated for the performance of her usual duties as a Behavioral Health Counselor based upon her orthopedic condition was persuasive. Both his IME reports and testimony at hearing provided clear and supported medical opinion that respondent's orthopedic condition, as specified in her Application, does not prohibit her from performing any job functions. His opinion resulted from his application of the CalPERS disability retirement standards to the competent medical evidence obtained and considered as part of his evaluation. Dr. McKinney's contrary opinion was not based on the CalPERS disability retirement standards. He was not familiar with those standards when he evaluated respondent. He determined that

respondent was substantially incapacitated from the performance of her duties as a Behavioral Health Counselor II because of her "inability to perform one or more job functions." He testified that he reached this conclusion without having reviewed or considered the physical requirements for respondent's position, as specified in the Physical Requirements of Occupational/Title form. Dr. McKinney's opinions were also largely unsupported by competent medical evidence. His opinion that respondent's driving abilities may be reduced due to either sleep deprivation or her prescribed opioid pain management did not support that she was unable to drive and was not supported by the evidence. His opinion that respondent may experience pain with prolonged sitting or standing, does not indicate an inability to perform those functions. Additionally, Dr. McKinney's concerns that respondent's condition may diminish her ability to either respond to, run away from, or defend herself against violent clients does not support that she is substantially incapacitated from the performance of her usual job duties as a Behavioral Health Counselor II.

36. The medical reports admitted as administrative hearsay did not support that respondent is substantially and permanently incapacitated from performing the usual duties of a Behavioral Health Counselor II. There was no evidence which established that the doctors who authored those reports applied the evaluation standards applicable in CalPERS disability retirement cases. Moreover, the November 2014 patient note from Dr. Carter stated that respondent could return to work after a week of steady use of long-acting or sustained release narcotics, because they did not have an impairing effect after the first week of use.

37. When all the evidence is considered, respondent did not present sufficient evidence to establish that she was rendered substantially disabled to perform the usual duties of a Behavioral Health Counselor II, due to "severe degenerative dis[c] disease," and "bursitis, recurrent, in hips," as specified in her Application. Consequently, her disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of her employment, respondent is a state miscellaneous member of CalPERS, who is subject to disability retirement under Government Code section 21150.[5]

2. To qualify for disability retirement, respondent must prove that she is "incapacitated physically or mentally for the performance of ... her duties." (Gov. Code, §

[5] Government Code section 21150, in relevant part, provides:

> (a) A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 or 21077.

21156.) Government Code section 20026 defines "disability" and "incapacity for performance of duty," as follows:

> "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board, ... *on the basis of competent medical opinion.*

(Italics added.)

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876 (*Mansperger*), the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.) In *Mansperger*, the court found that a fish and game warden who had applied for disability retirement was not incapacitated for the performance of his duties, because the work activities that he was unable to perform were not common occurrences, and he could otherwise "substantially carry out the normal duties of a fish and game warden." (*Mansperger, supra*, 6 Cal.App.3d at p. 876.)

4. In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 860 (*Hosford*), the court found that prophylactic restrictions imposed to prevent the risk of future injury or harm were not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

5. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 (*Harmon*), the court found that a deputy sheriff was not permanently incapacitated from the performance of his duties, because "aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for [the sheriff's] condition are dependent on his subjective symptoms."

6. *Mansperger*, *Hosford* and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was permanently and substantially unable to perform her usual duties as a Behavioral Health Counselor II for the County due to orthopedic (hip and back) conditions, as specified in her Application. The evidence established that although respondent has been separated from employment due to Dr. McKinney's opinion that she is unable to perform one or more of the essential job functions, her claimed level of incapacitation due to an orthopedic condition (back and hips) was not supported by the evidence. Her medical expert did not utilize the CalPERS standard for disability retirement applications, when reaching any of his opinions and those opinions were largely based on respondent's subjective claims. Respondent's application for disability retirement must therefore be denied.

ORDER

The application of Holly D. Massie for disability retirement is DENIED.

DATED: January 12, 2017

DocuSigned by:
Ed Washington
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ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings