

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Reinstatement from Industrial Disability

Retirement of:

NICHOLAS E. MEGAZZI,

Respondent,

and

**CALIFORNIA CORRECTIONAL INSTITUTION, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,**

Respondent.

Agency Case No. 2019-0719 (Accusation)

OAH No. 2019110607

PROPOSED DECISION

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on April 5 and May 12, 2021.

Helen L. Louie, Esq., represented the California Public Employees' Retirement System (CalPERS).

Brandon Martin, Esq., represented respondent Nicholas E. Megazzi (Megazzi).

There was no appearance by or on behalf of respondent California Correctional Institution, California Department of Corrections and Rehabilitation (CDCR).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on May 12, 2021.

SUMMARY

CalPERS accepted Megazzi's application for industrial disability retirement from his position as a correctional officer at CDCR effective January 1, 2015. In 2019, CalPERS determined Megazzi should be reinstated from industrial disability retirement because he was no longer disabled or substantially incapacitated from performance of the usual job duties of his former position. Megazzi appeals and argues he remains eligible for industrial disability retirement benefits. CalPERS has the burden of proving he should be reinstated from industrial disability retirement, but CalPERS did not meet its burden of proof. Therefore, Megazzi's appeal will be granted.

FACTUAL FINDINGS

Background and Procedural History

1. Megazzi began working as a correctional officer for CDCR in 2006. By virtue of his employment, Megazzi was a "[s]tate safety member" of CalPERS. (Gov. Code, § 20403.)¹

2. In May 2012, Megazzi was conducting cell searches on the top tier of the California Correctional Institution in Tehachapi, California. He removed a mattress weighing about 10 pounds from a cell and as he threw it over the edge of the railing, he noted a person standing on the floor below. Megazzi reached out quickly with his right arm to grab the mattress and stop it from falling on the person. Upon doing so, Megazzi felt a popping sensation with mild pain in his right shoulder. Megazzi reported the incident to his sergeant, but he declined medical attention at the time and continued working.

3. About two months later, Megazzi noted increased pain and popping in his right shoulder and sought medical treatment. He was referred by his employer to Irene Sanchez, M.D., and he received a cortisone injection that provided pain relief for about a month. Dr. Sanchez took Megazzi off work for six months, after which he returned to work on full duty.

4. After a while, Megazzi again noted increased pain in his right shoulder. He returned to Dr. Sanchez, who ordered magnetic resonance imaging (MRI) of

¹ Undesignated statutory references are to the Government Code.

Megazzi's shoulder. After review of the MRI, Dr. Sanchez referred Megazzi to Todd Shapiro, M.D., an orthopedic surgeon, who performed right shoulder surgery on Megazzi in February 2014. After the surgery, Megazzi attended 12 sessions of postoperative physical therapy, but he noted no benefit from the surgical procedure. He was taken off work and did not return.

5. On November 17, 2014, Megazzi applied to CalPERS for industrial disability retirement based on an orthopedic (right shoulder) condition. Megazzi was 35 years old at the time. CalPERS approved the application, and Megazzi was retired for industrial disability effective January 1, 2015.

6. In October 2017, CalPERS notified Megazzi that his industrial disability retirement benefits were under review to determine if he still qualified to receive them. After completing the reevaluation, CalPERS determined Megazzi continued to be substantially incapacitated from performance of the duties of a correctional officer at CDCR. By letter dated December 14, 2017, CalPERS notified Megazzi and CDCR that Megazzi's industrial disability allowance would continue.

7. In December 2018, CalPERS notified Megazzi that his industrial disability retirement benefits were again under review. CalPERS had Megazzi complete a questionnaire about his medical condition, provide records from his physicians, and submit to an orthopedic examination in May 2019 by John Kaufman, M.D., whom CalPERS hired to provide an independent medical opinion. After completing the reevaluation, CalPERS determined Megazzi was no longer disabled or substantially incapacitated from performance of his duties as a correctional officer and would be reinstated to his former position. By letter dated June 18, 2019, CalPERS notified Megazzi and CDCR of the determination and informed them of their right to appeal.

Megazzi timely appealed and requested an administrative hearing. CDCR did not appeal.

8. On November 5, 2020, CalPERS filed an Accusation against Megazzi and CDCR "limited to the issue of whether respondent Megazzi is still disabled or substantially incapacitated from performance of the usual job duties of a Correctional Officer for CDCR, due to an orthopedic (right shoulder) condition."

Hearing

CALPERS'S CASE

9. CalPERS presented documents establishing the facts described above and called two witnesses to testify: (1) Nelson Cooper, a CalPERS investigator; and (2) Dr. Kaufman, the orthopedic surgeon who examined Megazzi in May 2019.

Nelson Cooper

10. Nelson Cooper has been a CalPERS investigator for about four-and-a-half years. His job duties include surveillance and other investigation of persons receiving benefits from CalPERS.

11. Cooper conducted surveillance on Megazzi for a total of about 20 hours between March 9 and March 11, 2020. The surveillance on March 9 did not show Megazzi engaged in any physical activity of significance involving his right shoulder. On the next day, Megazzi arrived at Watson Realty, his current employer, and Cooper recorded video of Megazzi as he exited his vehicle holding a large binder in his left hand, a water bottle in his right hand, and gripping his cell phone between his ear and his right shoulder. Megazzi walked toward the building, pulled the door open with his right arm, and entered. Later that day, Megazzi exited the building and walked toward

his vehicle while holding two binders in his right hand at about waist level. He placed the binders in the back seat, entered his vehicle, and left the area. Cooper did not see Megazzi on the final day of surveillance.

12. Through online research, Cooper also found 12 photos and posts on social media of Megazzi engaged in, or referring to his participation in, physical activities including golfing, softball, fishing, and driving a vehicle. One golfing photo shows Megazzi with two other players on a golf tee, with Megazzi facing away from the photographer and standing behind another player who is preparing to tee off. Megazzi is holding a driver or wood in his hands with the club head above his head and his right leg bent slightly, as if he had just taken a practice swing. The other golf course photos and the softball and fishing photos show Megazzi posing with other participants rather than engaging in the activities themselves. One other photo shows Megazzi seated in the driver's seat of a vehicle with several passengers. Another photo shows Megazzi wearing a t-shirt and hat that both said "Security" while standing under a tent with two other people.

John D. Kaufman, M.D.

13. Dr. Kaufman received his medical degree from the University of Nebraska College of Medicine in 1970. He has been in private practice in orthopedic surgery in southern California since 1974 and is board certified by the American Board of Orthopedic Surgery. He reviews orthopedic cases about once a month for CalPERS, most involving correctional officers.

14. Dr. Kaufman testified he reviewed Megazzi's medical history and performed a standard orthopedic evaluation of his right shoulder, which included clinical observations, tests of Megazzi's active and passive range of motion,

circumferential measurements of Megazzi's arms, measurements of grip strength, and Hawkins and Neer testing for shoulder impingement. Megazzi complained to Dr. Kaufman of intermittent right shoulder pain with radiation of pain to the biceps, with stiffness and tightness of the shoulder. Megazzi denied numbness, tingling, popping, or locking of the shoulder, and he noted mild weakness of the right arm. Megazzi reported his pain increased with throwing a ball, reaching, and overhead use of his arm. The pain improved with ice applications and over-the-counter ibuprofen. Megazzi rated his right shoulder pain as zero to five out of 10, and he reported having difficulty with activities of daily living, including sleeping and prolonged driving.

15. Megazzi's active range of motion values for his right shoulder were 120 degrees for flexion and 110 degrees for abduction, compared to 160 degrees of flexion and abduction in his left shoulder. Internal and external rotation were the same in both shoulders. Dr. Kaufman also tried to check Megazzi's passive range of motion, but it was difficult to determine due to Megazzi not relaxing. Megazzi's average grip strength was slightly higher with his left hand than with his right. His upper arms and forearms had almost identical circumferential measurements, and sensation was intact to light touch in both extremities. Dr. Kaufman also noted Megazzi has calluses on the palmar aspect of both hands.

16. Based on the examination, Dr. Kaufman concluded Megazzi was not disabled or substantially incapacitated from the performance of his former duties as a correctional officer. Dr. Kaufman reached this opinion for several reasons. First, Dr. Kaufman did not find any objective factors of disability or pathology related to Megazzi's upper extremities during the examination. While Megazzi displayed a limited active range of motion in his right shoulder, that was a subjective factor, not an objective one. Second, Megazzi's surgery in February 2014 was for a labral repair,

which would normally result in a complete recovery by someone of Megazzi's age and overall health. Third, there was no atrophy in Megazzi's right upper extremity compared to his left, which was an objective indicator that Megazzi was using his right upper extremity normally. Fourth, Megazzi reported he works as a real estate agent; however, he had calluses on both hands, which would not be expected of someone in that position. This indicated to Dr. Kaufman that Megazzi did substantial work requiring the use of his hands.

17. Dr. Kaufman testified Cooper's surveillance video of Megazzi did not show anything especially relevant to Megazzi's shoulder condition, and Dr. Kaufman did not reach any conclusions based on the video. But the photos of Megazzi on social media were interesting because they showed him engaging in several sports, including golf and softball. Dr. Kaufman reached his opinion with reference to the essential job functions of a correctional officer as described by CDCR, which include functions requiring the use of an officer's shoulder. Among other functions, a correctional officer must be able to swing a baton with force to subdue an inmate; disarm, subdue, and apply restraints to an inmate holding a weapon; lift and carry light to medium weights frequently and very heavy weights (over 100 pounds) occasionally, including the weight of an inmate; physically restrain and drag an inmate out of a cell; reach occasionally to continuously overhead while performing cell or body searches; and brace occasionally while restraining an inmate during an altercation or while performing a body search.

MEGAZZI'S CASE

18. Megazzi presented consultation reports from Richard D. Scheinberg, M.D., his treating physician; medical records from other providers; physical therapy

records; and photographs of his right shoulder and upper body. Dr. Scheinberg and Megazzi also testified.

Richard D. Scheinberg, M.D.

19. Dr. Scheinberg received his medical degree from Duke University Medical School in 1975. He is the medical director of Sheinberg Orthopedic Group based in Santa Barbara, California, and he is board certified by the American Board of Orthopedic Surgery. He performs about five to 10 shoulder surgeries per week, and he has experience in treating correctional officers with orthopedic conditions.

20. Dr. Scheinberg examined Megazzi multiple times in 2019 and 2020. He testified Megazzi has persistent pain and a chronic limitation in the range of motion in his right shoulder. In December 2019, Dr. Scheinberg's diagnoses of Megazzi were "status post remote right shoulder glenoid labral repair" and adhesive capsulitis (i.e., frozen shoulder). Megazzi had reached maximal medical improvement by that time, and Dr. Scheinberg advised him to avoid repetitive at-or-above shoulder level activities with his right upper extremity. Dr. Scheinberg saw Megazzi again in November 2020 and confirmed those diagnoses, opining that Megazzi had a persistent permanent and stationary range of motion deficit and remained permanently disabled with the same work restrictions regarding at-or-above shoulder level activities as stated in December 2019.

21. Dr. Scheinberg criticized Dr. Kaufman's reliance on circumferential tests of Megazzi's arms, opining that the results were unrelated to Megazzi's range of motion deficit. Further, Dr. Scheinberg opined there was no relationship between the calluses on Megazzi's hands and his limited range of motion. Given the range of motion deficit and adhesive capsulitis, Dr. Scheinberg testified Megazzi would not be

able to swing a baton overhead with his right arm or subdue or disarm combative inmates safely. Megazzi should avoid any at-or-above shoulder level activities, lifting, or repetitive reaching involving his right shoulder. Dr. Scheinberg suspects Megazzi can do some of those activities, but not forcefully or repetitively, and his limitations would put others at risk if those activities involved dangerous situations with inmates.

Nicholas E. Megazzi

22. Megazzi testified he "can't use my right arm at all." He tried golfing once but it was too painful, and the photos of him on social media on golf courses were at networking events related to his job as a real estate agent for Watson Realty. He was not playing rounds of golf, although he sometimes used a putter. He testified he did not hit a drive in the photo of him holding a driver on a golf tee. He was the designated coach or manager of the teams in the softball photos, not a player. He was not acting as a security guard in the picture of him wearing a security hat and t-shirt. The hat and t-shirt were a joke; he was just picking people up to go to the bathroom at a networking event. In the fishing boat photo, he watched other people fish but did not fish himself. The picture of him driving was a trip to Universal Studios. He can drive but must brace his right shoulder for long-distance trips.

23. Megazzi also testified he is right-hand dominant, and his injury impairs most of his former duties as a correctional officer, especially those involving reaching over his head. Correctional officers often must reach above their shoulders, and Megazzi had to do that every day in his former job. He also has some limitations about lifting weight above his shoulder. His shoulder just stops and he can only raise his right arm so high. This has been true ever since his surgery.

24. Further, Megazzi testified combative inmates were common in his former employment, and he cannot push, pull, or lift a resisting or "dead-weight" inmate with his right shoulder. When his shoulder impinges, it feels like it will fall out of its socket and "puts him out for the rest of the day." It is "impossible" for him to lift or carry 11-25 pounds overhead. After his surgery did not improve his condition, his health insurance provider denied him a second surgery or additional physical therapy beyond the 12 sessions he completed. Dr. Scheinberg got him some additional physical therapy in 2020, but his condition remains the same. He has done home exercises for his shoulder since 2017, but his shoulder has not improved. He sees Dr. Scheinberg every six months or so. He does not take prescription medication for his shoulder, but he takes ibuprofen and uses ice when it is painful.

ANALYSIS OF EVIDENCE

25. The weight of the evidence supports Megazzi's assertion that he remains disabled or substantially incapacitated from performance of the usual job duties of a correctional officer for CDCR. Dr. Scheinberg's medical opinion testimony was more persuasive than Dr. Kaufman's, who discounted Megazzi's range of motion limitations as subjective and overemphasized the circumferential measurements of Megazzi's arms and the calluses on his hands. Over many examinations, Megazzi consistently had range of motion limitations in his shoulder that support Dr. Scheinberg's opinion he should avoid at-or- above shoulder level activities, which are frequently required of correctional officers. Dr. Scheinberg's opinion that Megazzi's shoulder condition poses a risk in physical interactions with inmates also makes sense. Correctional officers must be able to restrain and control combative inmates, some of whom may be armed with weapons. Megazzi's limited ability to use the shoulder of his dominant arm poses a risk of harm to himself and others in such dangerous and unpredictable situations.

Further, Dr. Scheinberg's critique of Dr. Kaufman's emphasis on the circumferential measurements of Megazzi's arms and the calluses on his hands was persuasive.

26. In addition, CalPERS did not prove what is different now about Megazzi's shoulder condition from when CalPERS accepted his disability retirement application in early 2015 and again found him to be disabled upon reevaluation in late 2017. Dr. Kaufman's report includes some discussion of Megazzi's condition over time, but Dr. Kaufman did not testify about how Megazzi's condition is different now versus early 2015 or late 2017. CalPERS also did not identify or present the medical opinion evidence that supported its determinations that Megazzi was disabled in 2015 and 2017. Thus, there is scant medical evidence of what CalPERS considered a qualifying disability then to compare with the evidence of Megazzi's condition now. While Megazzi presented some medical reports from 2014 and 2017, CalPERS objected to those reports as hearsay, making them insufficient by themselves to support a finding. (§ 11513, subd. (d).)

27. Megazzi's testimony that he "can't use my right arm at all" is an exaggeration, and the online photos and posts of Megazzi on social media lend some support to CalPERS's position. But none of the photos show Megazzi with his right arm over his head or using his right shoulder for strenuous physical activity. The photo of Megazzi on a golf tee holding a driver suggests he took a practice swing of a golf club, but that is not enough to prove he is no longer disabled. Megazzi testified that photo and others were largely from networking events or other situations where he did not participate in the sporting activity, and CalPERS did not rebut that testimony. Cooper's surveillance video of Megazzi also did not show any physical activity of significance to Megazzi's right shoulder condition, as Dr. Kaufman testified.

LEGAL CONCLUSIONS

Legal Standards

1. "Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service." (§ 21151, subd. (a).) "If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service." (§ 21156, subd. (a)(1).)

2. "Disability" and "incapacity for performance of duty" mean "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion." (§ 20026; see also § 21156, subd. (a)(2).) To be retired for disability, a member must be substantially unable to perform his or her usual duties. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Discomfort, which may make it difficult to perform one's duties, is not enough by itself to qualify for a disability retirement. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; *Hosford v. Board of Administration, supra*, 77 Cal.App.3d at p. 862.)

3. After a member is retired for disability, "[t]he board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination" (§ 21192.) Megazzi is under the minimum age for voluntary retirement for service applicable to members of his class, which is 50 years old. (§ 21060, subd. (a).) "The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency . . . where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification" (§ 21192.)

4. "If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system. [¶] If the recipient was an employee of the state . . . and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. . . . A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a

position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position." (§ 21193.)

Burden of Proof

5. "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. [Citations.]" (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5; see also Evid. Code, §§ 115, 500.) Here, CalPERS is asserting the affirmative argument that Megazzi is no longer disabled or substantially incapacitated for the performance of his usual duties, and CalPERS therefore has the burden of proof by a preponderance of the evidence. (See *McCoy v. Board of Retirement, supra*, 183 Cal.App.3d at p. 1051, fn. 5; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.) A preponderance of the evidence means "'evidence that has more convincing force than that opposed to it.'" [Citation.]" (*People ex rel. Brown v. Tri- Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Analysis

6. CalPERS did not meet its burden of proof. The weight of the evidence supports Megazzi's assertion that he is still disabled or substantially incapacitated from performance of the usual job duties of a correctional officer for CDCR. Megazzi's medical opinion evidence had more convincing force than CalPERS's evidence, and CalPERS did not prove what is different now about Megazzi's shoulder condition from when CalPERS accepted his disability retirement application in early 2015 or found him to be still disabled upon reevaluation in late 2017. Therefore, on this record, CalPERS has not proved Megazzi should be reinstated from industrial disability retirement.

ORDER

Megazzi's appeal is granted. The determination to reinstate him from industrial disability retirement is reversed.

DATE: 06/11/2021

Thomas Heller
Thomas Heller (Jun 11, 2021 14:24 PDT)

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings