

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Amended Statement of Issues Against:

JOSHUA A. YOUNG, Respondent,

and

CITY OF SAN BUENAVENTURA, Respondent.

Agency Case No. 2023-0887

OAH No. 2024080992

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on June 16 and 17, 2025.

Preet Kaur, Senior Attorney, represented Sharon Hobbs (complainant), Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Thomas J. Wicke, Attorney at Law, represented respondent Joshua A. Young (respondent).

Paul D. Knothe, Attorney at Law, represented respondent City of San Buenaventura (City)

Oral and documentary evidence was received, and argument was heard. At the hearing, the ALJ received exhibits containing confidential medical information and sealed them pursuant to a protective order.

The ALJ held the record open for simultaneous closing briefs from all parties due August 8, 2025, and reply briefs from all parties due September 5, 2025. Parties timely submitted their briefs. CalPERS opening and reply briefs were marked for as Exhibits 28 and 29, respectively; respondent's opening and reply briefs were marked for identification as Exhibits R6 and R7, respectively; and City's opening and reply briefs were marked for as Exhibits M and N, respectively. The record was closed and the matter was submitted for decision on September 5, 2020.

FACTUAL FINDINGS

Jurisdiction and Issue

1. Complainant filed the Amended Statement of Issues in her official capacity.
2. CalPERS is the state agency responsible for the administration of the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq.
3. The City is a local agency that contracts with CalPERS for retirement benefits for its eligible employees. The City is subject to the provisions of the PERL.

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4. Respondent was employed by the City as a Police Officer. By virtue of this employment, respondent became a local safety member of CalPERS subject to Government Code sections 21151, 21154, and 21156.

5. Pursuant to the Amended Statement of Issues, the issues on appeal are limited to: (1) whether respondent's eligibility for Industrial Disability Retirement (IDR) is precluded by operation of Government Code section 21156 and *Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292 (*Haywood*) and its progeny and (2) whether CalPERS correctly decided to recoup the entirety of overpayments to respondent, from October 4, 2016, onward, pursuant to Government Code sections 20160 and 20164 because "fraudulent reports" had been made to CalPERS.

Personnel Disputes Between the City and Respondent

6. The City's Police Department initially hired respondent as a Police Officer on January 1, 2005. In May 2015, respondent was promoted to the rank of Police Corporal on a probationary basis. (Ex. 22, p. A109.)

7. Sometime between December 22, 2015, and January 4, 2016, Commander R.M. of the Police Department's Internal Affairs (IA) Division began an administrative investigation of respondent, based on allegations that he falsified information in a probable cause declaration and failed to follow proper procedure in conducting a drug abuse recognition (DAR) evaluation. (Ex. 18.) (Initials are used to identify third parties to protect their privacy.)

8. On January 4, 2016, Commander R.M. notified respondent in writing that he and Sergeant J.F. of the IA Division intended to interview him for violations of

Police Department policy based on the alleged misconduct (Notice of Intent to Interview). (Ex. 16.)

9. On February 23, 2016, the Police Department issued a Written Notification of Failure to Complete Promotional Probationary Period (Failure to Complete Probation Notification) to respondent informing him that his probationary appointment as a Police Corporal was terminated. (Ex. 17, p. A76.) Consequently, respondent was reinstated to his former position as a Police Officer, effective February 27, 2016. (*Ibid.*)

10. On March 9, 2016, respondent's physician Richard Deamer, M.D., placed respondent off work from March 9, 2016, through June 9, 2016, based on "Generalized Anxiety Disorder with vocational stress." (Ex. D, p. C70.) Dr. Deamer wrote in his report: "For reasons likely due to religious bias of some sort ([respondent] is LDS), [R.M.] began mocking [respondent], belittling his Cambridge experience, etc." (*Ibid.*)

11. On March 9, 2016, respondent filed a Workers' Compensation Claim with the City, alleging he suffered cumulative trauma and stress due to religious discrimination. (Ex. 22, p. A109.)

12. On June 26, 2016, Elizabeth Foushee (Foushee), the City's then Director of Human Resources (HR) contacted Norman A. Traub Associates, an outside firm, to conduct an investigation of respondent's claim of religious discrimination by Commander R.M. (Ex. H, p. C101.)

13. On July 27, 2016, Commander S.A. of the Police Department's IA Division issued a report under File IA 15-04 (IA15-04 Report) regarding respondent's violations of Police Department policy based on allegations of falsifying information in a probable cause declaration and failure to follow procedure during a DAR evaluation.

(Ex. 18.) In the IA 15-04 Report, Commander S.A. sustained six of the seven alleged violations of Police Department policy against respondent. (*Ibid.*)

14. On August 11, 2016, respondent filed a complaint of discrimination with the Department of Fair Employment and Housing (DFEH), claiming religious discrimination during his employment with the City. (Ex. 19, p. A92.) On the same day, DFEH issued a Right to Sue Letter, providing respondent with the right to sue the City. (*Id.*, p. A93.) The City was copied on the Right to Sue Letter. (*Ibid.*)

15. On September 28, 2016, Norman A. Traub Associates issued an investigative report sustaining respondent's allegation that he was discriminated against and harassed by Commander R.M. because of his religion (Traub Report). (Ex. H, p. C112.)

16. On October 10, 2016, Dr. Deamer provided responses to five questions posed by the City (October 2016 Response), which was attached to a Physician's Notice of Temporary Medical Restrictions. (Ex. I.) In this October 2016 Response, Dr. Deamer opined that respondent's "vocational stress disorder associated with a hostile work environment" prevented respondent from returning to his work as a Police Officer with the City. (*Id.*, p. C114.) In response to a question asking what events or circumstances caused respondent to have this condition, Dr. Deamer wrote, "one of his fellow officers making persistent negative/pejorative remarks about [respondent's] spiritual/religious convictions." (*Ibid.*) Dr. Deamer also wrote however, that respondent "may be able to" work as a police officer for another police department. (*Ibid.*) On the attached Physician's Notice of Temporary Medical Restrictions, Dr. Deamer checked the box "No," in response to the question, "Do you have a reasonable, professional, medical expectation this employee will be released to his/her usual and customary duties within six (6) months from the date injury/illness began?" (*Id.*, p. C115.)

17. Notably, Dr. Deamer did not state in this October 2016 Response that he was familiar with respondent's job duties as a Police Officer, nor did Dr. Deamer state that respondent was substantially incapacitated for the performance of his usual job duties as a Police Officer for a permanent or extended and uncertain duration. (See Gov. Code, § 20026; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) Dr. Deamer's October 2016 Response, as well as other medical evidence of respondent's condition prior to October 2016, appears to be reports for his worker's compensation case, not for disability retirement.

Memorandum of Understanding (MOU) Between the City and Respondent

18. On a date not established by the record, respondent initiated legal action against the City.

19. On October 31, 2016, respondent and the City executed an MOU settling all respondent's legal claims against the City. (Ex. 20.) The terms of the MOU were contingent, in part, on "approval of [respondent's] industrial disability retirement." (*Id.*, p. A101.)

20. The MOU also contained the following terms:

1. Retirement - Subject to the above contingencies, [respondent] agrees to retire from his position with the City as of February 26, 2016, and not to seek re-employment with the City. He will neither request nor seek in any forum any outstanding or further benefits from the City (i.e., salary, retirement payments, vacation time, sick time, insurance benefits, etc.).

2. Potential Civil Action - With the exception of [respondent's] DFEH claim, [respondent] has not and will not file any lawsuit or action against the City, whether it be in court, an administrative process, arbitration or otherwise, regardless of the legal theory or remedies, and releases the City from any and all claims he may have against the City. The City will pay [respondent] and his attorneys \$222,000.

3. Workers' Compensation Action - Subject to the above contingencies, [respondent] and the City will enter into a Compromise & Release for the sum of \$78,000 with respect to any and all workers' claims against the City of which he has or should have knowledge of at the time of settlement.

4. Industrial Disability Retirement - Subject to the above contingencies, [respondent] will apply for and City will approve an industrial disability retirement for [respondent]. If necessary, [respondent] will cooperate in obtaining a medical report to substantiate a finding that [respondent] is unable to perform the duties of a police officer due to [respondent's] mental condition.

5. Discipline - Regardless of the satisfaction of the contingencies noted above, the date by which discipline can be imposed against [respondent] as a result of [the IA 15-04 Report] is hereby extended, as per Government Code § 3304(d)(2)(B), to March 31, 2017. If the contingences are satisfied, the City will not impose discipline and will not

place any documents from that investigation into
[respondent's] personnel file.

(Ex. 20, pp. A101-A102.)

21. Thus, under the MOU, respondent agreed to permanently sever his employment relationship with the City, and the City agreed to resolve any potential disciplinary action against respondent, contingent upon respondent's successful application for IDR. The MOU also contained the City's guarantee, under Term #4, that it will approve the IDR application that respondent submits. The MOU was signed by respondent; Kevin Rehwald (Rehwald), respondent's attorney in his civil case against the City; Ryan Trotta, respondent's attorney in his worker's compensation case against the City; and Robert Baumann (Baumann), of Adams, Ferrone & Ferrone, respondent's defense attorney in the City's disciplinary case against him. (Ex. 20, p. A103.) For the City, the MOU was signed by Lisa Ritts (Ritts), the City's Risk Manager, and Andy H. Viets (Viets), Senior Assistant City Attorney from the City's Office of the City Attorney. (*Ibid.*)

Respondent's IDR Application

22. On November 2, 2016, respondent filed an IDR application with CalPERS. (Ex. 6, p. A29.) On his IDR application, respondent indicated he held the position of Police Corporal. (*Ibid.*) Respondent certified under penalty of perjury that the information submitted in his IDR application is true and correct to the best of his knowledge. (*Id.*, p. A38.)

23. On November 4, 2016, approximately four days after the execution of the MOU, Dr. Deamer provided the City a letter (Substantial Incapacity Opinion), in which he diagnosed respondent with generalized anxiety disorder. (Ex. R5, p. B28.) In this

Substantial Incapacity Opinion, Dr. Deamer stated that he read the job descriptions for Police Officer and Police Corporal, that he was now familiar with the essential functions of respondent's job duties. (*Ibid.*) Dr. Deamer further opined: "This psychiatric condition and diagnosis have rendered [respondent] permanently and substantially incapacitated from the performance of his duties as a police officer." (*Ibid.*)

24. On December 15, 2016, respondent sent a letter to the City of his intent to retire "effective October 4, 2016, due to industrial disability." (Ex. 21, p. A108.)

25. On December 20, 2016, Foushee, on behalf of the City, sent to CalPERS a letter approving respondent's IDR Application and certifying that respondent was disabled from the performance of his job duties based on his psychological condition (Disability Certification). (Ex. 9.) Foushee stated in this Disability Certification, in relevant part, "after review of medical and any other evidence relevant thereto I have determined that [respondent], a local safety member of the Public Employees Retirement System, employed by the City is incapacitated within the meaning of the Public Employee's Retirement Law for the performance of duties in the position of Police Officer/Police Corporal and hereby find and determine that [respondent] is incapacitated for performance of the usual duties of the position for other California public agencies in CalPERS." (*Ibid.*) Foushee indicated in this Disability Certification that respondent's retirement date was October 4, 2016. (*Ibid.*)

26. On December 27, 2016, CalPERS received the Disability Certification. The City did not provide CalPERS with any disciplinary documents relating to respondent on or after December 27, 2016. As discussed more fully below, CalPERS did not receive respondent's disciplinary documents until 2024, after it had served a subpoena on the City to obtain those records.

27. On January 24, 2017, based on the information provided by the City, CalPERS issued a letter to respondent notifying him that his employer had found him eligible for IDR and that CalPERS had approved his IDR application. (Ex. 10.)

Settlement Agreement Between the City and Respondent

28. On February 14, 2017, respondent and the City executed a Settlement Agreement & Release of All Claims (Settlement Agreement). The Settlement Agreement states in pertinent part:

1.0 Recitals

[¶] . . . [¶]

1.2 The City Police Department's Internal Affairs [IA] Division has investigated two incidents with respect to [respondent] which occurred while he was a probationary corporal, the first incident taking place on November 22, 2015 and the second on December 22, 2015.

1.3 [Respondent] failed to complete his corporal probationary period and was reinstated to his position as a police officer as of February 27, 2016.

1.4 On March 9, 2016, [respondent] submitted a Workers' Compensation Claim form to the City, claiming a cumulative trauma due to "stress"; he subsequently alleged that his injury was due to religious discrimination.

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1.5 In or about August, 2016, [respondent] filed a complaint with the California Department of Fair Employment and Housing regarding alleged religious discrimination against him by the City. He requested a "right to sue" letter which was issued on August 11, 2016.

2.0 Discipline

2.1 The City has closed its investigation without any discipline being imposed on [respondent] related to the Internal Affairs investigation referenced above in paragraph 1.2 and will not place any documents from that investigation in his personnel file.

3.0 Restoration of Corporal Status

3.1 Concurrent with this Agreement being fully executed, City will restore [respondent] to corporal status as of the date of his retirement listed below in section 5.0.

4.0 Workers' Compensation Case

4.1 [Respondent's] workers' compensation case has been resolved by way of a Compromise & Release for the sum of \$58,825.00.

5.0 Retirement

5.1 [Respondent] hereby retires from his employment with City effective October 4, 2016, and will neither pursue nor present, nor cause to be presented, to the City any claims,

actions, complaints or lawsuits with respect to said retirement other than his application for disability retirement benefits which has been approved. In addition, he will not seek further employment with City.

(Ex. 22, pp. A109-A110, bold and underline in original.)

29. The Settlement was signed by respondent, Rehwald, and Andrew Scott of Adams, Ferrone & Ferrone, respondent's defense attorney in the City's disciplinary case against him. (Ex. 22 p. A114.) For the City, the Settlement was signed by Mark Watkins, the City Manager, and Viets. (*Id.*, p. A115.)

30. On February 16, 2017, CalPERS issued a letter notifying the City that respondent was placed on IDR as of February 2017, with an effective retirement date of October 4, 2016. (Ex. 11.)

CalPERS' Discovery of Potential Violations

31. According to Sharon Hobbs (Hobbs), CalPERS' Chief of the Disability and Survivor Benefits Unit who testified at the hearing, in early 2023, an anonymous third party gave CalPERS a partial copy of the Settlement Agreement, demonstrating respondent may not have met the eligibility requirements to apply for IDR. Prior to early 2023, CalPERS was unaware of any of the City's disciplinary actions against respondent, the DEFH claim, the MOU, or the Settlement Agreement.

32. In a letter dated February 28, 2023, CalPERS notified the City that it is conducting a review of respondent's IDR benefits. (Ex. 12, p. A64.) CalPERS requested the City to provide additional information regarding respondent's employment, including but not limited to medical and personnel records, by March 31, 2023. (*Ibid.*)

CalPERS noted that Government Code section 20221 mandates the City to provide CalPERS the requested information. (*Ibid.*)

33. In a letter dated March 31, 2023, Danielle Keys (Keys), the City's current HR Director, responded to CalPERS's request for additional information. (Ex. 13.) In this response, Keys provided to CalPERS the Disability Certification and the Settlement Agreement, but she refused to provide CalPERS with any other personnel information related to respondent's IDR. (*Ibid.*) Keys cited various legal basis for her refusal to disclose the requested information, and she claimed that the City had no personnel records "with the exception of [the] Settlement Agreement." (*Ibid.*) Prior to March 31, 2023, CalPERS did not have a full copy of the Settlement Agreement.

34. In a letter dated May 31, 2023, CalPERS notified the City that it disagreed with the City's objections to release of requested documents. (Ex. 14.) CalPERS also notified the City that the California Department of Justice, Office of the Attorney General (Attorney General's Office) would be investigating the matter going forward. (*Ibid.*) CalPERS then referred the matter to the Attorney General's Office to obtain personnel documents relating to respondent's IDR.

CalPERS' Determination

35. In a letter dated December 15, 2023, CalPERS informed respondent, with copy to the City, of its determination that he is not eligible for IDR (Determination Letter). (Ex. 3, p. A24.) The Determination Letter stated, in relevant part:

CalPERS has determined that your employment ended for reasons which were not the result of a disabling medical condition. Among other things, when an employee chooses to voluntarily resign and is ineligible for reinstatement, and

the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, separation from employment based on the terms of an agreement that prohibits reinstatement or reemployment renders the employee ineligible to apply for IDR.

(*Ibid.*)

36. Thus, according to the Determination Letter, respondent's IDR application was canceled, retroactive to October 4, 2016. (Ex. 3, p. A24.) Additionally, the Determination Letter informed respondent that the cancelation of his IDR benefits, from October 4, 2016 through December 31, 2023, resulted in an overpayment of \$446,575.71. (*Ibid.*) The Determination Letter also provided respondent with the right to appeal CalPERS' determination. (*Ibid.*) On January 5, 2024, respondent appealed CalPERS' determination. (Ex. 4.)

37. On December 18, 2023, the Attorney General's Office issued to the City, an Investigative Subpoena to Produce Documents (Subpoena). (Ex. 15, p. A68.) On January 26, 2024, in response to the Subpoena, the City released respondent's personnel documents from February 2016 through January 2024, including documents relating to the IA investigation of respondent and the MOU. (*Id.*, p. A74.)

38. At the hearing, Hobbs explained that under the PERL, the City was obligated to provide all respondent's relevant personnel records to CalPERS for IDR eligibility determination in 2016, when respondent applied for IDR. Specifically, Hobbs pointed to the 2016 Public Agency & Schools Reference Guide (Reference Guide), which provides employers with detailed information concerning CalPERS' disability

retirement and IDR rules and restrictions. Hobbs stated that the Reference Guide was available on CalPERS' website, and CalPERS also maintained a direct employer's phone line to answer specific questions from employers.

39. The Reference Guide states, in relevant part:

The employer shall not use disability retirement as a substitute for the disciplinary process. (G.C. § 21156 (a)

(2)) Employers must forward all relevant personnel documents and medical records to CalPERS for any of the following circumstances and obtain CalPERS' determination of the member's eligibility for disability retirement before the employer begins the process of a disability determination:

- Disciplinary process underway prior to the member's separation from employment
- The member was terminated for cause
- The member resigned in lieu of termination
- The member signed an Employer Reinstatement Waiver as part of a legal settlement
- The member has been convicted of or is being investigated for a work related felony

(Ex. 8, p. A54, emphasis in original.)

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40. Hobbs further explained that if the City had provided CalPERS with the respondent's relevant personnel documents in 2016, CalPERS would have applied *Haywood* and found respondent ineligible for IDR. According to Hobbs, the Failure to Complete Probation Notification and the IA 15-04 Report were relevant personnel documents that the City did not provide to CalPERS. These documents would have shown that respondent was undergoing discipline, and that discipline was not based on any medical condition, but based on respondent's alleged misconduct regarding falsification of records and failure to follow procedure. Additionally, Hobbs testified that CalPERS would have considered the MOU, had it been provided to CalPERS, as barring respondent from being eligible for IDR.

41. Specifically, Term #1 of the MOU, in which respondent agreed to retire from his position and not seek re-employment with the City, affected a complete severance of the employee-employer relationship. Such a complete severance would have rendered respondent ineligible for IDR because IDR requires the ability for respondent to be reinstated should he recover from his medical condition. Hobbs also found Terms #2 and #3 of the MOU to be problematic because under these terms, respondent agreed to resolve his civil lawsuit and worker's compensation claim against the City contingent on his IDR approval. Hobbs maintained that IDR was not intended to be a "bargaining chip" for settling personnel disputes between the employee and the employer. Moreover, Hobbs stated that Term #4, in which the City agreed to approve respondent's IDR even before he had applied for IDR, violated the PERL, because the City agreed to approve IDR without component medical opinion.

42. On January 30, 2025, CalPERS informed respondent that his appeal is pending before OAH and CalPERS will cancel his IDR benefits upon the issuance of a Proposed Decision in CalPERS' favor. (Ex. 5.) CalPERS noted that respondent's

overpayment will continue to increase each month until his benefits are canceled.

(Ibid.)

Foushee's Testimony

43. Foushee, the City's HR Director from March 16, 2016, until August 13, 2020, when she left the position to assume her current position as the City's HR Project Manager, testified at the hearing. As the City's HR Director in 2016, Foushee had several job duties, including reviewing the pension benefits of City employees. With respect to IDR determinations, Foushee testified that she was responsible for making determinations of disability for the City's peace officers. Foushee reviewed, in her own words, "personnel file information," workers' compensation claims, and medical records to certify disability retirement. Although the Police Department held, in Foushee's words, "the official personnel file," the City's HR Department could request personnel documents of an officer, such as the Failure to Complete Probation Notification and the IA 15-04 Report.

44. Ms. Foushee testified that in 2016, she was familiar with the laws under the PERL regarding IDR. She obtained such information by reading CalPERS publications, including the Reference Guide and CalPERS Circular Letters; accessing the CalPERS' website and the employer's phone line; and attending trainings from CalPERS, which she attended at least twice. When asked if she was aware of the requirement under the PERL that employers are not to use IDR as a substitute for the disciplinary process, Foushee responded that she was aware of the law, but could not recall being aware of *Haywood*. Nor could Foushee recall the specifics of the case law for *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Decision 13-01 (*Vandergoot*). In *Vandergoot*, the Board found an employee's resignation was tantamount to a dismissal for cause

when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and he agreed to waive all rights to return to his former employer. (*Id.* at p. 7, ¶ 18.) Foushee asserted that was not aware of the “details of this law [i.e. the case law under *Vandergoot*]” when she approved respondent’s IDR in 2016. Foushee further asserted that in 2016, the City was not required to notify CalPERS of any disciplinary process against an employee, such as respondent, who was seeking IDR. According to Foushee, the requirement to forward all relevant personnel documents of employees facing disciplinary action before separation from their employment was effective only beginning in 2017, when CalPERS issued a Circular Letter to this effect

45. Foushee insisted she relied on competent medical evidence in determining respondent’s eligibility for IDR. Foushee cited several medical notes from 2015 and 2016 (ex. B-E), respondent’s workers’ compensation deposition (ex. F), and the Traub Report (ex. H), as the evidence on which she relied to determine that respondent was eligible for IDR. Foushee emphasized that Dr. Deamer’s October 2016 Response (ex. I), in which he stated that respondent would not be able to return to work as a Police Officer with the City, was “an important document that [she] relied on in part” in determining respondent’s IDR eligibility. However, Foushee admitted that the City did not solicit the October 2016 Response from Dr. Deamer for IDR purposes, but for, in her words, “work status purposes.” Foushee conceded that Dr, Deamer’s October 2016 Response showed that respondent would not be able to return to work for at least another six months, until April 2017.

46. Foushee claimed that in 2016, she was unaware of, and did not see, documents relating to the City’s disciplinary action against respondent, including the January 4, 2016 Notice of Intent to Interview, the February 23, 2016 Failure to

Complete Probation Notification, and the IA 15-04 Report. Foushee further claimed that she did not see and was not aware of the MOU, when it was executed in 2016 until the end of her tenure as the City's HR's Director in 2020. Therefore, Foushee asserted she was unaware of Term #4 of the MOU, in which the City agreed to approve respondent's IDR before he had even submitted an IDR application. Foushee did admit that Ritts, the Risk Manager who signed the MOU, was a part of the City's HR Department. In fact, Foushee supervised Ritts. Foushee also admitted she was aware Ritt attended a mediation with the Viets, the City Attorney, to resolve legal claims by respondent, although Foushee denied giving authority to Ritts to sign the MOU. Foushee testified the City's attorney would have given Ritts the authority to sign the MOU. Additionally, Foushee claimed Ritts never gave her a copy of the MOU.

47. Foushee further claimed she was not aware of, and did not see the Settlement Agreement. When asked specifically when she first saw the Settlement Agreement, Foushee was evasive and answered that she does not recall the specific time, but she does not recall seeing the Settlement Agreement before 2020. Later, Foushee changed her testimony and stated that she saw the Settlement Agreement sometime in 2017, as it addressed respondent's religious discrimination and hostile work environment claims against the City.

48. Foushee insisted that no City employee instructed her to approve respondent's IDR application. When questioned about whether the City regularly re-evaluates respondent's IDR eligibility to assess for potential reinstatement under the PERL, Foushee initially testified that CalPERS did not require local agencies to regularly re-evaluate employees' IDR eligibility in 2016; it was "more encouraged." According to Foushee, in 2017, CalPERS expressed that employers "should" re-evaluate employee IDR eligibility. When asked whether after 2017, the City has ever re-evaluated any

peace officers placed on disability retirement for IDR eligibility, Foushee first avoided answering the question and then stated that she could not specifically recall any re-evaluations. Foushee later admitted that respondent was not re-evaluated for IDR eligibility from 2016 to 2020, because, according to Foushee, respondent had only left the agency for “a couple of years.”

Credibility Findings: Foushee’s Testimony

49. Foushee’s testimony is deemed not credible for several reasons. First, Foushee could not recall many issues and events during her testimony. For example, Foushee testified she could not specifically recall: the concept of CalPERS precedential decisions, the caselaw in *Haywood* and *Vandergoot*, the requirement for employers to re-evaluate employees for IDR eligibility, whether the City evaluated officers for IDR eligibility after 2017, whether she saw any of respondent’s internal investigation files by the Police Department, and when she first saw the Settlement Agreement. Whether it was purposeful evasion or an inability to recollect past events, Foushee’s memory was unreliable.

50. Second, Foushee’s testimony was inconsistent. Her explanation of some events, such as when she first saw the Settlement Agreement and whether respondent was re-evaluated for IDR eligibility between 2016 and 2020, changed throughout the hearing.

51. Third, Foushee’s claim that she was not aware of the MOU in 2016 is not credible, as it is contradicted by Foushee’s own admission that she was aware Ritts had attended the mediation to resolve the personnel disputes between the City and respondent. It strains one’s credulity to believe that Foushee, as the City’s HR Director and Ritt’s supervisor, did not follow up on the results of the mediation and was kept in

the dark about the existence of the MOU by both Ritts and the Viets, the two City officials who signed the MOU on the City's behalf.

52. Fourth, Foushee's claim that she relied on competent medical evidence in her decision to approve respondent's IDR is contradicted by the documentary evidence in this case. Although Foushee cited Dr. Deamer's October 2016 Response as an important document she relied on in determining respondent's IDR eligibility, by her own admission, the October 2016 Response is not a medical opinion of substantial incapacity for IDR purposes. It is insufficient because Dr. Deamer had only opined in this response that respondent could not return to work at the Police Department for another six months. In fact, before City entered into the MOU on October 31, 2016, there was no medical opinion indicating respondent was substantially incapacitated for the performance of his usual job duties as a Police Officer for a permanent or extended and uncertain duration. Nevertheless, on October 31, 2016, the City entered into the MOU, in which it agreed to approve respondent's IDR. (Ex. 20.) Respondent applied for IDR on November 2, 2016, two days after the City had already agreed to approve respondent's IDR in the MOU. (Ex. 6.) Dr. Deamer wrote his Substantial Incapacity Opinion on November 4, 2016, four days after the City had already agreed to approve respondent's IDR in the MOU. (Ex. R5.) The City sent the Disability Certification to CalPERS on December 20, 2016, approximately one month after the City had already agreed to approve respondent's IDR in the MOU. (Ex. 9.) This timeline of events demonstrates that the City's approval of respondent's IDR was not based on competent medical evidence but based on its agreement to fulfill the terms of the MOU.

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Respondent's Testimony

53. Respondent began working for the City's Police Department in 2003, as a part-time Police Cadet. After graduating from the police academy in January 2005, respondent worked as a patrol officer for four years before working for the property and narcotics crime unit. Beginning in 2009, respondent also had a collateral assignment as a member of the Police Department's Special Weapons and Tactics (SWAT) team. Respondent recounted some incidents he underwent on his job, including one in 2009 in which his partner abandoned him, that caused him stress and confusion. Respondent is currently unemployed and financially relies on his benefits.

54. At the hearing, respondent asserted he was truthful in his IDR application. Respondent stated he was never disciplined by the Police Department, had never seen the IA 15-04 Report until his preparation for this hearing, and was unaware of any discipline pending against him. However, respondent conceded that Commander R.M. interviewed him, in early 2016, as part of the IA investigation into alleged misconduct about falsifying information, although the interview was cut short. Additionally, respondent claimed Commander R.M. orchestrated the IA investigation against him due to religious discrimination.

55. Respondent, however, admitted he signed the MOU. Respondent conceded that as a part of the agreement under the MOU, his DFEH for religious discrimination, was in his words, "conclude[d]." Respondent also conceded that as a part of the agreement under the MOU, discipline would be removed from his personnel file.

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Credibility Findings: Respondent's Testimony

56. Respondent's testimony that the IA investigation under File 15-04 did not result in discipline against him is credible. Kenneth Corney (Corney), the City's Chief of Police from 2009 until his retirement in 2020, testified at the hearing and corroborated this fact. According to Corney, IA investigation under File 15-04 never concluded, the City's HR Department was not involved in the investigation, and a Notice of Intent to impose discipline was likely never issued.

57. However, respondent's assertion that he was unaware of any potential disciplinary action against him is not credible. To begin with, respondent admitted to having been interviewed as a part of the IA investigation against him. Furthermore, respondent signed the MOU, and the MOU directly refers to "the discipline [that] can be imposed against [respondent] as a result of Internal Affairs Investigation file no. 15-04." (Ex. 20, p. 102.) Respondent also had three separate attorneys representing him in negotiating the MOU, one of whom, Baumann, was "[respondent's] discipline attorney" and a signatory to the MOU. (*Id.*, p. A103.) Additionally, Corney admitted under cross-examination that in 2016, respondent failed to pass probation and was reinstated from the rank of Police Corporal to Police Officer due the allegation of misconduct involving falsifying information in a probable cause declaration and failure to follow procedure in a DAR evaluation.

58. Respondent's assertion that he was truthful in his IDR application is also not credible. As a part of the MOU, respondent agreed to retire, apply for IDR, and not seek re-employment. (Ex. 20, pp. A101-A102.) The City, in exchange, agreed to approve respondent's IDR application and not to impose any discipline against respondent. (*Ibid.*) Respondent did not apply for IDR and did not obtain Dr. Deamer's Substantial Incapacity Opinion until after the execution of the MOU on October 31, 2016. Under

these circumstances, it can only be concluded that respondent applied for IDR as a part of the agreement between the City and respondent to confer an additional benefit onto respondent in the settlement of his personnel disputes with the City.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Pursuant to Government Code section 20160, subdivision (b), the Board may correct actions taken by a member agency or CalPERS as a result of errors or omissions. However, the party seeking correction under subdivision (b) bears the burden of establishing the right to do so. (Gov. Code § 20160, subd. (d).) Additionally, in an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) Therefore, in this case, CalPERS bears the burden of proof, and the standard of proof is a preponderance of the evidence.

IDR Statutory Framework

2. Government Code section 21151, subdivision (a), provides:

(a) 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.

3. Pursuant to Government Code section 21152, an application to CalPERS for retirement of a member for disability may be made by, among others, the member's employer (subd. (c)) or the member or any person on his or her behalf (subd. (d)).

4. Government Code section 21154 provides, in relevant part: "On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination."

5. Government Code section 21156, subdivision (a)(2), provides "[i]n determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of *competent medical opinion* and *shall not use disability for the disciplinary process*." (Emphasis added.)

6. Government Code section 21192 provides, in relevant part:

The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, 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, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to

members of the class or category in which it is proposed to employ him or her. . . .

7. These provisions establish the statutory framework for IDR. Specifically, a local safety member employed by an agency contracting with CalPERS is entitled to IDR if he is incapacitated for the performance of duty as the result of an industrial injury, regardless of age or time in service. (Gov. Code, § 21151.) An IDR application may be filed by the local safety member or his employer. (Gov. Code, § 21152.) The local safety member's employer shall make the determination whether the employee is eligible for IDR, not CalPERS. (Gov. Code, § 21154.) However, the determination must be made based on competent medical evidence, and the employer cannot use IDR as a substitute for the disciplinary process. (Gov. Code, § 21156.) A local safety member on IDR, under the minimum age for voluntary service retirement, may be required to undergo a medical examination to determine if he or she is still substantially incapacitated and therefore subject to reinstatement. (Gov. Code, § 21192.) A local safety member on IDR may also apply for reinstatement, if less than six months from compulsory retirement age, and be subject to a medical examination to determine if reinstatement is warranted. (*Ibid.*)

Extinguishment of Reinstatement Rights Renders Respondent Ineligible for IDR

HAYWOOD AND PROGENY

8. Generally, the termination of a member's employment for cause renders the member ineligible for disability retirement. (*Haywood, supra*, 67 Cal.App.4th at pp. 1306-1307; *Smith v. City of Napa (2004)* 120 Cal.App.4th 194, 208 (*Smith*).) In *Haywood*, a firefighter applied for disability retirement after he was terminated for

cause following a series of increasingly serious disciplinary actions against him. (*Haywood, supra*, 67 Cal.App.4th at p. 1295.) The court explained in that case: "[A] firing for cause constitute[s] a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement—the potential reinstatement of [the employment relationship] if it is ultimately determined that he no longer is disabled." (*Id.*, at pp. 1306-1307.)

9. In *Smith*, the court further explained the legislative intent of the disability retirement laws presupposed a continuing employment relationship with the right to reinstatement. That is, the disabled annuitant could petition to return to active service; and/or the employing agency could compel the annuitant to undergo a re-evaluation, and if the disability is no longer continuing, the agency could insist on a return to active service. "Therefore if an applicant is no longer eligible for reinstatement because of a dismissal for cause, this also disqualifies the applicant for a disability retirement." (*Smith, supra*, 120 Cal.App.4th at p. 203.)

10. CalPERS precedential decision *Vandergoot* extends the holding in *Haywood* and *Smith* to situations where the employee resigns before the effective date of the termination for cause. In that *Vandergoot*, the employee applied for a disability retirement just days after he was served with a Notice of Adverse Action (NOAA), informing him he would be dismissed. The NOAA was upheld at a *Skelly* hearing; however, the employee filed an appeal with the California State Personnel Board. Prior to the hearing on his appeal, the employee and his employer entered a settlement agreement whereby the employee resigned from employment for personal reasons and agreed he would never seek employment. (*Vandergoot, supra*, CalPERS Precedential Decision 13-01 at pp. 3-4.) The Board found that the employee's resignation was tantamount to a dismissal for cause. (*Id.*, at p. 7.) The Board reasoned:

"In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*." (*Ibid.*)

11. In *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*), Martinez's employer issued a NOAA seeking discipline against her. Martinez and her employer later executed a settlement agreement whereby Martinez agreed to resign from her employment and never seek reemployment with her employer. In exchange, her employer agreed to pay a cash settlement to Martinez, cooperate with any application for disability retirement filed by Martinez, and withdraw the NOAA. After signing the settlement agreement, Martinez applied for disability retirement. CalPERS denied the application pursuant to *Haywood* and *Vandergoot*. Martinez appealed. The court concluded: "[i]n the language of *Haywood*, Martinez's voluntary resignation 'constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement—the potential reinstatement of [her] employment relationship.'" (*Id.*, at p. 1174.)

12. The court in *Martinez* expressly approved Board's reasoning in *Vandergoot*. The *Martinez* court, observing if Vandergoot were to receive a disability retirement allowance, "he would have no employer who could require him to undergo a medical examination under Government Code section 21192. And it is no longer possible for him to be reinstated under Government Code section 21193. These necessary prerequisites for receiving a disability retirement allowance are simply not present in this case. For this reason alone, CalPERS can fairly consider the terms of the Stipulation for Settlement. . . as being tantamount to a dismissal for purposes of applying the *Haywood* criteria." (*Martinez, supra*, 33 Cal.App.5th at p. 1168.)

APPLICATION OF *HAYWOOD* AND GOVERNMENT CODE SECTION 21156

13. In this case, respondent contends that *Haywood* does not apply in this case because the City did not terminate respondent and did not impose any discipline on respondent. The City, similarly, contends that respondent was not subject to discipline because he was not served a NOAA and therefore *Haywood* does not apply. The City further contends respondent did not “resign” but “retired.” These arguments are not convincing.

14. Reading the *Haywood*, *Smith*, *Vandergoot*, and *Martinez* line of cases as a whole, the linchpin of the eligibility for disability retirement is whether the member has the potential for reinstatement. If the member is unable to be reinstated by the employer to his or her position once the member is no longer disabled, then the member cannot be eligible for IDR. Here, under the MOU, contingent upon the approval of respondent’s IDR, respondent agreed to retire from his position and “not to seek re-employment with the City.” (Ex. 20, p. A101.) Once respondent’s IDR was approved, respondent agreed again, this time under the Settlement Agreement, to retire from his position and “not [to] seek further employment with City.” (Ex. 22, p. A110.) Whether respondent “retired” or “resigned” under the MOU and Settlement Agreement is only a matter of semantics. The language under the MOU and the Settlement Agreement is unequivocal: respondent waived all rights to be further employed or re-employed by the City. Thus, as in *Vandergoot* and *Martinez*, respondent’s agreement of no further employment by the City constituted a complete severance of the employer-employee relationship. Even if respondent recovered from his medical condition, he cannot request reinstatement, and the City cannot demand the same. Therefore, respondent’s waiver of reinstatement rights is tantamount to a termination for cause under *Haywood*, rendering him ineligible for IDR.

NO EXCEPTION UNDER *HAYWOOD* AND *SMITH* APPLIES

15. The Court of Appeal in *Haywood* and *Smith* created several exceptions to the rule that the extinguishment of reinstatement rights renders a member ineligible for IDR. In *Haywood*, the Court of Appeal found that a terminated employee can still seek IDR if the discharge was either the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim for IDR. (*Haywood*, *supra*, 67 Cal.App.4th at p. 1307.) In *Smith*, the court held that because CalPERS had not determined the employee eligible for a disability retirement before his termination from employment, the employee's right to a disability retirement was immature, and his dismissal for cause defeated it. (*Smith*, *supra*, 120 Cal.App.4th at p. 206.) The court further posited two scenarios under which an employee's right to IDR may have matured and thus survive a dismissal for cause. (*Id.*, at pp. 206-207.) First, if there was "an impending ruling on a claim for a disability pension that was delayed, through no fault of [the member's] own, until after [the member's] dismissal." (*Id.* at p. 207.) Second, if there were "undisputed evidence that the [member] was eligible for a CalPERS disability retirement, such that a favorable decision on [the member's] claim would have been a foregone conclusion (as perhaps with a loss of limb)." (*Ibid.*)

16. Here, neither the City nor respondent contends that the City took any personnel action against him due to his work injuries, medical treatment or IDR application. In fact, Corney's testimony established that the City's IA investigation and respondent's failure to complete his probation was due to allegations of misconduct. With respect to the maturity of respondent's right to IDR, respondent signed the MOU, in which he separated his employment from the City without reinstatement rights, on October 31, 2016, before respondent filed his IDR application on November 2, 2016, and before the City had determined him to be eligible for IDR on December 20, 2016.

Therefore, respondent's right to disability retirement was immature, and his waiver of reinstatement rights under the MOU defeated it. There is little evidence that respondent had an impending claim for disability pension that was delayed through no fault of his own. There is also little evidence that respondent was so disabled that his eligibility for IDR would have been a foregone conclusion. Respondent's evidence of permanent disability, prior to his signing of the MOU on October 31, 2016, consists of mainly medical reports created for his workers' compensation cases. However, as noted in *Smith*, "workers' compensation rulings are not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different." (*Smith, supra*, 120 Cal.App.4th at p. 208.) Prior to respondent's signing of the MOU, Dr. Deamer, in his October 2016 Response, found that respondent would not be able to work for the next six months, until April 2017, and that he could work for other police departments. (Ex. I.) Therefore, respondent's condition was nowhere near the level of severity of the "loss of limb" example cited by court in *Smith*. (*Id.*, 120 Cal.App.4th 194 at p. 207.)

Application of Government Code Section 21156

17. Additionally, Government Code section 21156 mandates that the local agency makes its IDR determination based on competent medical opinion and prohibits the agency from using IDR as a disciplinary process. As set forth in Factual Findings 43 to 52, there is little evidence that the City's approval of respondent's IDR was based on competent medical evidence. Rather, the City approved respondent's IDR to fulfill the terms of the MOU.

18. Moreover, as *Haywood* and its progeny hold, IDR is available when an employee must retire from service because he or she has suffered an industrial disability and can no longer substantially perform his or her job duties. The key to IDR

is the right to reinstatement. If the right to reinstatement is absent, the employment separation is more akin to a substitute for discipline. Although respondent was not ultimately disciplined by the City, he was certainly facing discipline, having failed his probation as a Police Corporal and under IA investigation for alleged misconduct. In the MOU, respondent waived his reinstatement rights in exchange for the City's agreement not to impose discipline against him for the same alleged misconduct. (Ex. 20, p. A102.) If respondent truly suffered an industrial disability, he could have simply retired, without having to sign an MOU waiving his reinstatement rights. If the City was truly not using IDR as a substitute for the disciplinary process, it could have resolved its personnel disputes with respondent without an MOU guaranteeing that it would approve respondent's IDR. (*Id.*, p. 102.)

19. Under these circumstances, respondent's eligibility for disability retirement is precluded by operation of Government Code section 21156 and *Haywood* and its progeny.

Correction of Errors Under the PERL

20. CalPERS seeks to recoup the entirety of overpayments to respondent from October 4, 2016, and onward, under Government Code section 20160, which allows the Board to correct errors or omissions. Respondent contends that CalPERS' correction is untimely because it is required to make the correction six months after the discovery of the right under Government Code section 20160, subdivision (a)(2). However, the statute respondent cites governs the request to correct the error or omission by a CalPERS member. In this matter, CalPERS is seeking to correct the error or omission of the contracting agency (i.e. the City), under Government Code section 20160, subdivision (b), and no six-month limitation exists for this type of correction under the statute.

21. However, corrections of erroneous payment to a member under Government Code section 20160 are subject to a three-year statute of limitations under Government Code section 20164. (Gov. Code, § 20164, subd. (b)(1).) This three-year statute of limitation is extended to 10 years “where any payment has been made as a result of fraudulent reports for compensation made, or caused to be made, by a member for his or her own benefit,” and the period of limitation “shall commence either from the date of payment or upon discovery of the fraudulent reporting, whichever date is later.” (Gov. Code, § 20164, subd. (d).)

22. The elements of fraud are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) In this case, respondent, in concert with the City, made a fraudulent report by submitting his IDR application, certifying that he suffered an industrial disability when in fact, it was done to fulfill the terms of the MOU settling his personnel disputes with the City. Respondent either knew or should have known the falsity of his IDR application because inherently, one of the purposes of the public employee pension program is to provide subsistence for disabled or retired employees and their dependents. (*Wheeler v. Board of Administration* (1979) 25 Cal. 3d 600, 605.) Disability retirement is not intended as a benefit for an employee who is facing discipline and will never return to work, nor is it a benefit to be conferred by an employer to an employee during negotiations to settle personnel disputes.

23. Direct proof of fraudulent intent is often impossible to establish. Therefore, the courts have held that fraud may be proven by inference, by circumstances surrounding a transaction, and by the relationship and interest of the parties. (*Taylor v. Osborne-Fitzpatrick Finance Co.* (1943) 57 Cal.App.2d 656, 135 P.2d

598; *Dyke v. Zaiser* (1947) 80 Cal.App.2d 639, 182 P.2d 344; *Bohn v. Watson* (1954) 130 Cal.App.2d 24, 278 P.2d 454; *Bell v. Graham* (1951) 105 Cal.App.2d 765, 234 P.2d 158; *Nelson v. Marks* (1954) 126 Cal.App.2d 261, 271 P.2d 900.) Here, it can be inferred, based on the terms of the MOU, that respondent, in concert with the City, intended to induce CalPERS to make IDR payments. Hobb's testimony established that CalPERS was unaware of the fraud until 2023, when an anonymous third party tipped off CalPERS, and that CalPERS would have denied respondent's IDR had it known about the MOU and the Settlement Agreement. As a result of respondent's fraud, CalPERS made overpayments of at least \$446,575.71, to the detriment of its other members

24. Therefore, all elements of fraud were established. Because respondent made a fraudulent report of his industrial disability to CalPERS, the statute of limitations is extended to 10 years upon the discovery of the fraudulent reporting under Government Code section 20164, subdivision (d), and CalPERS timely sought to correct the erroneous payment on December 15, 2023, after it discovered the fraud in early 2023.

Laches Does Not Bar Recoupment

25. Respondent further contends that the doctrine of laches prohibits CalPERS from recouping of overpayments because CalPERS purportedly waited eight years to cancel respondent's IDR and because respondent is financially dependent on the benefits.

26. In administrative law, the critical period for the claim of laches runs from the time the agency learned or should have learned of the conduct giving rise to the action. (*Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184, 192.) The proponent of a laches defense must establish: (1) unreasonable delay; and (2) or

prejudice to the defendant resulting from the delay. (*City of Oakland v. Oakland Police & Fire Ret. System* (2014) 224 Cal.App.4th 210, 248 (*City of Oakland*).)

27. Here, CalPERS learned of respondent's fraudulent report of IDR when a third party provided a partial copy of the Settlement Agreement in early 2023. CalPERS notified respondent of its determination of his ineligibility for IDR on December 15, 2023. This delay of approximately one year occurred, in part, due to the City's refusal to release respondent's MOU and other personnel records, and therefore was not unreasonable. Although the overpayments to respondent continued to accumulate from early 2023 until December 15, 2023, the amount of overpayments during this period is not as substantial as \$446,575.71, which is the amount of overpayments from October 4, 2016, through December 31, 2023. Thus, even if CalPERS had notified respondent of his ineligibility for IDR immediately after its discovery of the Settlement Agreement in early 2023, the bulk of the disputed overpayments had already been made. (See *City of Oakland, supra*, 224 Cal.App.4th 210, 248.) Given these facts, the equities do not support a laches finding.

28. Accordingly, CalPERS may recoup the entirety of overpayments to respondent, from October 4, 2016, and onward.

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ORDER

1. The appeal of respondent Joshua A. Young is denied.
2. Respondent's eligibility for disability retirement is precluded by operation of Government Code section 21156 and *Haywood* and its progeny.
3. CalPERS may recoup the entirety of overpayments to respondent, from October 4, 2016, and onward, pursuant to Government Code sections 20160 and 20164.

DATE: 10/02/2025



JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings