ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal of the Cancellation of Industrial Disability Retirement Benefits and Change to Service Retirement of:

FINN O. McCLAFFERTY; RICHARD B. CEJA; BRIAN WEIR; MARION WEIR, Respondents,

and

CITY OF BEVERLY HILLS, Respondent.

Agency Case No. 2020-0325 (Statement of Issues)

OAH No. 2020090244

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on December 21 through 23, 2020, by videoconference.

Preet Kaur, Senior Attorney, represented complainant California Public Employees' Retirement System (PERS).

Danny T. Polhamus, Esq., Cantrell Green, PC, represented respondents Richard B. Ceja and Brian Weir.

Richard A. Levine, Esq., Rains Lucia Stern St. Phalle & Silver, PC, represented respondent Finn O. McClafferty.

Rebecca T. Green, Esq., Kyle Brochard, Esq., Richards Watson Gershon, represented respondent City of Beverly Hills (City).

Marion Brewer (formerly Marion Weir) represented herself and participated on the first hearing day only.

The record remained open after the conclusion of the hearing for the parties to lodge closing and reply briefs. The lodged briefs are described in the ALJ's Order issued on March 2, 2021, which is the date the record was closed and the matter submitted for decision. However, the ALJ re-opened the record on March 25, 2021, requesting the parties to brief whether any limitations period within Government Code section 20164 applies to this case. The lodged briefs are described in the ALJ's Order issued on April 13, 2021, which is the date the record was re-closed and the matter resubmitted for decision.

SUMMARY

Respondents Finn O. McClafferty, Brian Weir, and Richard B. Ceja (collectively respondent Members) appeal PERS' decisions to cancel their previously approved industrial disability retirements (IDRs) and seek reimbursement from some of them.

PERS made those decisions after receiving an anonymous ethical complaint, resulting in its investigation and conclusion that the City certified respondent Members' as being eligible for IDRs as a substitute for the disciplinary process. Respondent Members contend their IDRs are valid because they are permanently disabled from injuries sustained at work, and their separation from employment with the City was not due to any discipline.

PERS met its burden of establishing by a preponderance of the evidence that respondent Members were, and are, ineligible for IDRs. Pursuant to the appellate case of *Haywood v. American River Fire Protection District* and its progeny, respondent Members' permanent separation from employment with the City without reinstatement rights precluded their disability retirements. Because their separations from employment were neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, respondent Members are not immune from application of *Haywood*.

The Board of Administration overseeing PERS is required to correct errors or omissions made by PERS or its contracting agencies at any time. Thus, cancellation of respondent Members' IDRs was appropriate, regardless of how many years have passed since their IDRs were approved. Moreover, reimbursement of past IDR benefits is appropriate relief sought by PERS. While it is unclear whether a limitations period applies to such reimbursement relief in this case, respondents Ceja and Weir, from whom reimbursement is sought, waived the affirmative defenses of a limitation period or laches by not pleading them.

Based on the above, respondent Members' appeals are denied.

FACTUAL FINDINGS

Jurisdictional Matters

PARTIES

1. PERS is a defined benefit plan administered under the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.) PERS is governed by its Board of Administration (Board).

2. Respondent Finn O. McClafferty (respondent McClafferty) was employed by the City as a Police Officer (Detective).

3. Respondent Richard B. Ceja (respondent Ceja) was employed by the City as a Police Sergeant.

4. Respondent Brian Weir (respondent Weir) was employed by the City as a Police Sergeant.

5. Respondent Marion Brewer (respondent Brewer) is the former spouse of respondent Weir and was known as Marion Weir. She has a nonmember account with PERS due to her community property interest in respondent Weir's PERS pension.

6. By virtue of their employment, respondent Members became local safety members of PERS subject to Government Code sections 21151, 21154, and 21156. (See Legal Conclusions 3-6.)

7. The City is a public agency that contracts with PERS to provide retirement benefits for its employees, including its local safety members. The provisions of the City's contract with PERS are contained in the PERL.

PERS' DETERMINATIONS AND NOTIFICATIONS

8. In 2015 and 2016, PERS approved respondent Members' applications for IDRs, based on the City's certifications, as required by the PERL. However, upon investigating the matter in 2018, after receiving an anonymous ethical complaint, PERS concluded that, at the time of the events in question, there were pending personnel matters by or against respondent Members and that the City recommended IDR benefits for them as a substitute for the disciplinary process. Key to this determination was that, in resolving the pending personnel matters, respondent Members were permanently separated from employment with the City with no right to return to employment if they recovered from their disabilities. (Exs. 4 & 5.)

9. By letter dated February 21, 2020, PERS notified respondent McClafferty of its determination his IDR would be cancelled. He was advised his benefits would be changed to a service retirement retroactive to the date his IDR began, which would eliminate the tax advantage his IDR allowance provided. He also was advised the cancellation of his IDR benefits reduced his health vesting benefit from 100 percent to 55 percent, and he would be obligated to pay prior premiums he did not have to make while on IDR. (Ex. 5, pp. 57-58.)

10. By letter dated May 4, 2020, PERS notified respondent Weir of its determination his IDR would be cancelled, and he would be obligated to re-pay the IDR benefits he had received, totaling $295,925.47. (Ex. 5, pp. 59-60.)

11. By letter dated May 4, 2020, PERS notified respondent Ceja of its determination his IDR would be cancelled, and he would be obligated to re-pay the IDR benefits he had received, totaling $341,764.39. (Ex. 5, pp. 61-63.)

12. By letter dated August 3, 2020, respondent Brewer was notified that, because her former spouse's IDR had been cancelled, she would stop receiving her portion of respondent Weir's retirement benefit payments. (Ex. 5, pp. 64-65.)

13. Respondent Members were notified of their appeal rights in the above-described correspondence. (Ex. 5, pp. 59-65.) Each timely submitted a written request to appeal PERS' determination described above. (Ex. 6.) Respondent Brewer was provided with notice of the hearing and allowed to participate in it, should she so elect. (Ex. 1.)

14. The City clarified in correspondence to PERS it was not appealing PERS' determinations to cancel respondent Members' IDRs. (Ex. 7.)

PLEADING

15. A Statement of Issues was signed and filed on PERS' behalf by Keith Riddle, Chief of PERS' Disability and Survivor Benefits Division. (Ex. 1.)

Respondent Members' Industrial Disability Retirement Applications

16. On May 7, 2012, PERS received respondent Ceja's IDR application. On June 1, 2015, PERS received respondent McClafferty's IDR application. On May 23, 2016, PERS received respondent Weir's IDR application. All three IDR applications were based on orthopedic work-related injuries. (Exs. 11, 24 & 35.)

17. By letters dated June 4, 2015, May 18, 2012, and May 26, 2016, PERS requested the City to determine whether respondents McClafferty, Ceja, and Weir, respectively, were substantially incapacitated from the performance of their individual job duties due to a physical or mental condition, as required by Government Code sections 21154 and 21156. (Exs. 12, 27-28, 40 & 47; see also Legal Conclusions 5 & 6.)

18. On July 24, 2015, September 18, 2015, and November 2, 2016, the City signed Determination of Disability certifications for respondents McClafferty, Ceja, and Weir, respectively, by which the City certified, in each instance, the applicable respondent Member was disabled from the performance of his individual job duties based on his individual condition; and the determinations were made in accordance with the PERL. The City did not provide PERS with any information related to the three IDR applications other than the certifications. (Exs. 16, 30, 45.)

19. Based on the information provided by the City, on August 12, 2015, October 6, 2015, and November 3, 2016, PERS notified respondents McClafferty, Ceja, and Weir, respectively, that the City found them to be incapacitated for the performance of their individual job duties and consequently their IDR applications had been approved. (Exs. 17, 31 & 47.)

Anonymous Tip Concerning Respondent Members' Industrial Disability Retirements

20. A. On March 28, 2018, an anonymous individual filed an ethical complaint with PERS regarding respondent Members' separation from employment with the City, and the City's approval of respondent Members' IDR applications. (Ex. 3.)

B. The anonymous ethical complainant alleged respondent Members were undesirable employees and all were granted "manufactured retirements" by the City "to get them to leave the [police] department without litigation." (Ex. 3, p. 2.) The ethical complainant further alleged the City and respondent Members "worked together to craft the retirement deals, conceal/seal personnel files related to investigations leading to termination/discipline, and settlement agreements. 'Injuries' leading to IDR were not contested, retirements were fast tracked." (*Ibid.*)

PERS' Investigation of Respondent Members' Industrial Disability Retirements

21. A. On March 30, 2018, and April 3, 2018, PERS notified the City of the above-described ethical complaint regarding the IDR benefits granted to respondent Members. (Ex. 4, pp. 1-6.)

B. Pursuant to Government Code section 20221, subdivision (b), PERS requested the City provide information and copies of various categories of personnel records, including any settlement agreements, necessary for PERS to determine whether respondent Members' IDR applications fit within the appellate case of *Haywood v. American River Fire Protection Dist.* and its progeny. (*Ibid.*; see also Legal Conclusions 9-12.)

22. A. By letters dated June 13, 2018, one for each respondent Member, Shelly Ovrom, the City's Director of Human Resources, responded to PERS. (Ex. 4, pp. 7-9.)

B. Ms. Ovrom provided basic employment information for respondent Members, but refused to provide PERS with any of the requested personnel documents, contending they were confidential and disclosure was prohibited by Penal Code section 832.7.[1] (*Ibid.*)

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[1] Penal Code section 832.7, subdivision (a), provides in relevant part, "the personnel records of peace officers . . ., or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall

C. While the City refused to produce settlement agreements for respondents Weir and McClafferty, it produced a copy of its settlement agreement with respondent Ceja, in which he separated from employment with the City. (*Ibid.*)

23. On June 29, 2018, PERS sent a letter requesting the City "investigate the circumstances surrounding the granting of" the IDR benefits to respondent Members and respondent City provide relevant documents to PERS to ensure the "IDRs were appropriately granted." (Ex. 4, pp. 10-11.) While PERS did not respond specifically to the City's citation of Penal Code section 832.7, PERS noted Government Code section 20221 mandated the City to provide the requested information. (*Ibid.*) PERS also requested the City perform an expedited reevaluation of respondents Weir and Ceja's IDRs. (*Ibid.*)

24. In a letter dated July 11, 2018, Mahdi Aluzri, the City Manager, reminded PERS it had not provided any legal authority concerning the protections of Penal Code section 832.7 previously cited by the City, but also advised because the City was "committed to cooperating" it would need more time to ensure it was acting in compliance with confidentiality laws, and would "apprise you of our progress." (Ex. 4, p. 12.)

25. On August 24, 2018, Mr. Aluzri sent a second letter to PERS. Mr. Aluzri informed PERS the City concluded it could not provide the requested personnel

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not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office."

information pursuant to Penal Code section 832.7, and had not been provided by PERS any legal authority indicating otherwise. While the City agreed to conduct medical reevaluations of respondents Weir and Ceja, it did not believe it had a legal obligation to "investigate" respondent Members' retirements. The City concluded the IDR determinations "were not used as substitutes for the disciplinary process." (Ex. 4, pp. 13-14.)

26. On November 5, 2018, PERS' Legal Office served the City with a subpoena for IDR-related information and also propounded special interrogatories relating to the application for, and the City's approval of, respondent McClafferty's IDR. (Ex. 4, pp. 15-16.)

27. On November 19, 2018, Rebecca T. Green, Counsel for the City, responded to PERS' subpoena and special interrogatories concerning respondent McClafferty. (Ex. 4, pp. 17-20.) Ms. Green raised a number of legal objections to the discovery requests, including Penal Code section 832.7. Ms. Green advised PERS the City refused to produce any information absent a court order. (*Ibid.*)

28. On December 11, 2018, PERS's Legal Office advised Ms. Green PERS was referring the matter to the California Department of Justice, Office of the Attorney General (Attorney General's Office), for further investigation. (Ex. 4, p. 21.)

Investigation of the Attorney General's Office into Respondent Members' Industrial Disability Retirements

29. In December 2018, the Attorney General's Office commenced an investigation into the facts and circumstances relating to respondent Members' IDR applications and the City's approval of them. (Testimony [test.] of Keith Riddle.)

30. As part of the investigation, the Attorney General's Office subpoenaed information and records and interviewed several witnesses, including Ms. Ovrom. (Exs. 18, 33 & 48.) The interview of Ms. Ovrom revealed:

a. Ms. Ovrom is the person responsible for making determinations of disability for City peace officers applying for IDR benefits and made the determinations of disability for respondent Members. (Ovrom test.)

b. Ms. Ovrom could not recall ever denying a peace officer's application for IDR retirement. (Ovrom test.)

c. Ms. Ovrom understood an IDR determination could not be used to exit an employee from the organization in lieu of discipline. (Ovrom test.)

d. Ms. Ovrom was aware of language in PERS rules and regulations requiring agencies to regularly recertify, or re-evaluate, employees it has determined to be disabled. However, Ms. Ovrom did not know if the City had ever done so, other than for respondents Weir and Ceja at PERS' request. (Ovrom test.)

e. During the hearing, Ms. Ovrom testified that in 2015 through 2016, when she made decisions on respondent Members' IDR applications, she was not aware of *Haywood v. American River Fire Protection Dist.* and its progeny. Nor was she advised by PERS she was required to be aware of it.

31. By July 24, 2020, the Attorney General's Office completed its investigation and provided pertinent personnel records of respondent Members to PERS. (Riddle test.) The information and records received through the Attorney General's Office investigation revealed critical facts common to the City's approval of

respondent Members' IDR applications. (*Ibid.*) These reports were the basis of PERS' decision to cancel the respondent Member's IDRs, as detailed above. (*Ibid.*)

Respondent McClafferty's Industrial Disability Retirement

Work-Related Injury

32. Respondent McClafferty was hired by the City as a Police Officer in 1998. He was promoted to Detective in a year not established, but that designation is still considered within the City's Police Officer position. He worked for the City for approximately 17 years before retiring. (McClafferty test.)

33. Respondent McClafferty offered no evidence that he suffered any work injury until 16 years into his employment with the City, when, on June 19, 2014, he reported to his supervisor that he injured his right knee that day after he "slipped on gasoline in the street" while walking to a courthouse to file cases. (Ex. W; McClafferty test.)[2]

34. Respondent McClafferty immediately sought treatment. On June 19, 2014, Dr. Raphael Darvish diagnosed respondent McClafferty with right knee strain and knee derangement. (Ex. Y; McClafferty test.) Dr. Darvish released respondent McClafferty to modified work duty with a treatment plan of elevation, ice pack, physical therapy, and pain medication. (Ex. Y; McClafferty test.)

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[2] Respondent McClafferty's exhibits are referenced by letters. The other respondent Members' exhibits are referenced by letters preceded by their last names.

35. On June 19, 2014, respondent McClafferty filed a workers' compensation claim for injury to his right knee. (McClafferty test.; Ex. BB.)

36. On June 25, 2014, the City placed respondent McClafferty on paid leave; he never returned to work. (Ex. 18, p. 4.) Respondent McClafferty's last day physically at work was June 24, 2014. (*Ibid.*) Respondent McClafferty testified the City placed him on temporary total disability as a result of this injury. His testimony is corroborated by various doctors' reports admitted as administrative hearsay pursuant to Government Code section 12513, subdivision (d).[3] (See, e.g., Exs. Y, TT, QQ, KK, II & FF.)

37. By August 2014, respondent McClafferty began treatment with orthopedic surgeon James E. Tibone. Over several months he was given conservative treatment for pain to his right knee, including an MRI, ultrasound, a brace, physical therapy, and blood plasma injection. (McClafferty test.; Exs. TT, SS & QQ.)

38. On March 18, 2015, Dr. Tibone issued a two-page workers' compensation Permanent and Stationary Report (P&S report). (McClafferty test., Ex. BBB.) Dr. Tibone concluded respondent McClafferty had chronic quadriceps tendinitis which prevented him from running, kneeling, squatting, and doing police work. (McClafferty test.; Ex. BBB.) Dr. Tibone found those impairments meant respondent McClafferty could no longer perform police work and he should retire from service. (McClafferty test.; Ex. BBB.)

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[3] "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. . . ." (Gov. Code, § 11513, subd. (d).)

39. On April 6, 2015, the City's workers' compensation adjuster, Athens Administrators, sent respondent McClafferty a Notice Regarding Permanent Disability Benefits Denial. (Ex. 13; McClafferty test.) In this document, Athens Administrators alleged McClafferty was not eligible for permanent disability benefits because he had been discharged from care and had recovered from his injury based on Dr. Tibone's March 2015 report. (Ex. 13, p. 1.) Respondent McClafferty was surprised by the notice because it contradicted what Dr. Tibone had told him about retiring from police work. (McClafferty test.)

PERSONNEL ACTION

40. In October 2014, respondent McClafferty was interviewed by investigators concerning a City Police Department internal investigation involving him and another officer. (McClafferty test.)

41. The investigation concerned a video respondent McClafferty produced in April 2012 regarding the purported malfunction of a pepper spray canister. (Ex. 9, p. 2.) The video was allegedly used in November 2013 as evidence by respondent Ceja in the arbitration of his appeal of the City's termination of his employment. (*Ibid.*) During a subsequent hearing day of the arbitration in December 2013, the veracity of the video allegedly was challenged by the City. (*Ibid.*)

42. Respondent McClafferty was vague about when he first learned he was being investigated. He testified he could not remember exactly when, but believed it was in October 2014, about the time he was interviewed. However, he also testified it was possible he learned earlier.

43. A. On November 14, 2014, the City issued to respondent McClafferty a Notice of Intent to Take Disciplinary Action, i.e., formal notice of the City's intent to

terminate him from employment due to misconduct (Notice of Disciplinary Action). (Ex. 9.)

B. The Notice of Disciplinary Action alleged respondent McClafferty made false or misleading statements in the video he produced regarding the malfunction of a pepper spray canister which was used during respondent Ceja's arbitration hearing. (Ex. 9, p. 2.)

C. The Notice of Disciplinary Action alleged respondent McClafferty made false entries in an official report, violated the Law Enforcement Code of Ethics, engaged in unbecoming conduct, and engaged in conduct unbecoming of an officer. (Ex. 9, p. 1.)

44. On November 17, 2014, respondent McClafferty's attorney appealed the Notice of Disciplinary Action and requested a *Skelly* hearing. (Ex. 10, p. 2.) The *Skelly* hearing never took place. (McClafferty test.)

SEPARATION FROM EMPLOYMENT WITH THE CITY

45. On May 29, 2015, respondent McClafferty submitted his IDR application. On June 4, 2015, PERS requested the City determine whether respondent McClafferty was substantially incapacitated.

46. In June or July 2015, a meeting took place at City Hall, attended by respondent McClafferty, his labor counsel and workers' compensation counsel, Ms. Ovrom, Mr. Aluzri, and the City Attorney. (McClafferty test.)

47. In July 2015, the City and respondent McClafferty entered a "Retirement and General Release Agreement" (Settlement Agreement) to resolve all personnel disputes and separate respondent McClafferty from his position of Police Officer with

the City. (Ex. 14.) At this time, respondent McClafferty was 52 years old, which was past the minimum age of voluntary service retirement (50 years old) for a City Police Officer. (McClafferty test.)

48. The Settlement Agreement recites: respondent McClafferty's leave of absence due to work injuries; the City's investigation of allegations of misconduct against him; the Notice of Disciplinary Action; his IDR application; and his workers' compensation claim. (Ex. 14, p. 1.) The Settlement Agreement also states, "The City has received and reviewed the medical evidence and believes that it demonstrates that Employee is qualified for IDR." (*Id.*, p. 1, ¶ C.)

49. Respondent McClafferty and the City agreed in the Settlement Agreement to resolve all claims, except the workers' compensation case. The City suspended activity on the Notice of Disciplinary Action until respondent McClafferty's retirement or return to work. (Ex. 14, p. 2, ¶ 2.) Respondent McClafferty agreed to "take all actions necessary to promptly file and support" his IDR application and the City agreed to promptly issue a decision and approve the application if it met the "standards in the PERL" (*Id.*, p. 1, ¶ 1). If the IDR application was not approved, the Settlement Agreement would have "no force or effect" (*id.*, p. 1, ¶1) and the City would reserve its options to proceed with the Notice of Disciplinary Action (*id.*, p. 2, ¶ 2). If the IDR application was approved, the City would withdraw and rescind the Notice of Disciplinary Action, close the investigation, remove the investigation and Notice of Disciplinary Action from his personnel file (*id.*, p. 2, ¶ 2), and respondent McClafferty would be considered an "honorably retired peace officer" with an endorsement to carry a concealed and loaded firearm (*id.*, p. 2, ¶ 3).

50. Paragraph 5 of the Settlement Agreement stated the following regarding McClafferty's termination of employment and reinstatement rights:

> Retirement and No Right to Reinstatement or Re-employment. Employee acknowledges that effective with his retirement, he will permanently terminate all employment with employer. Employee waives all mandatory or permissible rights he may have, if any, to re-employment, reinstatement or future employment with City. Employee further acknowledges that he shall not be eligible for re-employment, reinstatement or future employment, and further agrees that he will not apply for or otherwise seek employment with City.

(Ex. 14, p. 3, ¶ 5.)

51. On a date not established, respondent McClafferty's workers' compensation counsel requested Athens Administrators' change its prior denial of permanent disability benefits. (Ex. 15, p. 1; McClafferty test.)

52. On July 6, 2015, Athens Administrators issued a Notice Regarding Permanent Disability Benefits Payment Start, in which it advised respondent McClafferty he would receive disability benefits in bi-weekly payments, totaling $18,995. (Ex. 15, p. 1.) This notice did not provide a medical basis for Athens Administrators granting the benefits.

53. As explained above, on July 24, 2015, the City signed respondent McClafferty's Determination of Disability certification.

54. No further disciplinary action was taken against respondent McClafferty pursuant to the Notice of Disciplinary Action. Respondent McClafferty testified the City

never requested to go forward on the matter, and he had no record of formal discipline against him by the City during his entire career.

Respondent Weir's Industrial Disability Retirement

Work-Related Injuries

55. Respondent Weir was hired by the City as a Police Officer in 1996. He was promoted to Detective and Police Sergeant before retiring after approximately 20 years of service. (Weir test.)

56. Respondent Weir testified he had numerous work injuries throughout his employment with the City.

57. Respondent Weir testified his first injury was in 1997, when he hurt his back in a car accident while on duty. None of the admitted medical documentation substantiates this part of his testimony.

58. In August 2012, respondent Weir, while a member of the Police Department's SWAT team, fell off of a SWAT truck, and injured his head, neck, and back. (Weir test.; Ex. Weir A, p. 3.)

59. In 2013, respondent Weir was involved in an intersection car crash and again sustained injuries. (Weir test.; Ex. Weir A, p. 4.)

60. Respondent Weir's last injury while on duty occurred on April 26, 2016, when he was hurt jumping over fences during a foot pursuit of a suspect. (Weir test.; Ex. Weir S.) Respondent Weir testified this last incident caused him significant pain.[4]

61. On April 29, 2016, respondent Weir went on sick leave. He testified he did so because he was in pain from his back injuries, and could feel tingling in his legs. Respondent Weir also testified the accumulation of injuries sustained over his career with the City got to the point in April 2016 where he suffered extreme pain wearing his protective vest and gun belt. Reports from Kenneth Sabbag (Exs. Weir A & B), an orthopedic surgeon, corroborate this last point. Respondent Weir testified he feared he could not properly perform his job anymore and decided to retire. However, respondent Weir admitted while testifying he did not obtain a doctor's note instructing him to stop work.

PERSONNEL ACTION

62. In March and December 2014, respondent Weir filed two civil complaints for monetary damages against the City (civil litigation), which were later consolidated. (Exs. 20, 21, 23, p. 1 & 26, p. 1.) Respondent Weir alleged in those cases he was subjected to retaliation by the City because he notified officials of the Police Department a fellow Sergeant made indecent and inappropriate comments about the corpse of a celebrity at the scene of her death in February 2012. (Ex. 21, pp. 3-5, ¶¶ 14,

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[4] There are a few other injuries referenced in two reports (Exs. Weir A & B), but those reports were admitted only as administrative hearsay. Since respondent Weir did not specifically testify about these other incidents or injuries, the two reports alone cannot support a finding about them. (Gov. Code, § 11513, subd. (d).)

17 & 18.) Respondent Weir alleged the retaliation came in the form of denied promotions and other job benefits occurring in 2012, 2013, and 2014.

63. Respondent Weir's civil litigation continued throughout 2015, which respondent Weir testified was a "contentious kind of time" for him. Respondent Weir testified the City continued to retaliate against him in 2015. For example, two internal complaints were made against respondent Weir in 2015. (Exs. 22, p. 1; 33, p. 3; Weir test.) And, on March 10, 2015, an attorney representing respondent Weir in the City's investigation of one of the two internal complaints requested the City's Police Department recuse itself from the investigation due to animosity created by respondent Weir's civil litigation. (Ex. 22.)

64. On May 6, 2016, the California Court of Appeals stayed the trial of the civil litigation, pending review of a petition for peremptory writ of mandate the City had filed after denial of a summary judgment motion it had filed. (Ex. 23, p. 1.)

65. The City took no formal disciplinary action against respondent Weir related to either internal complaint. (Ex. 33, p. 3; Weir test.) Respondent Weir had no record of formal discipline against him by the City.

SEPARATION FROM EMPLOYMENT WITH THE CITY

66. In May 2016, the City and respondent Weir entered into a "Settlement Agreement and Release of Claims" (Settlement Agreement) to resolve all personnel disputes and separate respondent Weir from his employment with the City. (Ex. 23, p. 1.)

67. The Recitals of the Settlement Agreement describe: the civil litigation; the stay issued by the Court of Appeals; that on May 16, 2016, respondent Weir "will go on

paid leave pending disability retirement;" respondent Weir will "immediately apply for disability retirement;" and that respondent Weir will separate from employment on the date he receives a determination on his disability retirement application. (Ex. 23, p. 1.)

68. In the Settlement Agreement, the City agreed to pay respondent Weir $800,000 (Ex. 23, p. 2, ¶ 2, B) to resolve his claims for "physical injuries, physical sickness, and emotional distress arising therefrom." (*Id.*, p. 2, ¶ 2, C.) Respondent Weir released all known and unknown claims against the City. (*Id.*, pp. 3-4, ¶¶ 7-8.) Respondent Weir would dismiss the civil litigation. (*Id.*, p. 3, ¶ 5.) The City would "not interfere with WEIR's ability to file a claim for disability retirement." (*Id.*, p. 3, ¶ 13.)

69. In addition, respondent Weir waived his reinstatement rights in paragraph 16 of the Settlement Agreement as follows:

> No Re-employment. In consideration for the promises made by THE CITY in this Agreement, WEIR agrees that he will not seek or accept future work from THE CITY. If WEIR does seek or obtain such employment after the date of the execution of this Agreement, this Agreement shall constitute sufficient cause for refusal to hire or for the termination of any such employment.

(Ex. 23, p. 5.)

70. As described above, respondent Weir signed his IDR application on May 13, 2016, at or after the time he executed the Settlement Agreement. In his IDR application, respondent Weir claimed incapacity to perform his job duties based on back injuries occurring in August 2012 when he fell off the SWAT truck, November

2013 when he was involved in the car crash, and inability to wear a safety vest and gun belt. (Ex. 24, pp. 2, 9.)

71. On May 16, 2016, respondent Weir's attorney dismissed the civil litigation. (Ex. 26, p. 1.)

72. On May 26, 2016, PERS requested the City determine whether respondent Weir was substantially incapacitated. (Ex. 27.)

73. Respondent Weir went on paid administrative leave beginning on June 2, 2016; he never returned to duty. (Ex. 33, p. 3.)

74. On June 14, 2016, the City requested additional medical records from respondent Weir to substantiate his IDR application and requested respondent Weir "open a workers' compensation claim" in order to facilitate processing of his IDR application. (Ex. Weir W, p. 123, ¶ 11.)

75. In or about June 2016, respondent Weir filed claims for workers' compensation benefits based on his injuries described in his IDR application. (Weir test.; Ex. Weir HH.)

76. By a letter dated July 29, 2016, respondent Weir's civil litigation attorney wrote a letter to the attorney representing the City in the civil litigation complaining the City had delayed consummation of the Settlement Agreement by its failure to send needed documentation to PERS in connection with the IDR application. (Ex. Weir W.)

77. By a letter dated August 5, 2016, the attorney representing the City in respondent Weir's civil litigation responded, summarizing respondent Weir's attorney's above-described letter as an attempt to "assign fault to the City for not having made a determination on his [respondent Weir's] claim for an industrial disability retirement."

(Ex. Weir X, p. 127.) The City's attorney also stated the "City could have legitimately denied his claim for an industrial disability retirement" based on inadequate medical documents he submitted. (*Id.*, p. 128.)

78. On a date not established, Dr. Kenneth Sabbag, an orthopedic surgeon, was selected to perform an agreed medical evaluation (AME) of respondent Weir in connection with his workers' compensation claims. (Ex. Weir A.)

79. On September 16, 2016, Dr. Sabbag examined respondent Weir and issued an AME report. (Weir test.; Ex. Weir A.) Dr. Sabbag diagnosed respondent Weir with high Grade II spondylolisthesis (one vertebra slipped onto the one below it), cervical spine mechanical pain, and mild facet disease. (Ex. Weir A, p. 24; Ex. 30.) Dr. Sabbag noted respondent Weir must "limit his bending, twisting, torqueing, stooping, and lifting more than 20 pounds to an occasional basis." (Ex. Weir A, p. 26; Ex. 30.)

80. On November 2, 2016, the City certified respondent Weir was incapacitated for performing his duties as a Police Sergeant on the basis of symptomatic high Grade II spondylolisthesis; slight disc disease in the cervical spine; his preclusion from heavy lifting; and the limitation of his "bending, twisting, torqueing, stooping, and lifting more than 20 pounds to an occasional basis." (Ex. 30.)

Respondent Ceja's Industrial Disability Retirement

WORK-RELATED INJURIES

81. Respondent Ceja was hired by the City as a Police Officer in 1996. He was promoted to the position of Police Sergeant in 2009, which was his position when he retired. (Ceja test.)

82. Respondent Ceja testified he suffered foot and knee injuries in 2010, but he submitted no documentation concerning contemporaneous treatment for them.

83. On October 11, 2011, respondent Ceja reported to the City an injury to his feet occurred on October 10, 2010. (Ex. Ceja O, pp. 67-68.) Respondent Ceja began receiving treatment for pain in his feet by Dr. Raphael Darvish on October 13, 2011, which continued through November 28, 2011. (Exs. Ceja C, D, E, F, G & H; Ceja test.)

84. As explained below, on October 20, 2011, the City took respondent Ceja off work and placed him on administrative leave due to a personnel investigation against him. (Ex. 41, p. 10; Ceja test.) However, Dr. Darvish also placed respondent Ceja on light duty status while treating him. (Exs. Ceja C, D, E, F, G & H; Ceja test.)

85. Respondent Ceja testified he continued to receive treatment for planter fasciitis on both feet through the rest of 2011 and 2012, as corroborated by medical reports admitted as administrative hearsay from podiatrist Leslie G. Levy and orthopedic surgeon Andrew Roth. (Ceja test.; Exs. Ceja B & I.)

86. On August 22, 2013, Dr. Roth performed an AME on respondent Ceja and issued a medical report with restrictions, finding respondent Ceja should "avoid" frequent flexion, repetitive heavy lifting, physical combat or wrestling, jumping, and prolonged walking on uneven surfaces. (Exs. 42, pp. 1-2; Ceja I.) Dr. Roth further opined based on the relevant job duties, respondent Ceja would have "some difficulty returning to the occupation." (Exs. 42, pp. 1-2; Ceja I, p. 28.)

87. On October 1, 2013, Dr. Roth issued a supplemental report stating he stood by his opinions in the August 22, 2013 report. (Exs. 42, pp. 1-2; Ceja J, p. 48.)

88. Respondent Ceja returned to work in January 2015. On February 4, 2015, Dr. Jay Doostan, respondent Ceja's primary physician, who is an internist, issued a letter stating he performed a "comprehensive physical and neurological examination" and, except for mild low back discomfort, respondent Ceja is in perfect health and can "return to his full time job without any limitation or restriction." (Exs. 42, p. 2; Ceja K, p. 51; Ceja test.)

89. Respondent Ceja testified he was doing light duty by July 2015. He also was studying to re-certify for peace officer standards and training (POST), since he had been out of service for so long. However, respondent Ceja also testified he was still in pain from his injuries and did not feel like he could perform the duties of a Police Sergeant. He discussed his job requirements with Dr. Doostan and showed him Dr. Roth's reports. Respondent Ceja decided to retire.

90. On July 2, 2015, Dr. Doostan issued a letter stating he agreed with respondent Ceja's decision to retire. (Ex. Ceja L.) Dr. Doostan's letter, admitted as administrative hearsay, corroborates respondent Ceja's testimony the two discussed respondent Ceja's job duties and Dr. Roth's reports. However, the letter does not state why Dr. Doostan changed his February 2015 opinion on respondent Ceja's condition.

PERSONNEL ACTION

91. On June 24, 2011, the City commenced a personnel investigation against respondent Ceja for his use of foul language during roll call. (Ex. 48, p. 1.) On June 26, 2011, the City learned during the investigation of respondent Ceja's possible misuse of pepper spray on civilians exiting a punk rock concert on January 6, 2011. (Ex. 41, p. 3.)

92. On October 5, 2011, respondent Ceja was interviewed as part of the investigation against him. (Ex. 41, p. 2, fn. 3, p. 3.) As described above, respondent Ceja

reported his lingering foot injury the following week, on October 11, 2011. Respondent Ceja was interviewed again as part of the investigation on October 19, 2011. (Ex. 41, p. 2, fn. 3, p. 3.)

93. On March 6, 2012, the City issued to respondent Ceja a Notice of Intent to Dismiss, alleging he misused pepper spray on January 6, 2011, made untruthful statements during the investigation regarding his misuse of pepper spray, and used profanity during a roll call. (Ex. 41, pp. 2-5.) Respondent Ceja waived his right to a *Skelly* hearing, the City issued a Notice of Termination effective April 6, 2012, respondent Ceja appealed the termination, and the dispute was scheduled for arbitration. (*Id.*, p. 6.)

94. As described above, respondent Ceja filed his IDR application on April 25, 2012, after the City took personnel action against him. PERS requested the City to determine whether respondent Ceja was substantially incapacitated on May 18, 2012. On December 13, 2012, the City requested PERS for an extension until June 13, 2013. (Ex. 37, p. 1.)

95. On April 3, 2013, respondent Ceja filed a civil complaint for monetary damages against the City, alleging the City retaliated against him after he complained about another police officer making false police reports. (Ex. 38, p. 3, ¶ 13.) Respondent Ceja alleged the investigation and his termination were part of the pattern of retaliation against him. (*Id.*, p. 4, ¶¶ 16-17.)

96. Respondent Ceja's arbitration was heard on various dates throughout 2013, and concluded on December 13, 2013. (Ex. 41, p. 1.)

97. On October 14, 2014, the City refused to certify respondent Ceja was disabled, concluding there was insufficient medical documentation demonstrating he was incapacitated for performance of his job duties. (Ex. 39, p. 1.)

98. On November 25, 2014, the arbitrator issued his arbitration award in favor of respondent Ceja. (Ex. 41.) While the arbitrator found respondent Ceja had inappropriately uttered "you fucks" during a roll call, he found respondent Ceja had not used pepper spray inappropriately against civilians or later lied about it during the investigation. While the arbitrator affirmed a reprimand to respondent Ceja for the profanity, the arbitrator set aside the termination, and reinstated respondent Ceja to his position with full benefits and wages reimbursed. (Ex. 41.)

99. Effective January 20, 2015, the City reinstated respondent Ceja to his former position. (Ex. Ceja Y; Ceja test.) Respondent Ceja was reinstated to light duty because the City had received Dr. Roth's report, which the City believed implemented work restrictions. (Ex. Ceja Z.) The City offered to "engage in the interactive process to address potential disability and reasonable accommodation issues." (*Ibid.*)

100. On April 10, 2015, respondent Ceja and the City began engaging in an interactive process, with the assistance of Shaw HR Consulting, to explore reasonable accommodation options and support respondent Ceja "to be able to return to work as a Police Sergeant." (Ex. 42, p. 1.)

101. On April 15, 2015, the City granted respondent Ceja a temporary reasonable accommodation to allow him to work in the Police Sergeant position. (Exs. 42, p. 3; 43, p. 1.)

102. Shaw HR Consulting scheduled a Fitness for Duty (FFD) examination for respondent Ceja for June 25, 2015. (Ex. 43, at p. 2.) Respondent Ceja failed to attend

the FFD Examination. (*Ibid.*) Shaw HR Consulting scheduled an accommodations meeting for June 30, 2015; however, respondent Ceja's civil litigation attorney canceled the meeting and stated he would be unavailable all of July 2015. (*Ibid.*)

103. On August 6, 2015, Shaw HR Consulting issued a letter notifying the parties it was closing its file after being "notified of a global settlement completed at mediation." (Ex 43, p. 2.)

SEPARATION FROM EMPLOYMENT WITH THE CITY

104. In September 2015, the City and respondent Ceja entered a "Settlement Agreement and Release of Claims" (Settlement Agreement) to resolve all personnel disputes and separate respondent Ceja from his position as a Police Sergeant. (Ex. 44, p. 1.) Respondent Ceja signed the Settlement Agreement on September 11, 2015, and the City signed it on September 18, 2015. (*Id.*, p. 7.)

105. The Settlement Agreement recites: respondent Ceja was terminated; appealed the termination; the dispute went to arbitration; the arbitrator issued an award in favor of respondent Ceja and reinstated him to employment; respondent Ceja filed litigation against the City; respondent Ceja and the City participated in mediation "which resulted in the resolution of all existing and potential claims which [Ceja] had or has against [the City]; and respondent Ceja's "employment with the City ended on September 11, 2015." (Ex. 44, p. 1.)

106. Respondent Ceja and the City agreed to resolve all claims, including the following: Respondent Ceja would be paid $900,000.00 to resolve his claims for "physical injuries, physical sickness, and emotional distress arising therefrom." (Ex. 44, p. 2, ¶ 2, C.) Respondent Ceja released all known and unknown claims against the City.

(*Id.*, pp. 3-4, ¶¶ 5-6.) Respondent Ceja would dismiss the civil litigation. (*Id.*, p. 2, ¶ 4.) Respondent Ceja's counsel would provide a "dismissal of Litigation." (*Id.*, p. 2, ¶ 2, D.)

107. Paragraph 14 of the Settlement Agreement stated the following regarding respondent Ceja's reinstatement rights:

> No Re-employment. In consideration for the promises made by THE CITY in this Agreement, CEJA agrees that he will not seek or accept future work from THE CITY. If CEJA does seek or obtain such employment after the date of the execution of this Agreement, this Agreement shall constitute sufficient cause for refusal to hire or for the termination of any such employment.

(Ex. 44, p. 5, ¶ 14.)

108. On September 18, 2015, the City certified respondent Ceja was substantially incapacitated. (Ex. 45.) Ms. Ovrom testified she did not have Dr. Roth's 2013 report when she initially reviewed respondent Ceja's situation. Ms. Ovrom had Dr. Roth's report when she re-evaluated respondent Ceja. Ms. Ovrom testified it is likely she initially would have certified respondent Ceja as incapacitated had she seen Dr. Roth's 2013 report.

Other Relevant Facts

109. At PERS' request, the City had respondents Weir and Ceja re-evaluated. In July 2019, Dr. Sabbag issued a report maintaining his prior conclusions concerning respondent Weir's disability. (Ex. Weir B.) In April 2019, Dr. Roth issued a report maintaining his prior conclusions concerning respondent Ceja's disability. (Ex. Ceja N.)

110. Respondent McClafferty. No evidence was presented indicating PERS is seeking reimbursement from respondent McClafferty. Nonetheless, respondent McClafferty testified the cancellation of his IDR benefits has been "catastrophic." His wife recently lost her job. They have children still in school. Therefore, respondent McClafferty applied for a regular service retirement, since he is past the minimum age of retirement. Respondent McClafferty testified because his IDR payments were not taxable, he will have to revisit his income tax filings from past years if his IDR remains cancelled. He also testified his family's health insurance will be more expensive under a regular service retirement than an IDR.

111. Respondent Weir. After his retirement from the City, respondent Weir became employed full-time in an executive position with a security firm. It is light duty desk work. Respondent Weir testified his IDR benefits stopped in August 2020, including cancellation of his health insurance. As described above, PERS is demanding respondent Weir pay back $295,925.47 of IDR benefits previously paid to him. He is now 52 years old and eligible for a service retirement.

112. Respondent Ceja. He is now 45 years old and therefore too young for a service retirement. He also is employed in an executive position with a security firm. Respondent Ceja testified he lost his health insurance provided through his IDR and has not found a source of income to replace his IDR monthly benefit. As described above, PERS is demanding respondent Ceja pay back $363,930.06 of IDR benefits previously paid to him.

113. Respondent Brewer. No evidence was presented by or on behalf of respondent Brewer.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. A. Pursuant to Government Code section 20160, subdivision (b), the Board may correct actions taken by a member agency or PERS 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. (*Id.*, subd. (d).)

B. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) Thus, the party asserting a claim or making changes has the burden of proof in administrative proceedings. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 *[McCoy]*.) Put another way, there is a built-in bias in favor of the status quo; the party seeking to change the status quo usually has the burden of proving it. (*Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1388.)

C. In this case, PERS bears the burden of proof, as required by Government Code section 20160, subdivision (d). That provision is in line with the general case law cited above, in that PERS had honored respondent Members' IDRs for several years before deciding to cancel them and seek reimbursement of benefits paid to some of them. In these regards, PERS is proposing to make changes that will disturb the status quo of the parties.

2. The standard of proof in this matter is the preponderance of the evidence. (*McCoy, supra*, 183 Cal.App.3d at p. 1051.) That standard of proof is met

when a party's evidence has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

PERL Provisions Related to Industrial Disability Retirement

3. Government Code section 21151, subdivision (a), provides:[5]

> (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.

4. Pursuant to section 21152, an application to PERS 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)).

5. Section 21154 provides, "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."

6. 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.)

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[5] Undesignated statutory provisions are to the Government Code.

7. Section 21192 provides:

> 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.

8. In summary, the above provisions provide a local safety member employed by an agency contracting with PERS is entitled to an IDR if incapacitated for the performance of duty as the result of an industrial injury, regardless of age or time in service. (§ 21151.) An application for an IDR may be filed by the local safety member or his employer. (§ 21152.) The local safety member's employer shall make the determination whether the employee is eligible for an IDR, not PERS. (§ 21154.) However, the determination must be made based on competent medical evidence; the employer cannot use an IDR as a substitute for the disciplinary process. (§ 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. (§ 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.*)

A Member is Not Eligible for an Industrial Disability Retirement When Separated from Employment Without a Right of Return to Service

TERMINATION FROM EMPLOYMENT

9. A. Termination of the employment relationship usually renders an employee ineligible for a disability retirement. (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1297 *(Haywood); Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206 *(Smith).*)

B. In *Haywood*, the court explained, "[W]hile termination of an unwilling employee for cause completely severs the employer employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled." (*Haywood, supra*, 67 Cal.App.4th at p. 1296.)

C. In *Smith*, the court further explained the legislative intent of the disability retirement laws presupposed a continuing, if abated, employment relationship, i.e., the disabled annuitant could petition to return to active service, and/or the employing agency could compel testing to determine if the disability is no longer continuing, at which point it 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.)

RESIGNATION

10. The *Haywood* court noted the reasoning underlying the above-described rule also applies where the employment relationship had been terminated through resignation with no right to return to service, nodding with approval to cases such as *Collins v. County of Los Angeles* (1976) 55 Cal.App.3d 594 [employment relationship had been terminated through resignation] and *County of San Mateo v. Workers' Comp. Appeals Bd.* (1982) 133 Cal.App.3d 737 [employee resigned upon being given the choice of resignation or termination]. (*Haywood, supra*, 67 Cal.App.4th at p. 1308.) The *Haywood* court noted that although those other decisions were not directly controlling, they were closely analogous and may be considered in applying the PERL. (*Ibid.*)

11. A. In its Precedential Decision *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (No. 13-01, Oct. 2013), the Board applied *Haywood* in the absence of an actual dismissal for cause.[6]

B. In that case, Vandergoot 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, Vandergoot filed an appeal with the California State Personnel Board. Prior to the hearing on his appeal, Vandergoot and his employer entered a stipulation whereby Vandergoot resigned from employment for personal reasons and agreed he would never seek employment

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[6] Pursuant to Government Code section 11425.60, subdivision (a), an agency may designate a decision as one to be relied upon as precedent.

again with his employer, while his employer would withdraw the NOAA and remove the adverse action. (*Id.*, pp. 3-4.)

C. The Board in *Vandergoot* held that "[i]n 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*." (*Id.*, p. 7.) The Board reasoned the settlement was a distinction from a termination without a difference: the result in both situations is a separation with no right to return to the employing agency. Because Vandergoot could not return to service following a finding he was no longer disabled, the elements and requirements for receipt of a disability pension could not be satisfied. (*Ibid.*)

12. A. The court in *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156, determined *Vandergoot* was correctly decided by the Board.

B. In that case, 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. PERS denied the application pursuant to *Haywood* and *Vandergoot*. Ms. Martinez appealed.

C. The *Martinez* court expressly approved the reasoning by the Board in *Vandergoot*, 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, []PERS 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.)

D. Turning its attention to Martinez, 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.)

APPLIED TO RESPONDENT MEMBERS

13. In this case, respondent Members entered into settlement agreements with the City whereby they resigned and expressly relinquished their reinstatement rights. Respondent Members' resignations and waiver of reinstatement rights are tantamount to a termination for cause under *Haywood.* Without reinstatement rights, respondent Members lack the "necessary requisite" for disability retirement – the potential for reinstatement to their prior positions. (Factual Findings 32-108.)

14. A. Respondent Members argue *Haywood* and its progeny do not apply because none of them were terminated by the City. Specifically, while respondent McClafferty was served with the Notice of Disciplinary Action, the City did not move forward with his termination and began negotiating the settlement instead. Respondents Weir and Ceja did not have any disciplinary proceedings pending at the time of their separations. The City tried to fire respondent Ceja, but an arbitrator set aside the termination.

B. However, *Haywood* makes clear an employee is not eligible for an IDR when his or her employment has been separated and reinstatement rights extinguished. While a termination for cause was the mechanism that created the employment disruption in *Haywood*, subsequent cases have extended this principle to situations other than termination for cause, including resignations with waivers of reinstatement rights. As noted in *Vandergoot*, it is not necessary to make a "bright line distinction" between how an employee is separated from his employment. Whether the employee was fired for cause, resigned with charges pending, or left employment under other circumstances is not important. The critical issue is whether the employee can be reinstated to his former job. Respondent Members cannot be reinstated to their former jobs, pursuant to their respective Settlement Agreements, and therefore they are subject to *Haywood* and its progeny.

C. None of respondent Members offers a suitable explanation why the lack of a pending disciplinary proceeding precludes application of *Haywood*. Nor is one apparent. Such a requirement would be easy to circumvent, as an employing agency desiring to get rid of an undesirable employee could simply negotiate and arrange something resembling respondent Members' Settlement Agreements before taking any formal disciplinary action.

D. More intriguing is respondent Members' failure to answer a key question. If they were retiring from service simply because they were disabled, why would they agree to waive their reinstatement rights? One would expect respondent Members to have simply separated from the City by retiring, without waiving any rights. As *Haywood* and its progeny hold, an 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 duties. The key to an IDR is the employee can

request reinstatement, or the employer can demand the same, if a medical examination shows the employee has sufficiently recovered. When these elements exist, the employment separation is truly an IDR. When one or more of these elements is absent, the employment separation looks more like a substitute for discipline.

15. A. Respondent McClafferty contends his situation is different because he was past the minimum voluntary retirement age when his IDR was processed by the City. Respondent McClafferty argues *Haywood* therefore does not apply to him because the City is unable to force him to take a medical examination under section 21192 and potentially demand he return to service if he is no longer substantially incapacitated from performing his duties.

B. However, respondent McClafferty neglects to add that under section 21192, he would have had the right to request reinstatement to his former position under the same circumstances had he not waived that right in the Settlement Agreement.

C. In any event, there is nothing in any of the cases cited above withholding application of *Haywood* if the member in question seeks an IDR past a minimum retirement age.

EXCEPTIONS TO THE RULE

16. A. To ensure an employer does unfairly abridge an employee's right to an industrial disability retirement, the court in *Haywood* established an employee who is fired can still seek a disability retirement if the discharge was either (1) the ultimate result of a disabling medical condition or (2) preemptive of an otherwise valid claim for disability retirement. (*Haywood, supra*, 67 Cal.App.4th at p. 1307.)

B. This caveat flows from a public agency's obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability or indirectly through cause based on the disability. (*Smith, supra,* 120 Cal.App.4th at p. 205.)

17. These exceptions have dubious application to respondent Members because none of them were terminated. The *Haywood* and *Smith* courts created these exceptions to prevent an employer from purposely subverting an otherwise valid IDR claim by firing an employee. In this case, respondents Weir and Ceja executed lucrative settlement agreements with the City, and respondent McClafferty negotiated an honorable resignation from the Police Department with charges pending. The City did not try to subvert any of respondent Members' IDR claims; in fact, the evidence indicates the opposite.

The Ultimate Result of the Disabling Condition

18. *Haywood* noted, "[W]hile nothing in the PERS law restricts an employer's right to fire an unwilling employee, the Legislature has precluded an employer from terminating an employee because of medical disability if the employee would be otherwise eligible for disability retirement. (§ 21153.) In such a case, the employer must instead apply for the disability retirement of the employee." (*Haywood*, supra, 67 Cal.App.4th at p. 1305.)

19. In this case, no respondent Member argues the City took any disciplinary or personnel action against him due to his work injuries, medical treatment, or IDR application.

Preemptive of an Otherwise Valid Claim

20. A. The *Smith* court explained to be preemptive of an otherwise valid claim, the right to a disability retirement must have matured before the employee was fired or, for purposes of the instant case, separated from employment without reinstatement rights. (*Smith, supra*, 120 Cal.App.4th at p. 206.)

B. A vested right matures when there is an unconditional right to immediate payment. (See *In re Marriage of Mueller* (1977) 70 Cal.App.3d 66, 71.) Similarly, the *Smith* court noted the duty to grant a disability pension (i.e., the reciprocal obligation to a right to immediate payment) did not arise at the time of the injury itself but when the involved pension authority determined the employee was no longer capable of performing his duties. (*Smith, supra*, 120 Cal.App.4th at p. 206.)

C. In *Smith*, the court concluded because PERS 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.)

D. In analyzing the maturity of a claim, the *Smith* court noted consideration of equitable principles may be proper if necessary to "deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause." (*Id.*, p. 207.) Factors to be considered are whether the claimant "had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal;" if the claimant initiated the process after giving cause for dismissal; and the existence of undisputed evidence the claimant was eligible for a disability retirement, such a favorable decision on his claim would have been a foregone conclusion, e.g., a loss of limb. (*Ibid.*) Thus, to the extent a claimant's medical

evidence is equivocal and the employer has a basis for litigating whether the evidence demonstrates a substantial disability, a claim cannot be considered mature. (*Ibid.*)

21. The following general observations about this exception pertain to respondent Members.

a. All had their IDR claims certified by the City after execution of their Settlement Agreements, by which their employment was severed without reinstatement rights.

b. Only respondent Ceja contends his IDR determination was unfairly delayed by the City.

c. Respondent Members take great stock in the fact the City certified them as being permanently disabled. But the City's certifications are suspicious given all were granted after the respective Settlement Agreements. Moreover, the City had a motive to certify respondent Members as being permanently disabled, as all three were either employees the City had sought to terminate (McClafferty and Ceja), were disgruntled with their employment as evidenced by civil litigation (Weir and Ceja), or both (Ceja). Certifying the IDR claims was a faster and surer way of separating less than desirable employees.

d. Respondent Members' evidence of permanent disability are mainly medical reports created for their 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.) As discussed in more detail below, respondent Members' evidence of permanent disability is far from unequivocal.

Respondent McClafferty

22. A. Respondent McClafferty did not have a matured right to a disability retirement before his separation from employment. Because respondent McClafferty had a more classical *Haywood* fact pattern, where he resigned with disciplinary charges pending, the maturity of his right to a disability retirement can be viewed in two ways.

B. First, the events underlying the City's Notice of Disciplinary Action occurred on April 9, 2012, when respondent McClafferty allegedly produced the pepper spray demonstration video, and again in November and December 2013, when the video allegedly was used by respondent Ceja during his arbitration. Those events well predate the City's July 24, 2015 Determination of Disability certification and PERS' August 12, 2015 approval of the IDR application. (Factual Findings 16-19; 32-54.)

C. Second, the City's certification and PERS' approval of the IDR application both occurred after respondent McClafferty's Settlement Agreement, signed by him on July 6, 2015. This means the involved pension authority determined respondent McClafferty was no longer capable of performing his duties after he had already agreed to resign his employment without reinstatement rights. (Factual Findings 16-19; 32-54.)

23. A. In addition, the equitable principles accompanying this exception do not balance in his favor. (Factual Findings 16-19; 32-54.)

B. Respondent McClafferty did not have an impending ruling on a claim for disability retirement delayed for reasons beyond his control. The operative medical report , which was the basis of the City's disability determination, was not issued until March 2015, just a few months before the City certified him as disabled.

C. While respondent McClafferty initiated the IDR process in May 2015, two months before he signed the Settlement Agreement, his IDR application was submitted well after he was served the Notice of Disciplinary Action on November 14, 2014. As such, he only partially satisfies this equitable principle.

D. Respondent McClafferty lacks undisputed evidence such a favorable decision on his IDR claim was a foregone conclusion. The connection between slipping on spilled gasoline and being permanently disabled is not foregone. Respondent McClafferty's asserted disability based on subjective pain and limitations from a quadriceps injury is far from the loss of limb example described by the *Smith* court. In fact, before the Settlement Agreement was reached, the City's workers' compensation adjustor, Athens Administrators, denied respondent McClafferty's permanent workers' compensation disability payments. It was only after the Settlement Agreement was signed that Athens Administrators amended the denial and issued permanent disability payments to him. Under these circumstances, the City had a basis for litigating whether the evidence demonstrated a substantial inability for respondent McClafferty to perform his duties.

24. A. Respondent McClafferty argues his IDR claim matured before his separation because his injury (June 2014) occurred before he had notice of the City's investigation (October 2014) or before the City served him with the Notice of Disciplinary Action (November 2014).

B. However, respondent McClafferty was not clear in his testimony concerning when he first heard about the investigation, and he admitted it was possible he heard about it before he was interviewed. It also is suspicious respondent McClafferty served 16 years for the City without incident, only to injure himself by

slipping on a gasoline spill just a few months before being formally interviewed by the City for alleged misconduct occurring many months before. (Factual Finding 33.)

C. Regardless, the *Smith* court makes clear the date of injury is not controlling. The key is when the pension authority, here the City by delegation under section 21154, determined respondent McClafferty was no longer capable of performing his duties. The City made that determination not only well after the events giving rise to the Notice of Disciplinary Action, but more importantly, well after respondent McClafferty executed the Settlement Agreement in which he agreed to resign and waive his reinstatement rights.

25. Respondent McClafferty also argues his IDR claim should be viewed as undisputed because the City did not contest his injury occurred at work or he had been placed on temporary total disability. As discussed above, the key is whether an eventual determination of incapacitation would have been a foregone conclusion. As discussed above, the City was hesitant to make that determination before the Settlement Agreement was executed.

Respondent Weir

26. Respondent Weir did not have a matured right to a disability retirement before his separation from employment. Respondent Weir signed his Settlement Agreement on May 12, 2016, which was well before his November 2, 2016 Determination of Disability certification by the City and PERS' November 3, 2016 approval of his IDR application. Thus, like respondent McClafferty, the involved pension authority determined respondent Weir was no longer capable of performing his duties after he had already agreed to resign his employment without reinstatement rights. (Factual Findings 16-19; 58-80.)

27. A. In addition, the equitable principles accompanying this exception do not balance in his favor. (Factual Findings 16-29; 58-80.)

B. Respondent Weir did not have an impending ruling on a claim for disability retirement that was delayed for reasons beyond his control.

C. Respondent Weir initiated the IDR process after signing his Settlement Agreement.

D. For many reasons, respondent Weir lacks undisputed evidence that a favorable decision on his IDR claim was a foregone conclusion.

i. Respondent Weir's primary disabling condition is a bad back, which is far less serious than the loss of limb example noted by the *Smith* court.

ii. Respondent Weir had been working full duty prior to being placed on administrative leave in 2016. If it was the accumulation of injuries over his career that ultimately led respondent Weir to leave the work place in 2016, one would expect he already would have had in place some sort of limitation or restriction. When respondent Weir finally left work, he did so on his own volition and without doctor's orders, which is unusual.

iii. The City requested additional medical records to substantiate respondent Weir's IDR application, indicating the City had some level of doubt over his claim. Several weeks later, an attorney representing the City advised respondent Weir's attorney the "City could have legitimately denied his claim for an industrial disability retirement" based on the medical documents he submitted.

iv. Dr. Sabbag's AME report, which was the City's primary reason for ultimately certifying respondent Weir as disabled, was not issued until September

2016, well after the Settlement Agreement. In addition, Dr. Sabbag did not completely restrict respondent Weir from specified activities, but allowed him to do them occasionally.

v. Under these circumstances, the City had a basis for litigating whether the evidence demonstrated respondent Weir was substantially unable to perform his duties.

28. Respondent Weir argues his IDR claim was mature because, according to the Settlement Agreement, he technically was not separated from employment until his IDR was granted. That argument is unpersuasive because the cause giving rise for his separation without reinstatement was his execution of the Settlement Agreement. As PERS argues in it closing brief, the parties should not be allowed to manufacture after-the-fact separation dates to purposefully evade the limitations of *Haywood*.

29. Respondent Weir also argues similarly to respondent McClafferty that his IDR claim had matured before his separation because many of his injuries predated his personnel problems with the City, and none of his injuries were disputed by the City. However, his argument is not persuasive and rejected for the same reasons described above concerning respondent McClafferty's similar arguments. (See Legal Conclusions 24 & 25.)

Respondent Ceja

30. Respondent Ceja did not have a matured right to disability retirement before his separation from employment. Respondent Ceja filed his IDR application on April 25, 2012. On October 14, 2014, the City refused to certify respondent Ceja as disabled. He separated from employment with the City on September 11, 2015, when he signed the Settlement Agreement. The City re-evaluated the matter and certified

respondent Weir as disabled on September 18, 2015; PERS approved the IDR application on October 6, 2015. Thus, like respondents McClafferty and Weir, the involved pension authority determined respondent Ceja was no longer capable of performing his duties after he had already agreed to resign his employment without reinstatement rights. (Factual Findings 16-19; 81-108.)

31. A. In addition, the equitable principles accompanying this exception do not balance in his favor. (Factual Findings 16-19; 81-108.)

B. Respondent Ceja initiated the IDR process before he separated from employment, unlike the other respondent Members. Thus, this equitable principle is in his favor.

C. Respondent Ceja therefore argues he also had a pending ruling on his disability claim that was unfairly delayed by the City until after his Settlement Agreement was signed. For the reasons listed below, it cannot be concluded respondent Ceja's pending IDR claim was unfairly delayed until after his separation from employment with the City through no fault of his own.

i. The City initially requested a six-month extension to review respondent Ceja's medical records, and in October 2014 denied his disability claim due to insufficient medical evidence.

ii. The City contends it did not have Dr. Roth's August 2013 AME report at the time of its denial; respondent Ceja contends the report was lost. Ms. Ovrom testified it is likely she would have certified respondent Ceja as disabled had she seen Dr. Roth's report when she first reviewed the matter.

iii. If the City had simply lost the report, which is not entirely clear from Ms. Ovrom's testimony, that still is not obvious evidence of a delay by the City orchestrated to frustrate respondent Ceja's IDR claim.

iv. Even if the City had Dr. Roth's AME report at the time of its initial denial, the report was equivocal concerning permanent disability. For example, Dr. Roth's AME report lists certain activities for respondent Ceja to *avoid* doing *frequently*, and indicates respondent Ceja would only have "some difficulty" returning to work. Ms. Ovrom's after-the-fact, speculative testimony concerning how she would have determined respondent Ceja's IDR claim initially if she had Dr. Roth's report has limited probative value.

v. Respondent Ceja had been on administrative leave due to his termination and arbitration from October 2011 through his reinstatement in January 2015. Respondent Ceja's treating physician, Dr. Doostan, recommended in February 2015 that respondent Ceja could return to work without any limitation. Upon his return to duty after reinstatement, the City tried to engage respondent Ceja in the interactive process from January through at least June 2015 with little success.

D. Respondent Ceja lacks undisputed evidence that a favorable decision on his IDR claim was a foregone conclusion. He essentially has sore feet and lower back pain, far less than the loss of limb example discussed in *Smith*. As discussed above, Dr. Roth's August 22, 2013 AME report does not unequivocally support a finding of incapacity. Dr. Doostan's February 2, 2015 letter actually concluded respondent Ceja was in good health. Respondent Ceja's refusal in June 2015 to schedule a fitness for duty examination or otherwise complete the interactive process to find a work accommodation also sheds some doubt on his IDR claim. Under these

circumstances, the City had a basis for litigating whether the evidence demonstrated respondent Ceja was substantially unable to perform his duties.

Other Equitable Considerations

32. A. Respondents Weir and Ceja argue other equitable considerations warrant excepting them from the *Haywood* rule. Specifically, they: argue PERS is at fault for not independently investigating their IDR applications when submitted; complain about the number of years that passed before PERS cancelled their IDRs; and contend reimbursement of prior benefits is only available if there is clear and rational support for cancellation of their IDRs.

B. The *Smith* court indicated its list of equitable factors was not exclusive. However, the *Smith* court linked the equitable factors to whether an employee's right to a disability claim had matured and thus survived a permanent separation from employment. (*Smith, supra*, 120 Cal.App.4th at p. 206.) The equitable considerations listed by respondents Weir and Ceja do not have a clear connection to the maturity of their IDR claims.

C. Nonetheless, assuming arguendo these respondents' other equitable considerations relate to the maturity of their IDR claims, they do not support being excepted from application of the *Haywood* rule. PERS had no duty to investigate the respondent Members' IDR applications. In fact, section 21154 expressly required the City to make the disability determinations. PERS was required to rely on the City's certification. The time that elapsed before PERS cancelled the IDRs is due to the fact PERS did not know about the permanent separations until it received the anonymous tip and was able to get confirmation of that fact only after being forced to ask the Attorney General's Office to investigate due to the City's refusal to provide relevant

information. In any event, PERS acted expeditiously upon receiving the anonymous ethical complaint. Finally, the *Haywood* rule clearly applies to respondent Members, and the exceptions to the *Haywood* rule clearly do not apply to them. (Factual Findings 1-113.)

Cancelling Respondent Members' IDRs Was Appropriate

33. As discussed above, section 20160, subdivision (b), requires the Board to correct all actions taken as a result of errors or omissions of any contracting agency or PERS. Corrections made pursuant to section 20160, subdivision (b), must adjust the status, rights, and obligations of all involved parties "to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time." (*Id.*, subd. (e).)

34. Section 20164, subdivision (a), describes the duration of obligations of PERS, contracting agencies, and members, as follows:

> The obligations of this system to its members continue throughout their respective memberships, and the obligations of this system to and in respect to retired members continue throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged. The obligations of the state and contracting agencies to this system in respect to members employed by them, respectively, continue throughout the memberships of the respective members, and the obligations of the state and contracting agencies to this

> system in respect to retired members formerly employed by them, respectively, continue until all of the obligations of this system in respect to those retired members, respectively, have been discharged. The obligations of any member to this system continue throughout his or her membership, and thereafter until all of the obligations of this system to or in respect to him or her have been discharged.

35. Section 20164, subdivisions (b) through (e), provide various limitations of actions. For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, the period of limitations is three years (*id.*, subd. (b)(1)), unless PERS owes money to a member or beneficiary, in which case that period of limitation shall not apply (*id.*, subd. (b)(2)). Where payment is erroneous because of the death of the retired member or beneficiary, or because of the remarriage of the beneficiary, the period of limitation is 10 years. (*Id.*, subd. (c).) 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, the limitation period is 10 years. (*Id.*, subd. (d).) However, the Board "shall determine the applicability of the period of limitations in any case, and its determination with respect to the running of any period of limitation shall be conclusive and binding for purposes of correcting the error or omission." (*Id.*, subd. (e).)

36. A. Misclassification qualifies as an error that may be corrected pursuant to section 20160, subdivision (b). Such an error ordinarily should be corrected retroactively, to ensure the rights and obligation of all parties are adjusted to be the

same but for the error or omission. (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 44 *[City of Oakland]*.)

B. The obligations of the Board, PERS, and contracting agencies, lasts throughout the memberships of their individual members, or their lifetimes if they have retired. (*City of Oakland*, p. 44.) Therefore, reclassification is not subject to any statute of limitations because of the Board's ongoing duty to its members. (*Id.*, p. 46.)

37. Based on the above, PERS' cancellation of respondent Members' IDRs was appropriate. Because all three respondents separated from employment with the City without any right to return to service, *Haywood* and its progeny apply to them, but the exceptions articulated in *Haywood* and *Smith* do not. Therefore, respondent Members were not, and are not, eligible for an IDR. (Factual Findings 1-108; Legal Conclusions 1-32.) The misclassifications of respondent Members as being eligible for IDRs were errors or omissions made by PERS and the City that the Board can correct at any time. Pursuant to the *City of Oakland*, such corrections can be made retroactively, and without time limitation. (Factual Findings 1-113; Legal Conclusions 1-36.)

Reimbursement of Prior Benefits Paid is Permissible

38. Because the Board has the obligation to correct errors or omissions made by PERS or a contracting agency, throughout the lifetime of its members, and to adjust the status, rights, and obligations of all involved parties to be the same that they would have been if the error or omission had not been made, it also has available relief in the form of retroactive contributions. (*City of Oakland*, pp. 48-49.) However, the *City of Oakland* court expressly declined to decide whether a limitations period, including those articulated in section 20164, subdivisions (b) through (e), apply to an action against individual members seeking arrearages. (*Id.*, p. 49.)

39. In this case, respondents Ceja and Weir do not argue with the Board's ability to seek reimbursement of past IDR benefits paid to them. However, in response to the ALJ's order re-opening the record, these respondents argue the limitation periods specified in section 20164 apply and either limit or prevent reimbursement. These respondents argue that the equitable doctrine of laches also applies due to the passage of time from when they first received their IDR benefits.

40. The statute of limitations is a personal privilege which is waived unless asserted at the proper time and in the proper manner, whether it be a general statute of limitations or one relating to a special proceeding. This general rule applies to proceedings before an administrative tribunal. (*Moore v. City of Los Angeles* (2007) 156 Cal.App.4th 373, 382.) Laches also is a defense that must be pleaded or else waived. (*City of Oakland*, pp. 52-53.)

41. In this case, respondents Ceja and Weir presented their limitations and laches arguments only in response to the ALJ's order re-opening the record. However, there is nothing in the record indicating these respondents raised either defense in their pleadings, including the Notices of Defense or requests for hearing submitted on their behalf by the City or counsel. As PERS points out in its brief submitted in response to the ALJ's order re-opening the record, these respondents have therefore waived both defenses, and they should not be considered in this matter. Therefore, PERS is permitted to seek reimbursement of IDR benefits previously paid to respondents Ceja and Weir. (Factual Findings 1-113; Legal Conclusions 1-40.)

ORDER

The appeals of respondents Finn O. McClafferty, Richard B. Ceja, and Brian Weir, are denied.

DATE: 04/28/2021

Eric C. Sawyer (Apr 28, 2021 15:31 PDT)

ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings