

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Reinstatement from  
Industrial Disability Retirement of:

DARREN R. GUTIERREZ,

Respondent,

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,  
NORTH KERN STATE PRISON

Respondent.

Case No. 2015-0772

OAH No. 2015120578

**PROPOSED DECISION**

Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, heard this matter on August 2, 2016, in Fresno, California.

Senior Staff Attorney Preet Kaur represented the California Public Employees' Retirement System (CalPERS).

Darren R. Gutierrez (respondent) was present and represented himself.

CalPERS properly served California Department of Corrections and Rehabilitation, North Kern State Prison (CDCR) with the Notice of Hearing. CDCR made no appearance. This matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on August 2, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED August 25 20 16

*Maulen Martinez*

## ISSUE

Is respondent no longer substantially incapacitated from performing the usual duties of a Correctional Officer for CDCR?

## FACTUAL FINDINGS

### *Procedural History*

1. Respondent is 47 years old. He worked for CDCR as a Correctional Officer for approximately 13 years. On June 17, 2011, respondent applied for industrial disability retirement. CalPERS approved respondent's application, based on an orthopedic condition (right shoulder). He disability retired, effective October 19, 2010, at 41 years old.

2. In October 2014, CalPERS initiated a re-examination of respondent to assess his ability to perform his former job duties pursuant to Government Code section 21192, because respondent was under the minimum age for voluntary service retirement. The re-examination involved a review of information obtained from medical providers, including an Independent Medical Evaluation (IME) performed by Ghol Ha'Eri, M.D., on February 24, 2015, and information obtained from respondent regarding the scope, nature, and earnings of any employment.

3. After reviewing respondent's medical and employment information, CalPERS determined that respondent was no longer substantially incapacitated from performing the duties of a Correctional Officer. Respondent appealed from CalPERS' determination.

### *Respondent's Disability Retirement Application*

4. In his disability retirement application (Application), respondent described his disability, as follows:

(Right shoulder) On 8/7/09 while attending baton training at North Kern State Prison (NKSP), I attempted to strike a training dummy and missed striking a concrete pillar, which caused my injury. I have since had surgery to repair a torn rotator cuff, shave bone on my clavicle to relieve a nerve impingement and remove bone tissue from the shoulder joint. Additionally, repair was conducted to damaged tendons in my right biceps and shoulder region. Since the surgery my condition has not improved and I have been determined permanent and stationary as well as unable to perform the essential functions of my job. In addition, I have suffered injuries to my left knee, ankle and foot. These injuries occurred on 2/8/08 while working at NKSP. At this point, I don't receive ongoing medical treatment for

these injuries, however, I continue to experience problems. Currently, my attorney is in the process to establish medical treatment for me regarding these injuries.

5. In response to the question on the Application that asks what limitations or preclusions resulted from his injury or illness, respondent stated: "No lifting, carrying, pushing or pulling over 40 lbs. No over the shoulder lifting and limited repetitive motion of the right shoulder." In response to the question asking how his injury or illness affected his ability to perform his job, respondent stated: "Due to my physical condition and doctors restrictions, I am no longer able to perform the essential functions of my job." In response to the question asking whether he was currently working in any capacity, respondent stated: "No."

#### *Duties of a Correctional Officer*

6. As set forth in the Correctional Officer Job Analysis (Job Analysis), Correctional Officers "are sworn Public Safety Officers and must be qualified under the California Penal Code in the use of firearms and other areas relating to a sworn position." They "provide security to inmates in correctional institutions in accordance with established policies, regulations and procedures, and observe conduct and behavior of inmates to prevent disturbances and escapes." There are many posts to which Correctional Officers may be assigned to work in a correctional institution. Correctional Officers "must be able to perform the duties of all the various posts."

7. The Physical Demands section of the Job Analysis specifies that a Correctional Officer must occasionally to continuously walk, stand, and sit; occasionally to frequently climb, stoop or bend; and occasionally run, crawl, and crouch. It also specifies that a Correctional Officer must be able to lift and carry 20 to 50 pounds frequently (from one-third to two-thirds of the work day); lift and carry over 100 pounds occasionally (one-third or less of the work day); physically restrain, lift and carry an inmate; push and pull while opening and closing locked gates and cell doors throughout the work day; reach while performing regular duties, including operating automatic doors, searching inmates and their property, issuing keys and equipment, and locking and unlocking doors; reach overhead while performing cell or body searches, seeking out contraband, obtaining necessary supplies, and operating tower spotlights; move and use their arms freely while performing their regular duties; and move, use and grasp with their hands and wrists while performing their regular duties, including when opening and closing locked gates and cell doors, applying restraint devices, operating computers, loading and unloading weapons, operating radios, operating spotlights, and using weapons.

8. The essential functions of a Correctional Officer are set forth in the CDCR, Division of Adult Institutions Correctional Officer Essential Functions form. The form lists 37 essential job functions of a CDCR Correctional Officer, including the following:

- Must be able to perform the duties of all the various posts.

- Must be able to swing a baton with force to strike an inmate.
- Disarm, subdue and apply restraints to an inmate.
- Defend self against inmate armed with a weapon.
- Run occasionally; run in an all-out effort while responding to alarms or serious incidents distances varying from a few yards to up to 400 yards, running may take place over varying surfaces including uneven grass, dirt areas, pavement, cement, etc. Running can include stairs or several flights of stairs maneuvering up or down.
- Climb occasionally to frequently ascent/descent or climb a series of steps/stairs, several tiers of stairs or ladders as well as climb onto bunks/beds while involved in cell searches, must be able to carry items while climbing stairs.
- Crawl and crouch occasionally. Crawl or crouch under an inmate's bed or restroom facility while involved in cell searches. Crouch while firing a weapon or while involved in property searches.
- Stoop and bend occasionally to frequently. Stoop and bend while inspecting cells, physically searching inmates from head to toe, and while performing janitorial work, including mopping and cleaning.
- Lift and carry continuously to frequently. Lift and carry in the light (20 pound maximum) to medium (50 pound maximum) range frequently throughout the workday and in the very heavy lifting range (over 100 pounds) occasionally. Lift and carry an inmate and physically restrain an inmate, including wrestling an inmate to the floor. Drag/carry an inmate out of the cell. Perform the lifting/carrying activities while working in very cramped space.
- Reaching occasionally to continuously reach overhead while performing cell or body searches, etc.
- Must have the mental capacity to judge an emergency situation, determine the appropriate use of force, and carry out that use of force. Use of force can range from advising an inmate to cease an activity to firing a lethal weapon at an inmate when another life is threatened with great bodily harm or death

9. On March 21, 2011, a CDCR representative completed a Physical Requirements of Position/Occupational Title form for respondent's position. According to that form, a Correctional Officer must be able to engage in the following physical activities:

- Constantly (over 6 hours) sitting, standing, running, walking, bending (at the neck and waist), twisting (at the neck and waist), fine manipulation, power grasping, simple grasping, repetitive use of hands, lifting or carrying up to 50 pounds, and driving.
- Frequently (up to 6 hours) climbing, reaching (below shoulder), pushing and pulling, keyboard use, mouse use, walking on uneven ground, exposure to extreme temperature, humidity and wetness, exposure to dust, gas fumes or chemicals, and working at heights.

- Occasionally (up to 3 hours) crawling, squatting, reaching (above shoulder), lifting or carrying 51 pounds to in excess of 100 pounds, and operation of foot controls or repetitive movement.

### *Respondent's Evidence*

#### RESPONDENT'S TESTIMONY

10. Respondent began his career in law enforcement in 1990, working as a Sheriff's Aide in the Lerdo Pre-Trial Holding Facility in Bakersfield, California. He also worked as a Correctional Officer for the City of Taft and as a Reserve Deputy Sheriff for the Kern County Sheriff's Office prior to joining CDCR in 1996.

11. On August 7, 2009, respondent injured his shoulder during a training exercise. The exercise involved striking dummies with a baton. When respondent swung his baton to strike the dummy, the baton slipped and struck a concrete pillar behind the dummy. He felt pain in his right shoulder approximately 30 minutes later that did not subside. Approximately one week later, respondent saw Irene Sanchez, M.D., a specialist in occupational medicine. Dr. Sanchez treated respondent's injury with pain medication, physical therapy, and cortisone shots. Dr. Sanchez performed an MRI on respondent with normal results. Despite Dr. Sanchez' treatment, respondent's pain continued. The pain made it difficult for him to sleep. Respondent was also reluctant to continue taking pain medication because he had concerns with addiction and how the medication may affect his health over time.

12. In December 2009, respondent saw an orthopedic surgeon, Mark Schamblin, M.D. Conservative medical care continued without success. Because respondent's pain continued, Dr. Schamblin concluded that respondent had a torn rotator cuff. In May 2010, Dr. Schamblin completed an arthroscopic repair of respondent's torn rotator cuff, an impingement release, and a bicep tenodesis. According to respondent, after the surgery "things just weren't right." He testified that the surgery provided enough pain relief for him to sleep more regularly, but his arm "still was not moving very well." Approximately one year after surgery, respondent still could not raise his arm to certain heights and could not pick things up with his arm extended. Respondent discussed having a second shoulder surgery with Dr. Schamblin, but was concerned that it would not be effective. He decided not to have an additional surgical procedure performed on his shoulder as a "quality of life" decision. In October 2010 both Drs. Sanchez and Schamblin deemed respondent's shoulder injury to be permanent and stationary. Respondent asserted that he applied for disability retirement shortly thereafter because his physicians would not release him to return to work.

13. Respondent described the IME performed by Dr. Ha'Eri, which led to the decision he was no longer substantially incapacitated, as cursory. He stated that the examination by Dr. Ha'Eri was "more like a conversation" than an examination. He claimed they sat on opposite sides of Dr. Ha'Eri's desk and that Dr. Ha'Eri never had him remove his shirt during the examination. According to respondent, the entire examination consisted of a

brief interview, Dr. Ha'Eri walking over and grabbing his shoulder firmly to produce pain, and then Dr. Ha'Eri taking several notes.

14. Respondent did not testify to specific job functions he could not perform. Instead he expressed concern with his ability to protect himself or others if required to do so at work. He believes that his shoulder "will not hold up if challenged." Respondent asserted that due to budget reductions he is frequently the only Correctional Officer in a building that may have "100 plus inmates out" at any given time or be one of three Correctional Officers on the yard with as many as 400 to 500 inmates. Respondent is also concerned that his shoulder will not be able to withstand the physical requirements of Correctional Officer training.

15. After retiring, respondent performed dispatch and office work for a moving and storage company owned by his family. He then purchased a moving and storage company jointly with his brother and wife and performed similar office and administrative tasks for approximately two years and then sold the company. Respondent currently works part time performing swimming pool leak detection services for a swimming pool leak detection company he owns.

#### SECONDARY TREATING PHYSICIAN'S PROGRESS REPORT

16. Respondent submitted a 3-page Secondary Treating Physician's Progress Report (Progress Report), dated July 6, 2016, and signed by Dr. Schamblin and Physician's Assistant Lesley Lucero. The Progress Report reflects that it was prepared shortly after respondent's follow up visit for his right shoulder injury. The report was admitted as administrative hearsay, and has been considered to the extent permitted under Government Code section 11513, subdivision (d).<sup>1</sup> Respondent did not call a medical expert to testify on his behalf or offer any non-hearsay medial evidence to support his claimed incapacity.

17. According to the Progress Report, the inspection of respondent's shoulder revealed that there was no swelling, no atrophy of the surrounding muscles, or deformity over the acromioclavicular joints. Respondent reported mild pain with palpation, and some crepitus or friction with shoulder range of motion. The Progress Report also includes the following diagnostic impression and treatment plan:

#### **Impression:**

1. Right shoulder pain with rotator cuff and biceps tendinitis.

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<sup>1</sup> Government Code section 11513, subdivision (d), in relevant part, provides:

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

2. History of right shoulder arthroscopy for rotator cuff repair, biceps tenodesis, decompression, mumford procedure in May 2010.

**Plan:**

The patient is unchanged ... we have discussed options of a repeat right shoulder arthroscopy for evaluation of the integrity of the rotator cuff and decompression with an open biceps tenodesis ... [but respondent] states that he would like to hold off on repeat surgical intervention at this time. ... At this time his shoulder appears to have continued limitation and he may not be able to tolerate work-related activities as a correctional officer. He understands [that any] final work restriction would be per his primary treating physician.

(Bold in original.)

18. The Progress Report does not provide an opinion as to whether respondent is substantially incapacitated from the performance of his former job duties. The report describes respondent's work status as "per primary treating physician."

*CalPERS' Expert*

**GHOL HA'ERI, M.D.**

19. Ghol Ha'Eri, M.D., testified at hearing. Dr. Ha'Eri is a Diplomate of the American Board of Orthopaedic Surgery and the American Board of Neurological and Orthopaedic Surgery. He has been licensed to practice medicine for approximately 47 years and served as chief of orthopedic surgery at Kern Medical Center in Bakersfield for 11 years. Until approximately 2010, Dr. Ha'Eri ran a private practice and treated orthopedic patients. For the last six years he has primarily performed IMEs and Qualified Medical Evaluations for a variety of entities and occasionally performs out-patient surgical procedures.

20. On February 24, 2015, Dr. Ha'Eri evaluated respondent, reviewed his job functions and medical records, and prepared a 6-page report. Respondent told Dr. Ha'Eri that he was experiencing "off and on right shoulder pain" that occurred during heavy lifting and pushing and pulling. Respondent was under no medical care for his shoulder at the time.

21. Dr. Ha'Eri examined respondent's right shoulder and found no deformity, swelling, or atrophy. Respondent had mild acromial tenderness with palpation, but no spasms were noted. The report reflects that respondent's range of shoulder motion was normal with no crepitus and the impingement test, drop arm test, and apprehension test were all negative.



22. At the conclusion of the evaluation, Dr. Ha'Eri diagnosed respondent with "[s]tatus post right shoulder arthroscopic rotator cuff repair, impingement release, and biceps tenodesis on 05/13/2010." In response to questions posed by CalPERS, in his report Dr. Ha'Eri opined that "there are no specific job duties [respondent] is unable to perform. ... [Respondent] is not substantially incapacitated for the performed of his duties as a Correctional Officer."

23. Dr. Ha'Eri's testimony at hearing was consistent with his February 2015 report. He explained his examination process and reiterated the diagnoses in his report. He emphasized that each range of motion test he performed was normal with no cracking or crepitus, apprehension testing was also negative, dynamometer test results were consistent, and the neurological examination was normal and consistent with symmetrical measurements. Dr. Ha'Eri testified that the Progress Report from Dr. Schamblin's office did not change his opinion that respondent was not substantially incapacitated for the performance of his former job duties because the report does not address respondent's ability to perform his job and because it "appears to be a computer generated form ... usually prepared by a physician's assistant, rather than by the physician himself." Dr. Ha'Eri also found it odd for Dr. Schamblin's office to opine that respondent's 2009 surgery was not a success and to recommend additional surgery in the same area six years later. He felt that if the 2009 surgery was not a success, or if additional surgery was recommended, that should have been determined in October 2010 when both Drs. Sanchez and Schamblin deemed respondent's shoulder injury to be permanent and stationary.

### *Discussion*

24. Incapacity for performance of duty must be based on competent medical evidence. (Gov. Code § 20026.) Dr. Ha'Eri opined that respondent is not substantially incapacitated from performing his job duties. He reached this opinion based on his medical training and expertise, examination of respondent, and review of respondent's medical records. While respondent challenged the thoroughness of Dr. Ha'Eri's examination, no other competent medical evidence was produced at hearing. Respondent did not call a medical expert to testify to support his claimed incapacity. His medical evidence was provided entirely through the hearsay Progress Report obtained from Dr. Schamblin's office. That report alone cannot support a finding in an administrative hearing.<sup>1</sup>

25. When all the evidence is considered, CalPERS submitted sufficient evidence to meet its burden. Dr. Ha'Eri's opinion was persuasive and respondent presented no competent medical evidence to support his claimed incapacity. As a result, CalPERS' request that respondent be involuntarily reinstated from industrial disability retirement is granted.

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## LEGAL CONCLUSIONS

1. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

The board ... may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination .... The examination shall be made by a physician or surgeon, appointed by the board .... Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency ... where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

2. Government Code section 21193 governs the reinstatement of a recipient of disability retirement determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

3. Government Code section 20026 defines “disability” and “incapacity for performance of duty,” and, in relevant part, provides:

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

4. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term “incapacity for performance of duty” as used in Government Code section 20026 (formerly section 21022) to mean “the *substantial* inability of the applicant to perform his usual duties.” (Italics in original.) In *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862

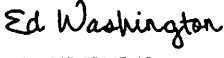
the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. Furthermore, in *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff's subjective complaints alone, without competent medical evidence to substantiate the complaints, were insufficient to support a finding that he was permanently incapacitated for the performance of his duties.

5. When all the evidence in is considered, CalPERS established that respondent is no longer substantially incapacitated for the performance of his usual duties as Correctional Officer for CDCR. Consequently, CalPERS' request that respondent be involuntarily reinstated from industrial disability retirement is granted.

### ORDER

Respondent's appeal is DENIED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Darren R. Gutierrez from industrial disability retirement is GRANTED.

DATED: August 24, 2016

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ED WASHINGTON  
Administrative Law Judge  
Office of Administrative Hearings