ATTACHMENT C

RESPONDENT(S) ARGUMENT

RESPONDENT'S ARGUMENT

THIS IS A WRITTEN ARGUMENT AGAINST THE PROPOSED DECISION OF DENIAL ON THE RIGHT TO FILE AN APPLICATION FOR DISABILITY RETIREMENT.

IF THE LEGAL ARGUMENT IS ADOPTED, RESPONDENT IS REQUESTING THAT THE BOARD DESIGNATE THE DECISION AS PRECEDENT IN WHOLE OR IN PART.

RESPONDENT BECAME DISABLED FROM HER POSITION ON 4/22/19. SHE HAS BEEN ON CONTINUING DISABILITY AS DETERMINED BY COMPETENT PROFESSIONAL MEDICAL PERSONNEL THROUGH MONTHLY TREATING PHYSICIAN REPORTS PROVIDED TO INSURER/EMPLOYER, STATE QME REPORTS, AND AN ADMINISTRATIVE JUDGE'S DECISION FINALIZING ALL *CONTINUING DISABILITY* FROM THE DATE OF INCAPACITATION TO PERFORM HER DUTIES (4/22/19) TO PRESENT. THIS INFORMATON HAS BEEN AVAILABLE TO THE EMPLOYER THROUGHOUT THE DATE OF INCAPACITATION FROM DUTY AND/OR DISABILITY AND DURING THE COURSE OF THIS PROCESS. FOR OVER 5 YEARS THE RESPONDENT MET THE REQUIREMENTS OF CONTINUING DISABILITY AND INCAPACITATION FOR PERFORMANCE OF DUTIES AND CONTINUES TO DO SO. THE EMPLOYEE WAS INCAPACITATED FROM EMPLOYMENT DUE TO AN INDUSTRIAL INJURY. HOWEVER, DUE TO A TURNOVER IN MGT WHO WAS UNFAMILIAR WITH THE RESPONDENT'S CASE, BELIEVED SHE HAD THE AUTHORITY TO OVERRIDE THE PROFESSIONAL MEDICAL OPINIONS OF THE TREATING PHYSICIAN, STATE QME PHYSICAN, AND THE ADMINISTRATIVE LAW JUDGE'S OPINION AND DEMAND THE EMPLOYEE RETURN TO WORK, WHICH RESULTED IN AN AWOL SEPARATION.

ISSUE: IS RESPONDENT ELIGIBLE TO APPLY FOR DISABILITY RETIREMENT OR IS SHE OTHERWISE PRECLUDED BY APPLICABLE LAW?

There is unrebutted evidence of an eligibility for disability, which ante-dates the AWOL. (Id at pp1305-1306, 79 Cal Rptr 2d 749). The EMPLOYER did not have a right to issue an AWOL status when they were notified of "***continuing disability"*** through their INSURER and ATTORNEY per these QME reports 1/25/21, 5/3/21 and 6/25/21 AND ongoing monthly treating physician reports. There was also an agreement by the parties through an Administrative Judge for continuing disability and continuing incapacity for the performance of duty.

8 C C R Section 10152 defines the definition of "permanent and stationary" as, "A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment".

The EMPLOYER AGREED BEFORE AN APPOINTED ADMINISTRATIVE JUDGE that RESPONDENT had *"CONTINUING DISABILITY AND "CONTINUING INCAPACITY FOR THE PERFORMANCE OF DUTY", (IDENTIFIED IN QME REPORT).* When RESPONDENT is declared with ***CONTINUING DISABILITY AND "CONTINUING INCAPACITY FOR THE PERFORMANCE OF DUTY" THIS INDICATES RESPONDENT IS CONTINUOUSLY INCAPACITATED TO PERFORM HER DUTIES DUE TO A CONTINUOUS DISABLING CONDITION.***

QME Dr. X in his QME report dated 1/25/21 uses the definition of "***permanent and stationary"*** to establish a "***permanent disability"*** for RESPONDENT. Dr. X states, ***"The definition of permanent and stationary is found in 8 C C R Section 10152, "A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment".***

QME Dr. X issued 1/25/21-QME SUPPLEMENTAL REPORT, MAY 3, 2021-QME SUPPLEMENTAL REPORT AND JUNE 25, 2021-ADDENDUM SUPPLEMENTAL REPORT to respondent's-EMPLOYER/INSURER AND RESPONDENT. In these reports QME Dr. X determined there was "***continuing disability and continuing incapacity for the performance of duty"*** and that RESPONDENT was ***"permanent and stationary"*** in her position as a Security Guard. These are the final QME REPORTS and conclusions regarding continuing disability **prior to the AWOL separation**.

The purpose of the QME report by QME Dr. X dated 1/25/21 was to determine whether RESPONDENT reached Maximum Medical Improvement. Dr. X states in the report *"Regarding permanent and stationary status, …February 25, 2020 was the MMI date in question. The patient would have been on temporary total disability from April 22, 2019 through February 25, 2020."* Dr. X goes on in the 1/25/21 report to state, *"The applicant has reached permanent and stationary status or maximum medical improvement."* He further states, *"This injury to left foot, cervical spine, thoracic spine, and lumbar spine is industrial in causation."*

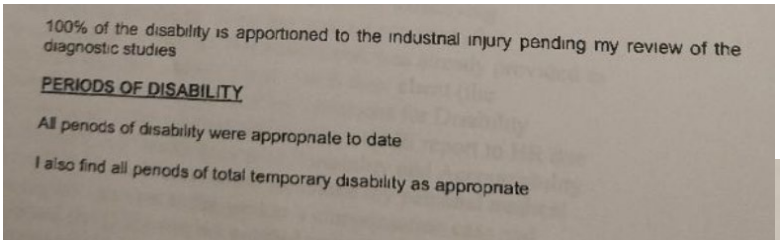
Dr. X's statement establishes that there will be no changes in the RESPONDENT's condition for at least one year, with little to no improvement. Dr. X establishes that this condition of "*permanent and stationary status or maximum medical improvement*" will be through at least 1/25/22 per the definitions set forth in 8 C C R Section 10152. THIS ASSESSMENT OF CONTINUING DISABILITY COVERS THE PERIOD THROUGH 1/25/22, WHICH ANTE-DATES THE AWOL TERMINATION CHARGE AND INDICATES THAT RESPONDENT IS ELIGIBLE TO APPLY FOR DISABILITY RETIREMENT.

IN 5/3/21 QME REPORT AUTHORED BY STATE QME Dr. X is contributing *"100% of the disability to the industrial injury."* DR. X ALSO STATES, *"All periods of disability were appropriate to date…Dates of disability started in 04/2019 until present".* Since QME Dr. X states "***Dates of disability started in 04/2019 until present"***, the medical records are reflecting documented evidence of "***continuous disability"*** from last day on pay through the date of the application and ongoing. This report was dated 5/3/21. Additionally, Dr. X indicates ***RESPONDENT is physically incapacitated to perform duties from the date of discontinuance of service to the time of application***. Dr. X has not waived in this regard and states ***"All periods of disability were appropriate to date…***. **AGAIN, THE ASSESSMENT IN THIS QME REPORT COVERS THE PERIOD WHICH ANTE-DATES THE AWOL TERMINATION CHARGE. As such, Dr. X continues to maintain that this condition of "*permanent continuing disability*" will be through at least 5/3/22 per the definitions set forth in 8 C C R Section 10152*, "A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment".* THIS QME ASSESSMENT REPORT DATED 5/3/21 COVERS THE CONTINUING DISABILITY PERIOD THROUGH 5/3/22, WHICH ANTE-DATES THE AWOL TERMINATION CHARGE AND INDICATES THAT RESPONDENT IS ELIGIBLE TO APPLY FOR DISABILITY RETIREMENT.**

RESPONDENT requested a Hearing based on the "Topic: AWOL"/AWOL Dismissal. The Hearing Representative stated she would provide a decision based on the evidence and emails RESPONDENT submitted to her. However, RESPONDENT never received a decision/determination regarding the Informal Hearing on the "Topic: AWOL"/AWOL Dismissal from the Hearing Representative. HEARING REP. stated if not able to make a meeting date, she would make a decision with information provided in email. Hearing Representative had a natural disaster and RESPONDENT had long term COVID and no date was given due to recovery by both people. Employer 2 testified she received a decision and respondent did not receive any notice, which violated due process rights.

The employer failed to meet the Employer Requirements and Responsibilities in completing the Disability Retirement forms which clearly states to mail to CalPERS and as directed in Haywood, Vandergoot and Smith case law.

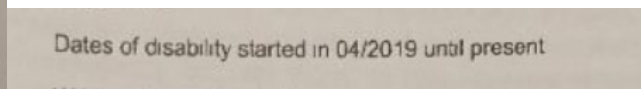
Below are snipits of Dr. X's QME reports and statements.


100% of the disability is apportioned to the industrial injury pending my review of the diagnostic studies

PERIODS OF DISABILITY

All periods of disability were appropriate to date

I also find all periods of total temporary disability as appropriate


Dates of disability started in 04/2019 until present

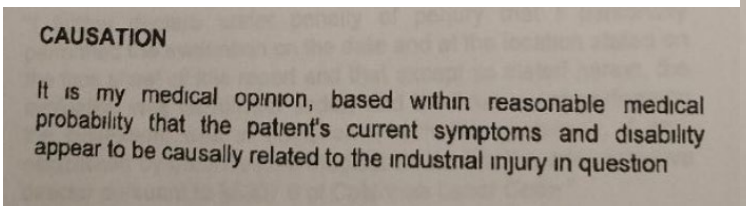
IN 6/25/21 QME REPORT AUTHORED BY DR. X STATES, ***"It is my medical opinion, based within reasonable medical probability that the patients "current symptoms and disability" appear to be causally related to the industrial injury in question."*** Dr. X indicates ***RESPONDENT continues to be physically incapacitated to perform duties from the date of discontinuance of service to the time of application***. Dr. X has not waivered in this regard of RESPONDENT'S disability and states ***"All periods of disability were appropriate to date…*** **AGAIN, THE ASSESSMENT IN THIS QME REPORT COVERS THE CONTINUING DISABILITY PERIOD THROUGH 6/25/22, WHICH ANTE-DATES THE AWOL TERMINATION CHARGE. As such, Dr. X continues to maintain that this condition of "*permanent continuing disability*" will be through at least 6/25/22 per the definitions set forth in 8 C C R Section 10152*, "A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment".* THIS QME ASSESSMENT REPORT DATED 6/25/21 COVERS THE CONTINUING DISABILITY PERIOD THROUGH 6/25/22, WHICH ANTE-DATES THE AWOL TERMINATION CHARGE AND INDICATES THAT RESPONDENT IS ELIGIBLE TO APPLY FOR DISABILITY RETIREMENT.**

The EMPLOYER was notified of RESPONDENT'S "***current symptoms and disability***", through these QME reports, as well as through ongoing treating physician reports provided to the EMPLOYER through the INSURER. RESPONDENT maintained the ***"continuing disability" and "the incapacity for performance of duties"*** throughout the duration of the disability of 4/22/19 to present per Dr. X's QME reports which cover the periods of disability which ante-date the AWOL termination.

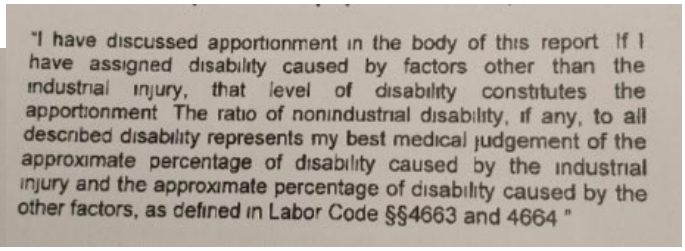
CA GOV'T CODE SECTION 19253.5, (i)(1), Medical examination, evaluation of employees work states, If the appointing power after considering the conclusions of the medical examination provided for by this section or medical reports from the employee's physician and other pertinent information concludes that the employee is unable to perform the work of his or her present position or any other position in the agency and the employee is eligible and does not waive the right to retire for disability, the appointing power shall file an application for disability retirement on the employee's behalf. The appointing power shall give the employee 15 days written notice of its intention to file such an application and a reasonable opportunity to respond to the appointing power prior to the appointing power's filing of the application. However, the appointing power's decision to file the application is final and is not appealable to the state personnel board. Based on this, the EMPLOYER should have filed an application of disability retirement for RESPONDENT.

According to the **Employer Disability Resource Guide** the basis to grant Disability Retirement/Industrial Disability Retirement (DR/IDR), CalPERS is governed by specific laws and regulations contained in the California Public Employees' Retirement Law. Government Code section 20026 defines "disability" and "incapacity for the performance of duty". "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least **12 consecutive months** or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion. RESPONDENT meets these requirements as evidenced above.

REGARDING CAUSATION, **in 6/25/21 QME REPORT UNDER AFFIDAVIT OF COMPLIANCE, DR. X STATES**, ***"I have discussed apportionment … of the approximate percentage of disability caused by the industrial injury and the approximate percentage of disability caused by the other factors…"***
QME Dr Xs states the following in the snipits:


CAUSATION

It is my medical opinion, based within reasonable medical probability that the patient's current symptoms and disability appear to be causally related to the industrial injury in question


"I have discussed apportionment in the body of this report If I have assigned disability caused by factors other than the industrial injury, that level of disability constitutes the apportionment The ratio of nonindustrial disability, if any, to all described disability represents my best medical judgement of the approximate percentage of disability caused by the industrial injury and the approximate percentage of disability caused by the other factors, as defined in Labor Code §§4663 and 4664 "

Dr. X apportioned 100% of the disability to the industrial injury as noted in his QME report 6/25/21.
(Reference 6/25/21 QME Dr. X's report, CAUSATION, CALPERS DOCKET #DRRR1033 AND AFFIDAVIT OF COMPLIANCE, CALPERS DOCKET #DRRR1035.)

State QME Dr. X under causation relates and states, ***"It is my medical opinion, based within reasonable medical probability that the patient's "current symptoms and disability" appear to be causally related to the industrial injury in question."*** Dr. X's professional medical opinion is indicative that RESPONDENT's current condition is, in fact, unequivocally disabling and causally related to the industrial injury. He also apportions "***100% of the disability"*** to the industrial injury.

When a qualified medical provider provides causal relationship, this means that the EMPLOYER should take responsibility in what has occurred regarding the industrial injury and provide the RESPONDENT with any benefits available to RESPONDENT, specifically that of *disability retirement*.

RESPONDENT was **eligible** to apply for disability retirement and **timely filed** the application for disability retirement. (Id. at pp. 1306-1307, 79 Cal.Rptr.2d 749.) RESPONDENT has a valid claim for disability retirement. (67 Cal.App.4th at p. 1307, 79 Cal.Rptr.2d 749.) By denying RESPONDENT'S application for disability benefits/disability retirement, the Board violated the Contract Clauses of the state and federal constitutions (Cal. Const., art. I, § 9; U.S. Const., art. I, § 10, cl. 1) and its duty to administer the CalPERS system "in a manner that will assure prompt delivery of benefits … to the participants." (See Cal. Const., art. XVI, § 17, subds. (a)-(b).) RESPONDENT'S concluding allegation is that the Board has "a duty to comply with Article XVI, section 17 of the California Constitution and … to process disability retirement applications on the merits even where an employer has issued the applicant a notice … terminating their employment".

GOV'T CODE SECTION 21154, an application for disability retirement must be made… (c) Within four months after the discontinuance of the service, or while in approved at leave of absence; or (d) While the member is physically or mentally incapacitated to perform duties from the date of discontinuance of service to the time of application. The regulation states that "If a member applies for disability greater than four months following last day on pay, then the medical records must

reflect "continuous disability." This means the member's medical records must reflect documented evidence of continuous disability from last day on pay through the date of the application and ongoing…" QME documentation as noted above was provided along with physician's report.

RESPONDENT has satisfied the criteria for a "***disability", namely a continuing medical condition resulting in a substantial inability to perform the usual duties,*** **per case law.** (Haywood, supra, 67 Cal.App.4th at pp. 1303-1304, 79 Cal.Rptr.2d 749.) The agreed upon medical examiner (QME) determined RESPONDENT had ***continuing disability*** from RESPONDENT'S position prior to the personnel action of AWOL and the disability is continuing through the present.

ISSUE: DOES THE EMPLOYER HAVE AN OBLIGATION AND DUTY TO ISSUE THE PERSONNEL ACTION NOTICE, SEPARATION TYPE: LEAVE OF ABSENCE, ON THE BASIS OF COMPETENT MEDICAL OPINION WHEN INFORMED OF "CONTINUING DISABILITY" AND "CONTINUING INCAPACITY FOR THE PERFORMANCE OF DUTY".

There is unrebutted evidence of an eligibility for disability, which ante-dates the AWOL. (Id at pp1305-1306, 79 Cal Rptr 2d 749). The EMPLOYER did not have a right to issue an AWOL status when they were notified of "***continuing disability"*** through their INSURER and ATTORNEY per these QME reports 1/25/21, 5/3/21 and 6/25/21 AND ongoing monthly treating physician reports.

ISSUE: IF AN EMPLOYER FAILS TO FILE A NOTICE OF PERSONNEL ACTION, DOES THIS ENABLE THE EMPLOYER TO SEVER THE EMPLOYER-EMPLOYEE RELATIONSHIP AND ALLOW THEM TO MOVE FORWARD WITH AN ADVERSE TERMINATION ACTION.

CA GOV'T CODE SECTION 19253.5, (i)(1), Medical examination, evaluation of employees work states, If the appointing power after considering the conclusions of the medical examination provided for by this section or medical reports from the employee's physician and other pertinent information concludes that the employee is unable to perform the work of his or her present position or any other position in the agency and the employee is eligible and does not waive the right to retire for disability, the appointing power shall file an application for disability retirement on the employee's behalf. The appointing power shall give the employee 15 days written notice of its intention to file such an application and a reasonable opportunity to respond to the appointing power prior to the appointing power's filing of the application. However, the appointing power's decision to file the application is final and is not appealable to the state personnel board. Based on this, the EMPLOYER should have filed an application of disability retirement for RESPONDENT.

The District after receipt of Dr. X's QME report dated 1/25/21, should have knowingly issued a new Notice of Personnel Action for RESPONDENT for all resultant disability extending the Separation Type: Leave of Absence to an effective date of one year, **per the definitions set forth in 8 C C R Section 10152*, "A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment",* thereby extending the Personnel action out to 01/25/22 for *"continuing disability" and "continuing incapacity for the performance of duty."* The employer failed to issue the Notice of Personnel Action.** Allowing the EMPLOYER'S FAILURE OF ACTION in filing the Notice of Personnel Action, allows/enables the employer to sever the employer-employee relationship and move forward with an adverse termination action-AWOL through no fault of the RESPONDENT. **CA GOV'T CODE SECTION 19253.5, (i)(1), Medical examination, evaluation of employees work. Based on this, the EMPLOYER should have filed an application of disability retirement for RESPONDENT.**

The District after receipt of Dr. X's QME report dated 5/3/21, should have knowingly issued a new Notice of Personnel Action for RESPONDENT for all resultant disability extending the Separation Type: Leave of Absence to an effective date of one year, **per the definitions set forth in 8 C C R Section 10152*, "A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment",* thereby extending the Personnel action out to 05/3/22 for *"continuing disability" and "continuing incapacity for the performance of duty."* The employer failed to issue the Notice of Personnel Action.** Allowing the EMPLOYER'S FAILURE OF ACTION in filing the Notice of Personnel Action, allows/enables the employer to sever the employer-employee relationship and move forward with an adverse termination action-AWOL through no fault of the RESPONDENT. **Based on this, the EMPLOYER should have filed an application of disability retirement for RESPONDENT.**
If this failure is allowed, it enables the employer to terminate their relationship with RESPONDENT. **CA GOV'T CODE SECTION 19253.5, (i)(1), Medical examination, evaluation of employees work.**

Thereafter, the District after receipt of Dr. X's QME report dated 6/25/21, should have knowingly issued a new Notice of Personnel Action for RESPONDENT for all resultant disability extending the Separation Type: Leave of Absence to an effective date of one year, **per the definitions set forth in 8 C C R Section 10152*, "A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment",* thereby extending the Personnel action out to 06/25/22 for *"continuing disability" and "continuing incapacity for the performance of duty."* The employer failed to issue the Notice of Personnel Action.** Allowing the EMPLOYER'S FAILURE OF ACTION in filing the Notice of Personnel Action, allows/enables the employer to sever the employer-employee relationship and move forward with an adverse termination action-AWOL through no fault of the RESPONDENT. **Based on this, the EMPLOYER should have filed an application of disability retirement for RESPONDENT.**
If this failure is allowed, it enables the employer to terminate their relationship with RESPONDENT. **CA GOV'T CODE SECTION 19253.5, (i)(1), Medical examination, evaluation of employees work.**

Because these Notice of Personnel Actions should have been extended out to 1/25/22, 5/3/2022 and 6/25/2022, they INVALIDATE the termination action-AWOL that the employer invoked on 11/25/21 and thereafter.

Based on the QME continuing disability reports of 1/25/21, 5/3/21 and 6/25/21, along with the Notice of Personnel Actions that should have been issued to extend the Leave of Absence time out to 1/25/22, 5/3/22 and 6/25/22, thereby makes the RESPONDENT ELIGIBLE for a disability retirement and the AWOL invalid. CA GOV'T CODE SECTION 19253.5, (i)(1), Medical examination, evaluation of employees work. Based on this, the EMPLOYER should have filed an application of disability retirement for RESPONDENT.

After receipt of the QME reports and supplementals, the employer had many opportunities regarding their obligation to file an application of disability retirement on behalf of the RESPONDENT, but the employer failed to apply for an application of retirement. QME reports were completed by 6/25/21 AND the last Notice of Personnel Action should have been issued to extend out till 6/25/22. CA GOV'T CODE SECTION 19253.5, (i)(1), Medical examination, evaluation of employees work. Based on this, the EMPLOYER should have filed an application of disability retirement for RESPONDENT.

If an employee is permanent and stationary, per 8 C C R Section 10152*, "A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized and unlikely to change substantially in the next year WITH OR WITHOUT medical treatment", and the RESPONDENT has NO MEDICAL to provide within the period demanded from the employer, entitles the employer to sever the relationship through no fault of the employee.* During the COVID period, it was very difficult to obtain the medical documentation within the allotted time period. However, RESPONDENT advised the

EMPLOYER the documentation was requested and would take time to receive. Since **8 C C R Section 10152 states WITH OR WITHOUT medical treatment, which in turn could mean with or without documentation.**

ISSUE: CAN THE EMPLOYER TERMINATE EMPLOYMENT THROUGH AN AWOL WITHOUT GOING THROUGH THE PROPER CHANNELS PER HANDBOOK CALHR HUMAN RESOURCE MANUAL, SECTION 2126, ABSENCE WITHOUT LEAVE, UNDER STATEMENT.

CALHR HUMAN RESOURCE MANUAL, SECTION 2126, ABSENCE WITHOUT LEAVE, UNDER STATEMENT, states: to invoke the AWOL statute, it is only necessary for the appointing power to demonstrate that the employee missed 5 consecutive working days without obtaining leave. Leave means permission from the employee's supervisor to be absent; it does not mean leave time on the books.

Per the **CALHR HUMAN RESOURCE MANUAL, SECTION 2126, ABSENCE WITHOUT LEAVE, UNDER STATEMENT, RESPONDENT** abided by these regulations and called and contacted her Lead to notify him that she was calling out sick indefinitely due to her ongoing medical conditions (naming all body parts) who acknowledged and granted permission by stating "OK" to the request. He indicated she was not on the schedule to report. RESPONDENT still had approximately 40 hours on the books at that time. Can the EMPLOYER still move forward with the AWOL after RESPONDENT abided by this rule?
When a qualified medical provider provides causal relationship, this means that the EMPLOYER should take responsibility in what has occurred regarding the industrial injury and provide the RESPONDENT with any benefits available to RESPONDENT, specifically that of *disability retirement*.

CalPERS has "a duty to comply with Article XVI, section 17 of the California Constitution and … to process disability retirement applications on the merits even where an employer has issued the applicant a notice … terminating their employment." Per Vandergoot, Haywood and Smith.

By denying RESPONDENT'S application for disability benefits, the Board violated the Contract Clauses of the state and federal constitutions (Cal. Const., art. I, § 9; U.S. Const., art. I, § 10, cl. 1) and its duty to administer the CalPERS system "in a manner that will assure prompt delivery of benefits … to the participants." (See Cal. Const., art. XVI, § 17, subds. (a)-(b).) RESPONDENT'S concluding allegation is that the Board has "a duty to comply with Article XVI, section 17 of the California Constitution and … to process disability retirement applications on the merits even where an employer has issued the applicant a notice … terminating their employment".

There was sufficient evidence documenting the continued disability as noted above in the QME reports AND treating physician's reports. The application for disability retirement should NOT have been denied. There were close to 1000 pages of continuing disability evidence that the Employer had access to per email dated 4/14/21 from Manager EMPLOYER 1 to new Manager EMPLOYER 2. (Reference CALPERS DOCKET #DRRR0712 AND #DRRR0713). EMPLOYER 2 testified she did not have sufficient medical documentation. Additionally, (Reference CALPERS DOCKET #DRRR0638) Insurance Representative provides EMPLOYER 2 with a complete synopsis of continuing medical disability status for RESPONDENT. EMPLOYER 2 testified and also written to RESPONDENT in District letter dated 11/30/21 she did not have sufficient medical evidence which prompted her to invoke the AWOL. RESPONDENT repeatedly informed EMPLOYER 2 to contact her Representative/Insurer regarding any medical documentation and disability updates.

RESPONDENT is pleading to the Board for appeal based on Haywood v. American River Fire Protection District (1998) 67 Cal. App. 4th 1292, Smith v. City of Napa (2004) 120 Cal. App. 4th 194, Martinez v. Public Employees Retirement System (2019) 33 Cal. App. 5th 1156, as well as the CalPERS Precedential Decisions in the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot (2013) CalPERS Precedential Dec. No. 13-01 and In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip MacFarland (2016) CalPERS Precedential Dec. No. 16-01.

The regulation states that "If a member applies for disability greater than four months following last day on pay, then the medical records must reflect "continuous disability." This means the member's medical records must reflect documented evidence of continuous disability from last day on pay through the date of the application and ongoing…" RESPONDENT meets the above criteria based on the evidence submitted above.

EMPLOYER 2 letter dated **11/30/21** requested medical documentation to request additional leave to be due by **12/1/21**, which was unreasonable, especially during COVID. This document was mailed to RESPONDENT on 11/30/21. Continuing disability was provided in the QME report submitted by RESPONDENT and also the anticipated doctor's note that was dated/submitted on 12/13/21 which stated, ***"Patient has been under my care since 4/29/21 till present. She is being treated for her left foot und workers comp."*** The note was unacceptable to EMPLOYER 2 because she stated it showed an upcoming appointment and ignored the most crucial part of the note. No adverse action should have taken place due to continuous disability per the medical documentation provided.

ISSUE: IF INTERACTIVE PROCESS WAS DEEMED COMPLETE BY THE EMPLOYER, DOES THE EMPLOYEE HAVE AN OBLIGATION TO RE-ENGAGE WHEN EMPLOYER DETERMINED NO POSITION AVAILABLE AND EMPLOYEE DEEMED TO HAVE *"CONTINUING DISABILITY AND CONTINUING INCAPACITY FOR THE PERFORMANCE OF DUTY"*

In 4/14/21 Email, EMPLOYER 1 states interactive process completed by EMPLOYER 1 who stated to EMPLOYER 2 (new Mgr) ***"she cannot return to her job here as a Security Guard, and there are no other jobs available her employment with District needs to come to a close whether or not her claim has been settled,…"*** (Reference Email 4/14/21, CALPERS DOCKET #DRRR0712 AND DRRR0713). On 4/14/21 EMPLOYER 1 gave a breakdown of the completed interactive process as well as respondent's choice on election of disability retirement to EMPLOYER 2. She informed EMPLOYER 2 that RESPONDENT was permanent and stationary, she could not return to her job and there were no other jobs available. EMPLOYER 1 also informed EMPLOYER 2 that there were over 1000 medical documents in support of the total disability.

On 11/30/21 letter to RESPONDENT, EMPLOYER 1 states ***"your assertion that the district has determined that there is no suitable work available for you as a Security Guard to accommodate your conditions is not accurate. Regardless of what may or may not have been discussed during the course of prior reasonable accommodation requests, the district has been attempting to reengage in the reasonable accommodation process with you…and our ability to accommodate you may change based on your restrictions, the positions available or other factors.*** "

It has already been provided that QME reports 5/3/21 and 6/25/21 determined RESPONDENT had ***"continuing disability and continuing incapacity for the performance of duty" for at least 12 months.*** Why is the employer asking respondent to reengage in a process when respondent has already been deemed disabled and permanent and stationary? It was also determined in the QME report there was not going to be any recovery either for better or worse. This makes the interactive process a mute point. There was NOT going to be a change in the RESPONDENT'S condition.

Also, the District advises RESPONDENT that the interactive process is "complete", and then EMPLOYER 2 states that information was "not accurate". When RESPONDENT receives contradictory information, it confuses matters because RESPONDENT can't rely on the information being received. This causes delays on life

changing decisions RESPONDENT must make and should not be held against her because she has to reverify the information received and get an understanding of why or why not information is valid. The District advised RESPONDENT eligible for Industrial Disability and then retracts and states not eligible for Industrial Disability. District said they verified service years, but it is still showing incorrectly today. (Reference email 8/21/21) It appears District wants RESPONDENT to make quick decisions that affect a permanent life change. These inaccuracies delay processes.

It is indicated that "*EMPLOYER 2 reported it is unknown if District could have provided respondent an accommodation at a later date because respondent stopped participating in the reengaging of the engaging interactive process.* RESPONDENT was notified by District that the interactive process was "**complete".**

According to the **Employer Disability Resource Guide** the basis to grant Disability Retirement/Industrial Disability Retirement (DR/IDR), CalPERS is governed by specific laws and regulations contained in the California Public Employees' Retirement Law. Government Code section 20026 defines "disability" and "incapacity for the performance of duty". "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least **12 consecutive months** or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

DR. X's assessment on the QME report that ***"All periods of disability were appropriate to date…Dates of disability started in 04/2019 until present",*** specifically means "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, **which is expected to last at least 12 consecutive months** or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion. DR. X is a competent medical opinion provider who has provided his professional medical opinion of respondent's condition--that of "disability" and "incapacity for performance of duty".

Based on the information above, the District should have issued a new personnel action for all accepted injuries extending the Separation Type: Leave of Absence to an effective date of one year from Dr. X's QME report of May 03, 2021, **which extends this Leave of Absence action out to 05/03/22 for "continuing disability" and "continuing incapacity for the performance of duty". If the personnel action was completed by the employer, this would have avoided or prevented the wrongful termination due to AWOL separation. (Reference 5/3/21 QME Dr. X's report, PERIODS OF DISABILITY, CALPERS DOCKET #DRRR1022 AND DRRR1023).**

IN 6/25/21 QME REPORT DR. X STATES, ***"It is my medical opinion, based within reasonable medical probability that the patients current symptoms and disability appear to be causally related to the industrial injury in question."***

The reports of respondent's treating physician and QME reports are unrebutted evidence of an eligibility for disability antedating the AWOL. (Id. at pp. 1305-1306, 79 Cal.Rptr.2d 749.) RESPONDENT timely filed the application for disability retirement. (Id. at pp. 1306-1307, 79 Cal.Rptr.2d 749.)

RESPONDENT HAD a valid claim for disability retirement. (67 Cal.App.4th at p. 1307, 79 Cal.Rptr.2d 749.) A public agency has an 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 (id. at p. 1305, 79 Cal.Rptr.2d 749 [citing § 21153]) or indirectly through cause based on the disability (Patton v. Governing Board (1978) 77 Cal.App.3d 495, 501-502, 143 Cal.Rptr. 593). And the claim, or evidence which would support a claim, of eligibility for disability retirement was presented before the disciplinary actions were taken." (Id. at p. 1306. **The EMPLOYER MUST have an obligation to file the personnel action to not delay eligibility of retirement and/or cause a wrongful termination action.**

CalPERS has "a duty to comply with Article XVI, section 17 of the California Constitution and … to process disability retirement applications on the merits even where an employer has issued the applicant a notice … terminating their employment." Per Vandergoot, Haywood and Smith.

ISSUE: During a preceding court hearing, the parties (EMPLOYER and RESPONDENT) AGREE BEFORE AN APPOINTED ADMINISTRATIVE JUDGE TO *"CONTINUING DISABILITY AND "CONTINUING INCAPACITY FOR THE PERFORMANCE OF DUTY", (IDENTIFIED IN THE QME REPORT). THE EMPLOYER CANNOT IGNORE THE AGREEMENT AND DEMAND PROOF OR EVIDENCE OF "CONTINUING DISABILITY" AND "CONTINUING INCAPACITY FOR THE PERFORMANCE OF DUTY", AND MOVE FORWARD WITH AN AWOL SEPARATION WITHIN THE YEAR.*

WHEN THE EMPLOYER RECEIVES NOTICE OF "CONTINUING DISABILITY AND "CONTINUING INCAPACITY FOR THE PERFORMANCE OF DUTY", IS THERE A TIME PERIOD THE RESPONDENT MUST PROVIDE ADDITIONAL MEDICAL DOCUMENTATION IN SUPPORT OF "CONTINUING DISABILITY AND "CONTINUING INCAPACITY FOR THE PERFORMANCE OF DUTY" PRIOR TO AN ADVERSE PERSONNEL ACTION, IE GREATER THAN A YEAR?

Insurer represents the Employer who authorizes all medical treatment regarding **RESPONDENT'S** injury and disability and they are provided medical notes from the treating physician after each appointment regarding any progress. At a court hearing, RESPONDENTS (EMPLOYER/INSURER-Insurer AND RESPONDENT) agreed in court before an **appointed Administrative Judge** to the ***"continuing disability" and "continuing incapacity for the performance of duty".*** Even though the Employer was notified of ***"continuing disability" and "continuing incapacity for the performance of duty,"*** the Employer still subjected RESPONDENT to provide medical documentation of ***"continuing disability" and "continuing incapacity for the performance of duty" within the year and issued an adverse personnel action.***

ISSUE: When a decision of ***"continuing disability" and "continuing incapacity for the performance of duty"*** is made by competent medical opinion, does this relieve the employer of all responsibilities to file an application of retirement on behalf of employee. **CA GOV'T CODE SECTION 19253.5, (i)(1), Medical examination, evaluation of employees**

Insurer has an obligation and a responsibility to inform the Employer (State of California, District, Del Mar Fairgrounds) and/or their State's Representative of the status on **RESPONDENT'S** continuing disability and should have provided their parties with medical documentation and the status of the continuing disability so the Employer would not invoke the AWOL status.

According to the **Employer Disability Resource Guide** the basis to grant Disability Retirement/Industrial Disability Retirement (DR/IDR), CalPERS is governed by specific laws and regulations contained in the California Public Employees' Retirement Law. Government Code section 20026 defines "disability" and "incapacity for the performance of duty". "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least **12 consecutive months** or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion. RESPONDENT meets these requirements as evidenced above.

ISSUE: CAN AN EMPLOYER WITH NO RESERVATIONS ON AN INITIAL CALPERS SUBMITTED APPLICATION FOR DISABILITY RETIREMENT, (AFTER CERTIFICATION AND SIGNATURE OF ELIGIBILITY), NEGATIVELY CHANGE AN EMPLOYEE'S ELIGIBILITY STATUS WHEN THE APPLICATION FOR DISABILITY RETIREMENT IS RESUBMITTED

PURSUANT TO GOVERNMENT CODE 21156. (I.E. ON FORM "CALPERS EMPLOYER INFORMATION FOR DISABILITY RETIREMENT, SECTION 3", CHECKS OFF: "NONE OF THE ABOVE APPLY TO THIS MEMBER." WHEN DISABILITY APPLICATION RESUBMITTED, EMPLOYER INFORMED CALPERS EMPLOYEE TERMINATED FOR CAUSE.).

ISSUE: CAN THE EMPLOYER OVERRIDE AN ADMINISTRATIVE LAW JUDGES DETERMINATION OF CONTINUING DISABILITY AND CONTINUING INCAPACITY FOR THE PERFORMANCE OF DUTY BY DEMANDING THE EMPLOYEE RETURN TO WORK OR INVOKE THE ABSENCE WITHOUT LEAVE (AWOL) PROVISIONS OF GOVERNMENT CODE SECTION 19996.2.

During a hearing, an ADMINISTRATIVE LAW JUDGE had an agreement between the EMPLOYER/RESPONDENT that employee had continuing disability and permanent and stationary, as noted above. If there is a determination of permanent and total disability from a state Qualified Medical Examination (QME) with no possibility of recovery from the total disability and/or the disabling position, the employer should not have the right to re-demand that RESPONDENT re-engage in the interactive process and demand that the employee report to her former disabling position when excused from work.

During COVID most jobs were dissolved. Maintenance/Public Safety were only entities operating and the District did not and could not offer a suitable position or identify one as provided in EMPLOYER'S statements because most jobs dismissed due to COVID. QME deemed RESPONDENT permanent and totally disabled prior to EMPLOYER 2 coming on board. Treating physician stated RESPONDENT permanent and totally disabled AND that RESPONDENT had disabling condition and could not perform duties of the job. RESPONDENT's occupation was one of two that survived the COVID downsizing. If the employee does not participate in the interactive process for the disabling position, can the employer move forward with disciplinary action thereby finding employee ineligible for disability retirement benefits?

THE DISABILITY STATUS WAS PREEMPTIVE OF THE AWOL. RESPONDENT had a mature right to a pension. A vested right matures when there is an unconditional right to immediate payment. (In re Marriage of Mueller (1977) 70 Cal.App.3d 66, 71, 137 Cal.Rptr. 129; see In re Marriage of Brown (1976) 15 Cal.3d 838, 842, 126 Cal.Rptr. 633, 544 P.2d 561.) The AWOL personnel action goes completely against the very essence of ADA and FEHA disability laws, which call for an *individualized assessment* of a qualifying disabled employee's disabilities, restrictions, and limitations.

DUTY TO FILE: CalPERS has "a duty to comply with Article XVI, section 17 of the California Constitution and … to process disability retirement applications on the merits even where an employer has issued the applicant a notice … terminating their employment." Per Vandergoot, Haywood and Smith.

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 (id. at p. 1305, 79 Cal.Rptr.2d 749 [citing § 21153]) or indirectly through cause based on the disability (Patton v. Governing Board (1978) 77 Cal.App.3d 495, 501-502, 143 Cal.Rptr. 593).

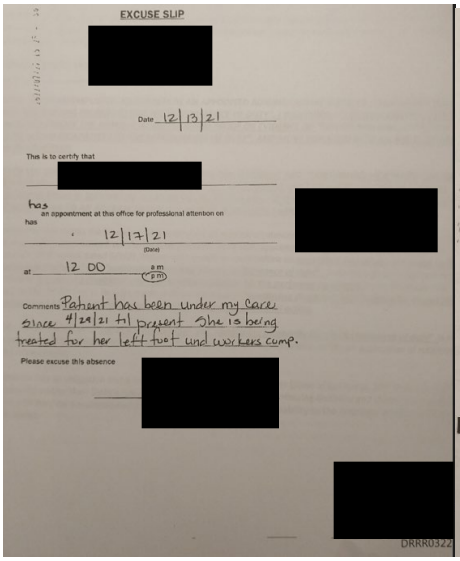
By denying RESPONDENT'S application for disability benefits/disability retirement, the Board violated the Contract Clauses of the state and federal constitutions (Cal. Const., art. I, § 9; U.S. Const., art. I, § 10, cl. 1) and its duty to administer the CalPERS system "in a manner that will assure prompt delivery of benefits … to the participants." (See Cal. Const., art. XVI, § 17, subds. (a)-(b).) **RESPONDENT'S** concluding allegation is that the Board has "a duty to comply with Article XVI, section 17 of the California Constitution and … to process disability retirement applications on the merits even where an employer has issued the applicant a notice … terminating their employment".

RESPONDENT believes the agency had an intention to thwart an otherwise valid claim for disability through the adverse personnel action of AWOL. However, even if the employer dismisses an employee solely for a cause unrelated to a disabling medical condition, this cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect. (Willens, supra, 10 Cal.3d at pp. 458-459, 110 Cal.Rptr. 713, 516 P.2d 1; Skaggs v. City of Los Angeles (1954) 43 Cal.2d 497, 503-504, 275 P.2d 9; see Pearson v. County of Los Angeles (1957) 49 Cal.2d 523, 543-544, 319 P.2d 624.) RESPONDENT has proved that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot preempt the right to receive a disability pension for the duration of the disability. (See In re Gray (1999) State Personnel Bd. Precedential Dec. No. 99-08, p. 6 [disability retirement effective before dismissal does not forestall dismissal; however, dismissal does not affect receipt of disability retirement].) Conversely, "the right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures." (Dickey v. Retirement Board (1976) 16 Cal.3d 745, 749, 129 Cal.Rptr. 289, 548 P.2d 689 (Dickey).) One of the key issues is whether **RESPONDENT'S** right to a disability retirement matured before **RESPONDENT'S** separation from service.[11] A vested right matures when there is an unconditional right to immediate payment. (In re Marriage of Mueller (1977) 70 Cal.App.3d 66, 71, 137 Cal.Rptr. 129; see In re Marriage of Brown (1976) 15 Cal.3d 838, 842, 126 Cal.Rptr. 633, 544 P.2d 561.)

MEDICAL EXCUSE SLIP DATED 12/15/21

PAYROLL DATED 12/3/21 NO TERMINATION INDICATED ON DISABILITY APP.

EMPLOYER 2 CERTICATION DTD 11/30/21 NO TERMINATION FOR CAUSE NOTED.


EXCUSE SLIP

[redacted]

Date 12/13/21

This is to certify that [redacted]

has an appointment at this office for professional attention on

12/17/21 (Date)

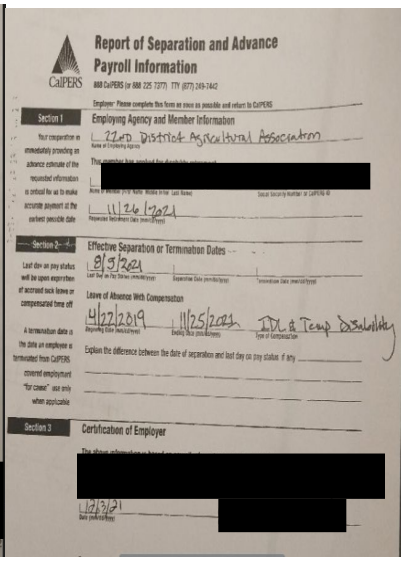
at 12 DO a.m. p.m.

Comments Patient has been under my care since 4/29/21 til present. She is being treated for her left foot und workers comp.

Please excuse this absence [redacted]

[redacted]

DRRR0322


CalPERS

Report of Separation and Advance Payroll Information

888 CalPERS (or 888 225 7377) TTY (877) 249-7442

Employer: Please complete this form as soon as possible and return to CalPERS

Section 1 Employing Agency and Member Information

Name of Employing Agency: 22nd District Agricultural Association

This member has worked for this employer

Name of Member (First Name, Middle Initial, Last Name) [redacted] Social Security Number or CalPERS ID

Member's Retirement Date (mm/dd/yyyy) 11/26/2021

Section 2 Effective Separation or Termination Dates

Last day on pay status will be upon expiration of accrued sick leave or compensated time off: 8/5/2021 (Last Day on Pay Status (mm/dd/yyyy))

A termination date is the date an employee is terminated from CalPERS covered employment "for cause" use only when applicable. Separation Date (mm/dd/yyyy) Termination Date (mm/dd/yyyy)

Leave of Absence With Compensation

4/22/2019 (Beginning Date (mm/dd/yyyy)) 11/25/2021 (Ending Date (mm/dd/yyyy)) IDL & Temp Disability (Type of Compensation)

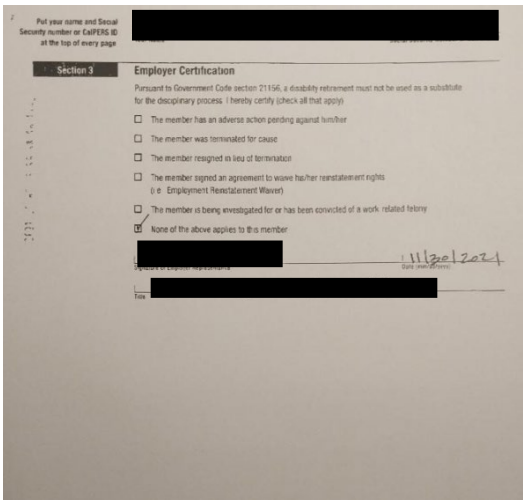
Explain the difference between the date of separation and last day on pay status, if any

Section 3 Certification of Employer

The above information is based on records of

[redacted]

12/3/21 (Date (mm/dd/yyyy))


Put your name and Social Security number or CalPERS ID at the top of every page [redacted]

Section 3 Employer Certification

Pursuant to Government Code section 21156, a disability retirement must not be used as a substitute for the disciplinary process. I hereby certify (check all that apply)

- ☐ The member has an adverse action pending against him/her
- ☐ The member was terminated for cause
- ☐ The member resigned in lieu of termination
- ☐ The member signed an agreement to waive his/her reinstatement rights (i.e. Employment Reinstatement Waiver)
- ☐ The member is being investigated for or has been convicted of a work related felony
- ☑ None of the above applies to this member

[redacted] 11/30/2021 (Date (mm/dd/yyyy))

Title [redacted]