

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the First Amended Statement of Issues  
against:**

**TREVER R. DALTON,**

**Respondent,**

**and**

**CALIFORNIA HIGHWAY PATROL,**

**Respondent.**

**Agency Case No. 2020-0294**

**OAH No. 2020070478**

**PROPOSED DECISION**

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video and teleconference on March 15, 2021.

Austa Wakily, Attorney, represented complainant Keith Riddle, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS).

Jill Suzanne Breslau, Attorney, represented respondent Trever R. Dalton (respondent), who was present. There was no appearance by or on behalf of respondent California Highway Patrol (CHP).

Oral and documentary evidence was received. The record was held open to permit closing briefs to be filed. Complainant filed a closing brief on August 26, 2022; it was marked for identification as exhibit C16. Respondent filed a closing brief on September 26, 2022; it was marked for identification as exhibit R46. Complainant filed a reply brief on October 10, 2022; it was marked for identification as exhibit C17.

The record was closed and the matter was submitted for decision on October 10, 2022.

## **SUMMARY**

In December 2017, respondent, a CHP Officer who was off duty, shot his neighbor in the back. Four months later, in April 2018, after being diagnosed with PTSD and major depression, both of which were determined to have pre-dated the shooting, respondent applied to CalPERS for industrial disability retirement benefits. CalPERS approved the application in September 2018 and told respondent it would reevaluate his disabled status in a year.

In July 2018, two months after respondent applied to CalPERS for disability benefits, CHP notified respondent he would be fired effective August 8, 2018, primarily

due to the off duty shooting incident. Respondent resigned on August 7, 2018, in order to avoid the humiliation of being fired.

In October 2019, as it told respondent it would, CalPERS began to evaluate claimant's status to determine whether he was still disabled. But, in a February 2020 letter, CalPERS informed respondent that it had determined he was not eligible for disability retirement at the time he applied for it in April 2018, that he would no longer receive benefits, and that CalPERS would recover the amounts erroneously paid to him. Respondent appealed that determination.

Respondent's appeal is granted.

## **FACTUAL FINDINGS**

### **Jurisdiction**

1. Respondent was employed by CHP as an officer for a total of approximately 12 years, from December 2006 to August 2018. Respondent's employment at CHP establishes him as a state safety member of CalPERS subject to Government Code sections 21151 and 21154.

2. In April 2018, respondent applied to CalPERS for industrial disability retirement benefits. CalPERS determined respondent to be eligible and granted respondent's application. In February 2020, after examining respondent's continued eligibility, CalPERS determined it had erroneously approved the initial application, determined respondent was ineligible, and revoked the benefits.

3. Respondent appealed CalPERS's decision. This hearing ensued.

## **Shooting Incident**

4. On December 4, 2017, respondent was off duty. He became inebriated and got into an altercation with a neighbor on the neighbor's driveway. Respondent went home but returned to the neighbor's driveway, drew his firearm, and shot at his neighbor twice. One bullet struck the neighbor in the back. (See Factual Findings 9 and 10.)

5. Ventura County Police Department officers arrested respondent and charged him with violating Penal Code section 245, subdivision (a)(2) (assault with a firearm), a felony.

## **CHP's Actions in Response to the Shooting Incident**

### **CHP'S NOTICES TO RESPONDENT OF LEAVE OF ABSENCE WITH PAY**

6. In December 2017, CHP served respondent with a Notice of Leave of Absence With Pay, pending CHP's investigation of allegations regarding respondent's arrest and being charged with a violation of Penal Code section 245, subdivision (a)(2), assault with a firearm resulting in great bodily injury. In the notice, CHP relieved respondent of all duties. (Ex. C5, p. A40.) CHP sent respondent another Notice of Leave of Absence With Pay six weeks later, on January 19, 2018. (Ex. R15.)

7. On April 25, 2018, a week after respondent applied to CalPERS for industrial disability retirement (see Factual Finding 18), CHP sent respondent another Notice of Leave of Absence With Pay, again placing him on leave of absence with pay pending CHP's investigation of allegations related to the criminal investigation of respondent.

///

## CHP'S NOTICE TO RESPONDENT OF ADVERSE ACTION

8. On July 18, 2018, CHP served respondent with a Notice of Adverse Action (NOAA) terminating his employment effective August 8, 2018. The NOAA stated that respondent was dismissed due to inexcusable neglect of duty, violation of prohibitions in accordance with Government Code section 19990, and other failures of good behavior outside of duty hours of such a nature that it causes discredit to the person's employment. (Ex. C7, pp. A54-A55.)

9. The NOAA charged that respondent had begun drinking alcohol at 9:00 a.m. on December 4, 2017, and continued drinking through the day and night. By late that night, at 12:36 a.m., respondent had drunk about 13 alcoholic beverages when he got into a physical altercation with a neighbor in the neighbor's driveway. The neighbor pushed respondent off his bicycle. Respondent went to his home a few houses away, moved his revolver from his ankle holster to his coat pocket, and, despite being in a position of relative safety, chose to return to the neighbor's house. The neighbor was standing in his driveway. Respondent pulled his firearm from his coat pocket and shot two rounds at the neighbor; one of the bullets struck the neighbor in the back and exited his abdomen.

10. The NOAA charges included respondent's statements to Ventura Police Department officers who appeared at the scene of the shooting. Respondent allegedly said he hoped his neighbor would die. He continued, "I will not tolerate if someone just fucking assaults me, okay? I'm not a pussy. I'm not going to fucking cower down and go fucking run and hide and call the cops. I am a cop, okay? And no one is going to fucking assault me and get away with it." (Ex. C7, p. A56.) During an administrative interrogation, respondent said, "I believe I was in policy when I fired my weapon." (*Id.* at p. A57.) The NOAA recited that respondent told his interrogator that he has "a

drinking problem." (*Ibid.*) Ventura Police Department officers arrested respondent and charged him with felonious assault with a firearm.

11. The NOAA also recited charges about another incident, during which respondent was alleged to be rude and discourteous to, and belligerent and confrontational with, CHP Sergeant Nick Salmeron on April 2, 2016. (See Factual Finding 42.)

12. CHP found respondent to be in violation of various CHP policies, that his misconduct was unethical and without excuse or justification, and that it brought discredit on respondent and the CHP. "It is therefore in the best interest of the Department, yourself and the people of the State of California that you be dismissed from your position as an Officer with the California Highway Patrol." (Ex. C7, p. A59.)

13. The NOAA informed respondent of his right to present a response to the charges by August 1, 2018, with a representative of his choice, at an informal pre-disciplinary response hearing. The NOAA also informed respondent of his right to file an answer to the charges within 30 days, and that the answer would be deemed a request for hearing to appeal the adverse action.

14. Respondent and a representative met with M. Garreti, Assistant Chief, Southern Division, CHP, on August 1, 2018, to present a response to the NOAA. Mr. Garreti wrote, in a memorandum dated the same day, that, having reviewed the allegations, the supporting documents, and the measure of discipline, "I am satisfied that the alleged offense(s) occurred, that reasonable evidence exists to believe you committed the act(s) of misconduct, and that the discipline imposed is not excessive. Accordingly, I recommend the Adverse Action be imposed without modification002E

Nevertheless, if you desire to pursue this matter further, you are entitled to appeal your Adverse Action to the State Personnel Board.” (Ex. C8, p. A64.)

### **RESPONDENT’S RESIGNATION FROM CHP**

15. On August 7, 2018, one day before the effective date of his termination set forth in the July 2018 NOAA, respondent filed with CHP a memorandum of resignation. He wrote that during his years as a CHP Officer, he “developed physical, emotional and cognitive symptoms that are a result of stress.” (Ex. C9, p. A66.) He continued, “Recently I have been diagnosed with P.T.S.D. (Post Traumatic Stress Disorder) and Major Depression. My symptoms make it impossible to perform my work duties. I am hereby resigning my position as a California Highway Patrol Officer, effective today, August 7, 2018, at 1600 hours.” (*Ibid.*)

### **CHP’S RESPONSE TO RESPONDENT’S RESIGNATION**

16. By letter dated August 8, 2018, A.R. Goulding, Captain Commander, CHP, wrote to respondent:

On August 7, 2018, at 1700 hours, I received your written resignation from your position of Officer with the California Highway Patrol, *in lieu of Adverse Action being taken against you.*

As such, your employment with the Department has officially terminated, effective August 7, 2018, at 1700 hours. *You may only reinstate with the Department at the discretion of the Commissioner.*

(Ex. R8, p. B29, italics omitted and added.)



17. By letter to respondent dated August 24, 2018, R. Romo, Captain Commander, Office of Internal Affairs, CHP, wrote to confirm respondent's resignation effective August 7, 2018.

I have reviewed the circumstances present at the time of your resignation and have determined that it was "under unfavorable circumstances." *At the time of your resignation, the Department was in the process of taking adverse action against you. Should you return to the CHP, this adverse action will be pursued.* The adverse action is based on allegations that you were involved in an altercation in which you fired two (2) rounds from your personal firearm at a person, who was struck in the back. You were subsequently arrested and charged with felony assault with a firearm by the Ventura Police Department. [¶] . . . [¶]

In accordance with Government Code Section 3306 and departmental policy, you are hereby advised of your right to file a written response to the above referenced matter within thirty (30) days.

(Ex. C11, p. A94, italics added.)

///

///

///

///

## **Respondent's Application for Industrial Disability Retirement, and CalPERS's Determination**

### **RESPONDENT'S APPLICATION FOR INDUSTRIAL DISABILITY RETIREMENT**

18. On April 7, 2018, four months after respondent shot his neighbor and was placed on leave with pay (see Factual Findings 4-6, *ante*), he signed an application for industrial disability retirement. CalPERS received the application on April 9, 2018.

19. In the application, respondent claimed the nature of his disability was Post-Traumatic Stress Disorder (PTSD) and Major Depressive Disorder as a result of "cumulative trauma" he experienced during the course of his employment with CHP from December 11, 2006, through January 22, 2018. (Ex. C6, p. A43.) Respondent wrote in his application that his condition "has led me to a place now that I don't think I can perform any job to support my family do [*sic*] to my mental state. I have now been on 2 medications for depression, anxiety, and insomnia and have a difficult time with focusing on one idea without interrupting thoughts. I am very depressed and constantly stressed and hypervigilant." (*Ibid.*)

20. On April 17, 2018, respondent provided information from his treating psychotherapist, Inés Manguió, Ph.D., that he was not available to work due to "severe anxiety, PTSD symptoms." (Ex. R15.) Based on Dr. Manguió's report, CHP cancelled respondent's administrative time off with pay status. (*Ibid.*)

///

///

///

**CALPERS'S REQUESTED AN INDEPENDENT PSYCHIATRIC DISABILITY  
EVALUATION OF RESPONDENT**

21. In response to respondent's April 7, 2018 Application for Industrial Disability Retirement, CalPERS's asked Lawrence H. Warick, M.D., Ph.D., to perform an independent psychiatric disability evaluation of respondent.

22. By letter dated July 16, 2018, Kayliegh Matisевич, Benefit Program Specialist, Disability Retirement Section, notified respondent CalPERS had arranged for a Psychiatry Independent Medical Examination by Dr. Warick to take place on August 8, 2018, in Oxnard. Ms. Matisевич explained the examination was necessary to provide CalPERS with "sufficient medical information to make a determination as to whether you are substantially incapacitated from the performance of your job duties." (Ex. R6, p. B25.)

23. Dr. Warick performed the evaluation on August 8, 2018, one day after respondent resigned from the CHP and the date his termination would otherwise have become effective.

24. Respondent reported to Dr. Warick that he had not drunk alcoholic beverages since the shooting incident in December 2017. He told Dr. Warick that, in connection with a workers' compensation claim he filed in January 2018, he was seen a few times by a psychiatrist, Mark Nehoraya, M.D., and by a psychotherapist, Inés Monguió, Ph.D., whom he continued to see weekly.

25. Dr. Warick reviewed documents, clinically interviewed respondent, and applied the Millon Clinical Multiaxial Inventory IV.

///

26. Dr. Warick diagnosed respondent with PTSD; Major Depressive Disorder; and Alcohol Abuse, currently in remission.

27. Dr. Warick wrote of respondent,

He is currently having active symptoms of [PTSD] which need to be treated and addressed, as well as depression. . . . He cannot perform, psychologically, the duties of a CHP officer (as per the job description). [¶]. . . [¶] He is substantially incapacitated from a psychiatric point of view . . . . [¶] . . . [¶] It is hard to tell how long the incapacity will last. He may have a susceptible underlying personality which has made the PTSD more severe, and with proper treatment, it is still difficult to ascertain if he will be able to recover from his PTSD or depression in the next 12 months. [¶] . . . [¶] He is considering some employment when he gets "healed." However, he is not sure what employment, and at present time, he feels he is not capable of returning to his work as a highway patrolman.

(Ex. C10, pp. A79-A80.)

**CALPERS'S DETERMINATION APPROVING RESPONDENT'S INDUSTRIAL  
DISABILITY RETIREMENT APPLICATION**

28. By letter to respondent dated September 18, 2018, Crystal Esparza, Retirement Program Specialist, Disability Retirement Section, CalPERS, wrote that respondent's application for Industrial Disability Retirement had been approved. "We find you are substantially incapacitated from the performance of your usual duties with

the Department of California Highway Patrol based upon your psychological condition.” (Ex. C12, p. A97.) “This determination of disability was made without evidence establishing the industrial relationship [of] your incapacity.” (*Ibid.*) Ms. Esparza noted respondent was under the minimum age for service retirement.

29. Ms. Esparza’s letter informed respondent that, “you may be reexamined periodically for your continued eligibility for disability.” (Ex. C12, p. A98.) This was based on Dr. Warick’s report that he was not certain whether respondent’s PTSD or depression would continue more than 12 months. (Factual Finding 25.)

30. CalPERS began paying respondent disability retirement benefits on October 1, 2018, retroactive to August 8, 2018, the effective date of his disability retirement.

### **CalPERS’s Reevaluation of Respondent’s Continued Eligibility for Industrial Disability Retirement**

31. About one year later, consistent with Ms. Esparza’s letter, CalPERS undertook a review of respondent’s continued eligibility for disability. By letter dated October 2, 2019, Suli Garcia, Benefit Program Specialist, Disability Retirement Section, CalPERS, notified respondent’s treating physician that respondent’s industrial disability retirement was under review “to determine whether the retiree is still eligible to receive disability retirement benefits.” (Exs. C14, p. A101; R17, p. B72.) The letter requested a re-evaluation of current disability.

32. Over the next four months, CalPERS re-evaluated respondent’s continued eligibility for disability retirement benefits. Rather than determine whether respondent was still disabled, however, CalPERS determined that respondent was never eligible for disability retirement.

**CALPERS'S DETERMINATION OF RESPONDENT'S INELIGIBILITY AT THE TIME OF HIS APPLICATION AND REVOCATION OF DISABILITY RETIREMENT BENEFITS**

33. By letter dated February 4, 2020, Keith Riddle, Chief, Disability and Survivor Benefits Division, CalPERS, wrote to respondent:

Upon review of your file, we have found you were not eligible for disability retirement benefits at the time you applied for disability retirement.

We have determined that your employment ended for reasons which were not related to a disabling medical condition. When an employee is separated from employment as a result of disciplinary action or the employee enters into a settlement agreement *where the employee chooses to voluntarily resign in lieu of termination, and the discharge is neither the ultimate result of medical condition nor preemptive of an otherwise valid claim for disability retirement*, termination and/or a mutual understanding of separation from employment due to a pending adverse [action] renders the employee ineligible to apply for disability retirement.

Your disability retirement benefits will be revoked. You will not be eligible to apply for disability retirement in the future unless you return to work for a CalPERS-covered employer and subsequently become unable to perform your job duties because of a physical or mental condition.

(Exs. C15, p. A104; R18, p. B75 [same letter, dated February 7, 2020], italics added.)

34. Mr. Riddle cited as authority for CalPERS's position the cases of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*), and *Martinez v. Public Employees Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*), as well as the CalPERS Precedential Decisions in *In The Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Dec. No. 13-01 (*Vandergoot*), and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip MacFarland* (2016) CalPERS Precedential Dec. No. 16-01 (*MacFarland*). (See Legal Conclusions 6-14.)

35. The letter advised respondent of a right to appeal its determination through an administrative hearing at the Office of Administrative Hearings.

### **RESPONDENT'S APPEAL OF CALPERS'S DECISION TO REVOKE BENEFITS**

36. By letter dated February 24, 2020, respondent timely appealed CalPERS's determination that he was not eligible for industrial disability retirement benefits at the time he applied for them and CalPERS's decision to revoke those benefits.

37. Respondent wrote that he filed his application due to PTSD in April 2018 "after I was made to understand my diagnosis and it's [*sic*] severity by my doctors." (Ex. R19.) He wrote of Dr. Warick's finding that he was "disabled as a result of PTSD from my job." (*Ibid.*) He continued,

I resigned because of my mental health issues—specifically my mental, physical and cognitive symptoms caused by all of the trauma, death and stress over the years starting

barely a few weeks into my career which made it impossible to perform my duties. It was because of things that happened in my career, and in fairness, CHP should have retired me a few years ago. They knew for a few years that I had problems and did nothing to help me. It is my understanding that my problems and behavior have been caused by PTSD so my discharge was really the result of a psychiatric condition that disabled me. My doctors' reports are already in your file as is Dr. Warick's.

*(Ibid.)*

## **Additional Evidence**

### **RESPONDENT'S DUTIES AS A CALIFORNIA HIGHWAY PATROL OFFICER**

38. Respondent testified that his position as a CHP Officer involved "working the road," responding to calls about traffic collisions, conducting investigations, and making traffic enforcement stops, among other duties.

39. Respondent witnessed numerous vehicle accidents or their aftermath during the course of his career with CHP, including fatal incidents. Respondent found many to be disturbing and traumatic. They gave him nightmares, flashbacks, anxiety attacks, and feelings of guilt about people he was powerless to help or save. He drank to self-medicate, which caused additional health complications.

### **CHP MEMORANDA AND APPRAISALS ISSUED TO RESPONDENT**

40. In support of his claim that he was experiencing adverse psychological symptoms as a result of his job stresses and was unable to receive appropriate



assistance, respondent submitted in evidence various performance appraisals and memoranda he received while serving as a CHP Officer.

41. Respondent received a Memorandum of Direction dated February 19, 2011, criticizing him for confronting a neighbor regarding a suspected drug sale while off duty on February 15, 2011. "Your display of poor judgment in this incident was unacceptable and will not be tolerated by this Department. If you engage in similar conduct in the future, the Department may take Adverse Action against you based on the incidents cited in this documentation, as well as any future incidents." (Ex. R22, p. B83.)

42. Respondent received another Memorandum of Direction, dated April 25, 2016, criticizing respondent for behavior toward Sergeant N. Salmeron. Sgt. Salmeron visited respondent at his home to check on his welfare and arrange a doctor's visit to determine his work status after respondent called in sick for a work-related injury. The memorandum stated that respondent's actions "were inappropriate, unprofessional, and contrary to policy . . . ." (Ex. R24.) (See Factual Finding 11, *ante*.) The memorandum continued,

Always remember, Ventura Area Management staff is here to help you with any personal and/or work related problems you may encounter. Family and Medical Leave Act (FMLA) is a right afforded to all employees to assist with certain qualifying care matters. Additionally, the Employee Assistance Program (EAP) is another resource available to support you in addressing any personal issues which may adversely affect your personal and/or work state and may be reached at . . . . In closing, I must conclude with the

"Bazemore Decision" Admonishment, which reads: "Your conduct on this occasion was unacceptable and will not be tolerated by this Department. If you engage in similar conduct in the future, the Department may take adverse action against you based on the incident cited in this documentation, as well as any future incidents."

*(Id. at p. B95.)*

43. An appraisal issued in August 2012, after respondent's fifth year on the job, remarked that, "In May 2012, you and several of Santa Paula PD officers were first on scene of a horrendous traffic collision on SR 126. You and the other officers climbed inside a severely damaged vehicle in an all-out effort to save the lives of the two occupants. Although the two parties succumbed to their injuries, your valiant efforts were recognized and praised by the Chief of Santa Paula PD. Your transfer to Santa Barbara is coming up shortly. Continue to strive for perfection and you will surely be an asset to your new Area." (Ex. R20, p. B80.) Respondent received a written commendation for his conduct at the May 2012 accident scene. (Ex. R23.)

44. Almost four years later, on April 25, 2016, CHP placed respondent on "attendance reporting" for six months, requiring him to provide to his supervisor a reason for all absences due to illness, and imposed certain other restrictions. CHP found that respondent's use of sick leave as a bridge between scheduled regular days off was "inconsistent with the normal and acceptable pattern of sick leave usage" and was unacceptable. (Ex. R25.) CHP had already placed respondent on attendance reporting for the same issues in November 2014. (Ex. R26.)

///

45. An appraisal issued in July 2016 noted respondent's unacceptable use of sick leave and continued,

During our past discussions and counseling sessions, you expressed personal issues which would weigh heavily on anyone. As explained during all our discussions, the Department is prepared to provide you with the resources (peer support, EAP, etc.) which may assist you in addressing those issues. There is no question that when you show up ready to work, you are a valued employee and possess the ability to earn Excellent ratings in several of the nine Critical Tasks.

(Ex. R21, p. B82.) A handwritten note on the assessment form thanked respondent for his "candid discussions and your willingness to address and attempt to correct these issues." (*Id.*)

46. In a memorandum dated September 12, 2016, CHP's T.S. Roberts, Captain, Commander, referred respondent to the Managed Healthcare, State of California, Employee Assistance Program (EAP), for assistance in resolving concerns about his self-reported drinking problem and its effects. The memorandum referred to respondent's pattern of sick leave use, reports of his off-duty behavior, including walking in his neighborhood in an apparently inebriated state, and reports of his having "drunk dialed" CHP employees to have inappropriate and unprofessional conversations. (Ex. R27, p. B110.) Capt. Roberts wrote that respondent's participation in the EAP would be voluntary, but that Capt. Roberts would monitor respondent's job performance and "may need to proceed with disciplinary action." (*Ibid.*)

47. On October 28, 2016, respondent saw Ted Wrablik, MFT, having been referred to Mr. Wrabik through the EAP. Respondent told Mr. Wrabik he had problems with work and alcohol and expressed skepticism that therapy could help him. Respondent was reluctant to disclose anything other than generalities and was not forthcoming. Respondent "is seeking help but will not admit that he needs to change anything." (Ex. 30, p. B121.) Mr. Wrabik noted there was insufficient information on which to base a diagnosis, and that respondent appeared reluctant to commit to therapy. At hearing, respondent testified that he was reluctant "to be lumped in with 'Crazy Craig'."

### **RESPONDENT'S WORKERS' COMPENSATION CLAIM**

48. Respondent filed a workers' compensation claim on January 22, 2018, the month following the off-duty shooting, and was placed on temporary disability status. By letter dated December 16, 2021, the State Compensation Insurance Fund (SCIF), claims administrator for CHP, notified respondent that temporary disability payments were ending. (Ex. R28.) By letter the following day, SCIF notified respondent he would receive monthly permanent disability payments and that his medical condition would be monitored until it became "permanent and stationary," at which time a medical evaluation would be performed. Monitoring would continue to March 11, 2022, to determine the extent of respondent's permanent disability. (Ex. R29.)

49. On January 22, 2018, respondent reported to Wendy A. Sylvester, M.D., for a workers' compensation claim medical evaluation. (Ex. R44.) Dr. Sylvester referred respondent to Dr. Stanley Goodman in March 2018. Dr. Goodman initially diagnosed respondent with adjustment disorder with anxiety and major depressive disorder and prescribed mirtazapine and clonidine daily.

## **Dr. Monguió**

50. Respondent was then referred to Dr. Monguió, who began seeing respondent on March 29, 2018.

51. Dr. Monguió reported, in a Complex Initial Evaluation dated April 9, 2018, that respondent selected her as his primary treating physician, and that she intended to identify his injury and suggest a course of treatment. After reviewing medical records, conducting a clinical interview of respondent and structured behavioral observations, and applying various psychological instruments, Dr. Monguió diagnosed respondent with PTSD and Major Depression, single episode, severe, conditions she found resulted from "exposure for more than 10 years to traumatic events in the course of his duties as a CHP officer . . . ." (Ex. R40, p. B498.) (See Factual Findings 20 and 24, *ante*.)

52. In a progress report to SCIF dated March 31, 2021, Dr. Monguió reported on respondent's continuing symptoms and recommended continuing weekly sessions including cognitive behavioral interventions, as well as medication management by Marc Nehorayan, M.D.

## **Dr. Nehorayan**

53. On May 14, 2018, Dr. Nehorayan, a Diplomate of the American Board of Psychiatry and Neurology, saw respondent in order to perform a psychiatric examination and psychological testing "with respect to the psychiatric component of his Workers' Compensation claim" alleging "emotional injury as a result of employment." (Ex. R35, p. B283.) In a report dated May 24, 2018, Dr. Nehorayan wrote that he examined respondent, reviewed records, and administered psychological testing instruments.

54. Dr. Nehorayan diagnosed respondent with PTSD, chronic; Major depressive episode, severe with psychotic features; rule out ethanol related disorder not otherwise specified; and rule out ethanol abuse now in sustained partial remission per patient's report.

55. Dr. Nehorayan found that, because respondent's symptoms were not resolved even though respondent reported having stopped using alcohol five months earlier, they were likely "associated with the continuous repetitive trauma that the patient has been through while working as a CHP officer and any long-term exposure associated with multiple traumatic events and the nature of the aspects of the off duty shooting." (Ex. R35, pp. B290-B291.) Dr. Nehorayan strongly recommended respondent continue treatment with Dr. Monguió.

56. Dr. Nehorayan re-examined respondent on October 6, 2018, to evaluate respondent's medication regime. In a report dated January 25, 2019, Dr. Nehorayan noted that respondent had seen Dr. Spencer since Dr. Nehorayan's last report. Dr. Nehorayan made medication recommendations and again recommended respondent continue seeing Dr. Monguió. (Ex. R36.)

57. On January 10, 2020, Dr. Nehorayan again examined respondent. In a report of the same date, Dr. Nehorayan wrote of respondent's experience with the criminal justice system as a result of the off duty shooting of his neighbor. Dr. Nehorayan wrote that the court denied respondent a diversion program, but that his probation officer assessed him to be of low risk. "He indicates that the Judge felt that the patient did have PTSD, but that the PTSD did not have enough to do with the incident." (Ex. R37, p. B400.) Dr. Nehorayan recommended continuing various medications and psychotherapy.

58. On September 24, 2021, Dr. Nehorayan again examined respondent. In a report of the same date, Dr. Nehorayan wrote that respondent's criminal trial was scheduled for the following month. Dr. Nehorayan recommended continuing various medications and psychotherapy. (Ex. R38.)

### **Dr. Spencer**

59. SCIF referred respondent for a psychiatric Qualified Medical Evaluation by Edward L. Spencer, M.D., Q.M.E., a Diplomate of the American Board of Psychiatry and Neurology. Dr. Spencer conducted the evaluation on December 10, 2018. In a report dated January 9, 2019, Dr. Spencer reported he interviewed respondent, reviewed his medical records, and administered psychological testing. "The examination was conducted to evaluate alleged industrial injuries to the psyche, in connection with the applicant's employment with California Highway Patrol." (Ex. R31, p. B125.)

60. Respondent reported to Dr. Spencer the gradual development of symptoms over the course of his employment at CHP. Respondent reported that he drank to cope with job stresses and his drinking escalated, resulting in attendance and behavioral problems. Respondent reported receiving only sporadic mental health treatment and counseling before 2018. Dr. Spencer told respondent that records showed he resigned from CHP due to an off-duty shooting; respondent refused to discuss the details of that incident with Dr. Spencer.

61. Respondent reported persistent psychiatric symptoms despite his psychotherapy and medications. "In addition to psychiatric treatment with Dr. Mark Nehorayan, [respondent] continues to see Dr. Monguió on a weekly basis." (Ex. R31, p. B129.) Dr. Spencer found a strong possibility that respondent had seriously

contemplated suicide, and that respondent's "thought content was notable for suspiciousness and paranoia related to the motives and purpose of this examination." (Ex. R31, p. B136.)

62. Using the Diagnostic and Statistical Manual (IV-TR), Dr. Spencer diagnosed respondent with PTSD; Major Depressive Disorder, Single Episode, Severe with Psychotic Features; and Alcohol Abuse.

63. Dr. Spencer found respondent's depression "arose out of a sense of his diminishing psychological capacity associated with the development of a post-traumatic stress reaction and recently was worsened by his involvement in the off-duty shooting in which he felt unsupported by the CHP." (Ex. R31, p. B143.)

64. Dr. Spencer made findings regarding respondent's eligibility for workers' compensation insurance. Dr. Spencer's conclusions regarding eligibility and allocating relative percentages to various contributing causes of respondent's conditions are not relevant here. Relevant, however, are Dr. Spencer's discussion of the causes of respondent's conditions, without assigning each of them a relative weight.

65. Dr. Spencer concluded, and believed his conclusion to be consistent with Dr. Monguió's opinion, that respondent suffered a chronic psychiatric injury and that respondent:

developed chronic post-traumatic stress disorder arising out of his frequent exposure to traumatic situations in the ordinary course of his duties as an officer with the CHP. There was the development of depression in the context of the applicant's declining functioning and loss of self-concept as well. However, given that the [workers'



compensation] claim was filed after an incident in which the applicant was involved in an off-duty shooting, and his emotional state appeared influenced by the stressors of those legal proceedings and his employer's subsequent reaction to the shooting, that event would appear to play a causal role as well. . . .

In any case, the off-duty shooting could not be considered to be responsible for the applicant's post-traumatic stress disorder and depressive reaction, which by his credible account were present during his employment, well before the shooting. Further, his PTSD was organized around traumatic experiences occurring related to the highway patrol and did not really encompass the events of the shooting.

(Ex. R31, p. B145.) Dr. Spencer recommended ongoing psychiatric and psychological treatment.

66. In a supplement report dated October 29, 2021, Dr. Spencer wrote that he had reviewed additional documents and reaffirmed the findings of his earlier report. (Ex. R33.) In another supplement report dated November 24, 2021, Dr. Spencer wrote that he had reviewed additional clinical reports of Drs. Monguió and Goodman, mainly bearing on subsequent events affecting respondent's condition, and that his opinions remained unchanged. (Ex. R34.)

///

///

## **TESTIMONY AT HEARING**

### **Dr. Monguió**

67. Dr. Monguió, respondent's treating psychotherapist, testified that in March 2018, when she started treating respondent, he was "a mess." He had a dismal attention span, was extremely anxious, and would startle at any sound from outside the room due to his PTSD. She testified that he has made progress in the past four years, and continues to improve. She testified that respondent decided to resign before he was fired because being fired would be too demeaning.

### **Timothy Grigsby**

68. Timothy Grigsby, an Associate Government Program Analyst at CalPERS, reviews industrial disability retirement applications, among other things. He testified that if an employee is terminated for cause, the employee is not eligible for industrial disability retirement.

69. Mr. Grigsby testified that when CalPERS notified respondent it had approved the application on September 18, 2018, after Dr. Warick found him incapacitated from his usual duties, CalPERS's system showed respondent was still employed at CHP. It was not until two days later, on September 20, 2018, that CHP submitted for input into CalPERS's database the information that, as of August 7, 2018, respondent's employment terminated. CalPERS does not review employment status after approving an industrial disability retirement application; it only did so with respect to respondent when it conducted its reevaluation after 12 months.

70. CalPERS, according to Mr. Grigsby, should not have approved respondent's application. And because respondent was not eligible at the time he

applied, CalPERS had a legal obligation under Government Code section 20160 to correct the situation, stop benefits, and recover sums already paid.

71. Mr. Grigsby explained that he looked to see whether respondent had a medical condition in December 2017 that may have caused him to shoot his neighbor. A medical condition would, according to Mr. Grigsby, result in an exception to *Haywood*, the holding of which makes an employee ineligible for disability retirement benefits if the employee is terminated for cause.

72. Mr. Grigsby found that respondent was severely intoxicated when he shot his neighbor, but that intoxication is not a medical condition. Mr. Grigsby testified that CalPERS rejected the possibility that respondent's PTSD was a disabling condition at the time of the shooting incident because there was no indication respondent was receiving any psychological treatment for PTSD until after the investigation started. Mr. Grigsby rejected respondent's statement in his resignation notice that he was resigning due to his PTSD. Mr. Grigsby concluded the incident was caused by respondent's being intoxicated.

73. Contrary to Mr. Grigsby's testimony that there was no indication of treatment before the investigation, the records show that Dr. Monguió began treating respondent in March 2018, and reported that in April 2018. (See Factual Findings 20, 24, 50-52.) Mr. Grigsby testified that CalPERS did not obtain termination information from the medical records, but from the employer. This explanation, that CalPERS's ignorance of respondent's treatment for PTSD and major depression during its investigation justifies reversing its eligibility determination, is not persuasive. Also, respondent in his application wrote that his disability arose from stress, strain, and trauma over his career and that he was receiving treatment in the form of two medications to address his depression, anxiety, and insomnia. (Ex. C6, p. A43.)

74. Also unpersuasive is Mr. Grigsby's limiting the possible cause of respondent's actions to alcohol abuse. Mr. Grigsby testified he is not aware that those suffering from PTSD commonly self-medicate with alcohol. Mr. Grigsby's lack of awareness cannot establish the truth or falsity of the proposition and is insufficient to properly form any part of a basis for CalPERS's denial of eligibility.

75. Mr. Grigsby testified that he reviewed all of Dr. Spencer's reports but that, because respondent resigned in lieu of termination under unfavorable circumstances and there was no longer an employment relationship, Dr. Spencer's reports were not relevant to CalPERS's determination of respondent's eligibility for industrial disability retirement benefits.

76. This, too, is not persuasive. They are relevant at least to the extent that, as the record shows, the diagnoses of Dr. Spencer, Dr. Monguio, and Dr. Nehorayan of PTSD and major depression caused during the long course of respondent's career at CHP are consistent with the diagnoses of Dr. Warick, the psychiatrist CalPERS retained to conduct the psychiatric independent medical examination on which CalPERS based its decision to grant respondent's disability application.

## **LEGAL CONCLUSIONS**

### **Applicable Law**

1. CalPERS initiated this action by filing a Statement of Issues. (Factual Finding 8.) Where an applicant files an appeal of a CalPERS determination, the Executive Officer "shall execute a statement of issues." (Cal. Code Regs., tit. 2, § 555.2 [compare Cal. Code Regs., tit. 2, § 555.3 (requirement of accusation where employer requests employee's disability retirement)].) Though generally the filing of a Statement

of Issues places the burden of proof on respondent, CalPERS has the burden of proof in this proceeding, as it wishes to change the status quo. CalPERS must show that, having originally determined respondent was entitled to industrial disability retirement benefits, its current decision to stop paying those benefits complies with Public Employees' Retirement Law.

2. The standard of proof is a preponderance of the evidence, meaning that CalPERS is obliged to adduce evidence that has more convincing force than that opposed to it. (Evid. Code, § 115; *Glover Vernon. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

3. For industrial disability retirement purposes, "disability" and "incapacity for performance of duty" mean "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, *as determined by the board . . . , on the basis of competent medical opinion.*" (Gov. Code, § 20026, italics added.)

4. A state safety member "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability." (Gov. Code, § 21151, subd. (a).) "The member may apply for disability retirement while in state service; on receipt of the application, the board must order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty." (Gov. Code, §§ 21152, 21154.)

5. If the Board finds, on the basis of the medical examination and other information, "that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability . . . ." (Gov. Code, § 21156,

subd. (a)(1).) Courts applying the pertinent statutes have established that “incapacitated” means the applicant for a disability retirement has a “substantial inability” to perform his or her usual duties. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 886-887) (*Mansperger*.) Courts look not solely to job descriptions but to the duties actually performed by the individual. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854, 860 (*Hosford*.)

6. The board must correct actions CalPERS has made as a result of error. (Gov. Code, § 20160, subd. (b).) In cases where CalPERS has made erroneous payments to a member, its right to collect repayment shall expire three years from the date of payment or, if the payments were a result of fraud, 10 years. (Gov. Code, § 20164, subds. (c), (d).)

7. Dr. Warick found respondent incapacitated in this case, and CalPERS approved respondent’s application.

8. “[W]here . . . an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed.” (*Haywood, supra*, 67 Cal.App.4th at p. 1307.) In *Haywood*, the employee’s “firing for cause constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement—the potential reinstatement of the employee with the employer if it is ultimately determined that he is no longer disabled.” (*Haywood, supra*, 67 Cal.App.4th at p. 1306.) “[T]he disability provisions of the PERS law contemplate a potential return to active service.” (*Haywood, supra*, 67 Cal.App.4th at p. 1307.)

9. In *Haywood*, a firefighter was terminated for cause following disciplinary actions against him. He was denied disability retirement despite his claim that the disciplinary actions caused him to suffer major depression and that, though again able to perform his former duties, a return to work would create a risk of future depression. The court found that the behavior that led to Haywood's firing was not caused by a physical or mental condition that could have been present before he was fired. Though the firing completely terminated the employment relationship, the court noted that "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. 1305.)

10. The evidence here is persuasive that should applicant attempt to reinstate with his employer, the NOAA would be enforced and CHP's investigation into the shooting incident would be reopened. What is not clear, however, is the effect respondent's diagnoses and treatment might have on any decision by the CHP.

11. Respondent would be barred from returning to his former employment unless he could satisfy the *Haywood* exception, namely, that he had a matured right to disability retirement at the time of his separation from employment. A vested right matures when there is an unconditional right to immediate payment. And, in the case of CalPERS disability retirement, there is no unconditional right to immediate payment without a finding by CalPERS that there is a right to a disability retirement pension. (*Smith, supra*, 120 Cal. App. 4th 194 at p. 206); see also *Martinez, supra*, 33 Cal.App.5th 1156 [approving *Haywood* and *Smith*].)

12. Here, CalPERS made such a finding after its appointed psychiatrist, Dr. Walrick, diagnosed respondent with PTSD and major depression and found him

incapacitated at the time he applied, which was four months before CHP terminated him.

13. In a precedential decision, CalPERS's Board of Administration found that, "At the time [the employer] issued the NOAA and severed its employment relationship with applicant, applicant had no unconditional right to immediate payment of a disability retirement. His workers' compensation actions were unresolved, and had no bearing on a determination as to whether he was substantially and permanently incapacitated from his duties under retirement law. CalPERS had had no opportunity to evaluate any disability claims; applicant did not even initiate the disability retirement process until after giving cause for his dismissal. Applicant had no unconditional right to immediate payment of a disability pension at the time he was terminated."  
(*MacFarland, supra*, Precedential Dec. No. 16-01, at p. 10.)

14. Here, unlike in *MacFarland*, respondent applied for disability retirement benefits in April 2018, and was examined and diagnosed by Dr. Manguió with PTSD and depression, four months before CHP terminated his employment. On the same day respondent's termination became effective, August 8, 2018, the CalPERS's-appointed psychiatrist, Dr. Warick, conducted an independent medical examination of respondent and diagnosed him with PTSD and major depression.

15. As explained in another precedential decision, "a necessary requisite for disability retirement is the potential reinstatement of the employment relationship" with the employer if it ultimately is determined that the employee is no longer disabled. (*Vandergoot, supra*, at pp. 7, 18.)

///

///



16. Here, reinstatement cannot be precluded in advance; it will depend on the weight CHP gives to the effect of respondent's disabling conditions on his actions in December 2017.

### **Additional Analysis**

17. Complainant did not introduce evidence sufficient to demonstrate that respondent was not substantially and permanently incapacitated from performing his usual job duties at the time he applied for industrial disability retirement benefits. The record shows that, upon receiving respondent's application, CalPERS referred respondent for a psychiatric independent medical examination by Dr. Warick. Dr. Warick diagnosed respondent with PTSD and major depression and found he was incapacitated from performing his usual job duties. Dr. Warick suggested a reexamination of respondent's condition in 12 months to determine whether he was still disabled. Based on Dr. Warick's examination, CalPERS determined that respondent qualified for industrial disability retirement benefits.

18. The standards in disability retirement cases are different from those in workers' compensation. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].)


19. But the diagnoses of therapists and physicians examining or treating respondent in connection with his workers' compensation claim of PTSD and depression arising out of his employment experiences at CHP are consistent with Dr. Warick's findings and CalPERS's original determination of eligibility. (Factual Findings

21-30.) Findings in workers' compensation matters, though not binding, may be relevant evidence. (See *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1055.) Courts may look to workers' compensation precedent for guidance when dealing with similar issues that arise in disability retirement matters. (*Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 578, fn. 4.) The findings of Drs. Spencer, Nehorayan, and Monguió therefore lend support to the conclusion that respondent's discharge was the ultimate result of a medical condition or preemptive of an otherwise valid claim for disability retirement.

## ORDER

The appeal of respondent Trever R. Dalton from CalPERS' determination that he was not eligible for industrial disability retirement at the time of his application, that he is not entitled to further benefits, and that he must repay benefits he has received, is granted. CalPERS' decision to deny respondent's eligibility for industrial disability retirement is overruled.

DATE: 11/09/2022

  
Howard W. Cohen (Nov 9, 2022 11:25 PST)

HOWARD W. COHEN

Administrative Law Judge

Office of Administrative Hearings