

ATTACHMENT C

RESPONDENT'S ARGUMENT

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10 Seth D. Horst

11 **BEFORE THE BOARD OF ADMINISTRATION**
12 **CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM**

13 In the Matter of the Reinstatement from Ref. No. 2022-1039

14 Industrial Disability Retirement of:)

) **RESPONDENT'S ARGUMENT**

15 SETH D. HORST)

16 Respondent,)

17 Attention: Board Services Coordinator
18 California Public Employees' Retirement System
19 Post Office Box 942701
20 Sacramento, Ca. 94229-2701
21 **Board@calPERS.ca.gov**

1 Public employee pension legislation must be liberally construed, resolving all ambiguities in
2 favor of the applicant. *Gorman v. Cranston* (1966) 64 Cal.2d 441, 444; *Neeley v. Board of Retirement*
3 (1974) 36 Cal.App.3d 815, 822; *Weissman v. Los Angeles County Employees Retirement Association*
4 (1989) 211 Cal.App. 3d 40, 44.

5 The 10/20/20 CalPERS Physician's Report on Disability (CalPERS Exhibit "4" A36-A37)
6 was prepared by Dr. McKinney. In the report he indicates Horst suffers hypersensitivity to the left
7 groin from ilioinguinal nerve pain. He further indicates the pain increases with prolonged sitting with
8 a duty belt or vest. Lastly, he states Horst cannot sit for prolonged periods of time with the vest or a
9 duty belt. This opinion is also consistent with his medical report dated 8/19/20 (Respondent's Exhibit
10 "L" B90-B95) where Dr. McKinney stated the following:
11

12 "After returning to work, he continues to note groin pain, which has
13 become incapacitating to him, if he has to drive a patrol car for any
14 prolonged periods of time or if he even has to sit at a desk, but especially
15 if he has to wear his duty belt. Wearing the duty belt causes direct
16 pressure to the scar and pain into the lower abdomen and into the
17 testicles. This is magnified in the sitting position, especially in a vehicle
18 because the legs are forced into a close position. The ballistic vest that
19 he is required to wear puts pressure directly on his lower abdomen. This
20 clear impairs him while driving or prolonged sitting. He also has pain
21 that runs down his groin and radiates into the left testicle, ..." (B90.)

19 Dr. McKinney concluded Horst was precluded from wearing a duty belt, and a vest could not
20 be worn while sitting. Horst could not return to his usual occupation (B94.) **This is significant**
21 **because CalPERS granted the disability retirement based on Dr. McKinney's opinion and these**
22 **specific symptoms.** Horst was granted a disability retirement on a very specific and narrow
23 incapacity. Horst cannot sit for long periods of time while wearing a ballistic vest and / or a highway
24 patrol officer's duty belt. This is due to the fact that a ballistic vest is heavy and rigid, and while
25 sitting the lower edge of the vest pushes into the abdomen directly in the area of the surgery and the
26 nerve. The duty belt is several inches wide and is made of hard rigid leather. While sitting, the duty
27 belt pushes into the abdomen directly in the area of the surgery and the nerve. The nerve pain becomes
28 steadily worse the longer he sits with this gear on in these circumstances.

1 CHP lists the 14 critical activities for a highway patrol officer (CalPERS Exhibit "9" A56-
2 A57). #3 requires sitting in a patrol car for an extended period of time during patrol or surveillance.
3 Horst could do this for a few hours with some discomfort and pain. He might be able to do it for
4 several days with increasing discomfort and pain. Low levels of pain and discomfort do not rise to
5 the level of being incapacitating. However, pain can become so severe, that it is intolerable and
6 causes an inability to perform certain actions. Here, performing this task, Horst's pain will steadily
7 increase and spread until it is so severe that it is incapacitating. He will not be able to sit in the car or
8 drive it around. He will not be able to chase suspects or grapple with them effectively. He will not
9 be able to react effectively in emergency situations. In sum, he will not be able to do his job as a
10 highway patrol officer. This is not a prospective incapacity. He will become incapacitated in a matter
11 of days. This is not a part time job where you can work a few days and then miss a week or two.
12 This is not a risk of further injury. These are symptoms that become incapacitating from the
13 preexisting injury. Horst cannot sit in a car for hours at a time, for multiple days, in a vest and / or
14 duty belt. He will become incapacitated. CalPERS agreed and determined that Horst's increasing
15 pain under these circumstances is substantially incapacitating.

16 CalPERS has the burden of proving that the above incapacity has not continued to the present.
17 CalPERS has failed to do so. The fundamental flaw with CalPERS case is that CalPERS never
18 evaluated Horst's ability to wear a ballistic vest and / or duty belt while sitting for hours in a patrol
19 car for multiple days.

20 Horst is physically fit. Horst participates in Jiu-Jitsu training. Horst is active in that he swims
21 and has jumped 15-20 feet from a cliff into a lake. Horst can sit or drive for short periods of time.
22 However, he did all of these things before he was granted an industrial disability retirement.
23 CalPERS case is based on evidence they acquired of Horst participating in Jiu-Jitsu, swimming, and
24 jumping into a lake. These activities are not in dispute. However, CalPERS is taking away his
25 retirement based on activities that existed when CalPERS granted the retirement in the first instance.
26 These activities cannot be evidence against incapacity now when they were not evidence against
27 incapacity before. CalPERS relies on the opinion of Dr. Bhuller. Dr. Bhuller conducted a physical
28 examination and reviewed medical reports. However, his opinion is primarily based on videos he

1 watched of Horst's activities described above after the retirement was granted. He never observed
2 Horst sitting for long periods of time. He never observed Horst wearing a ballistic vest and / or duty
3 belt while sitting for long periods of time. He did not put Horst through a functional capacity exam
4 to see if he could sit for long periods while wearing a ballistic vest and / or duty belt without
5 developing incapacitating symptoms. Dr. Bhuller stated in his own report of 9/23/22 (CalPERS
6 Exhibit "25" A87-A99) that "The only thing that was not clear is how a gun belt would impair him."
7 The only question we cannot answer is how the gun belt would impair him" (A96.)

8 The only disability Horst has, was not addressed by Dr. Bhuller. CalPERS has the burden of
9 proof in this case. How is that burden met when their doctor does not answer the question at issue.

10 Dr. Bhuller makes assumptions that the videos depict "combat" (A96), "fighting in a frog-
11 like position" (A96), and "lying on the floor with leg abduction and pressure being exerted on the left
12 ilioinguinal region" (A88.) It should be noted that Dr. Bhuller made no attempt to get further
13 information from Horst, the Jiu-Jitsu instructor, or another Jiu-Jitsu expert regarding the physical
14 aspects of the actions depicted in the videos before making uninformed conclusions that the evidence
15 shows were in error. It is also of note that the videos are not "surveillance" videos. The were videos
16 made by Horst that he posted on social media for everyone to see. He was not trying to conceal his
17 involvement with Jiu-Jitsu.

18 The videos do not depict "combat" or "fighting". These techniques are occurring in a slow
19 and controlled fashion. The participants are not trying to hurt each other. The Jiu-Jitsu instructor,
20 Dr. Rourke, was aware of Horst's medical condition and avoided putting pressure on the lower groin
21 area. The pressure was always placed on the hip bones, and while some positions have a knee in the
22 groin area, the weight is always on the other leg and foot, not that knee. It was also pointed out that
23 at any time, the participant can discontinue the technique if it is in danger of affecting the area of the
24 medical condition. Horst and Dr. Rourke testified specific to these issues at hearing (TT Vol. II Pages
25 7-34; Vol. I Pages 167-169.)

26 Dr. Rourke also testified that he has several disabled students that train at his facility. The
27 co-owner has a reconstructed shoulder. He trains, instructs, and participates in competitions. He just
28 avoids using the shoulder and discontinues the activity / competition if the shoulder is at risk.

1 Dr. Bhuller would have been aware of these facts if he had made some minimal additional
2 inquires. Furthermore, Horst was participating in Jiu-Jitsu before and after being granted the
3 industrial disability retirement. Horst was never told to stop his training. Horst never said he was
4 unable to train in Jiu-Jitsu techniques. Most importantly, the Jiu-Jitsu techniques help Horst maintain
5 good physical condition and range of motion. However, the actions shed little light on whether he
6 can sit for 4-6 hours in a car with a duty belt and a ballistic vest pressing into his abdomen for multiple
7 consecutive days.

8 Dr. Bhuller made the erroneous assumption that the videos depict Horst wearing a “flak
9 jacket” without difficulty (A88.) Again, Dr. Bhuller made no attempt to get any information
10 concerning the vest depicted in the video. Horst testified it was a light, flexible, nylon equipment
11 vest with no equipment in it (TT Vol. I 191-192.) Nor did it have ballistic panels. Dr. Bhuller
12 admitted on cross examination he did not know the weight, flexibility, or make-up of the vest (TT
13 Vol. I Page 129). Furthermore, just as concerning is the fact that the video shows Horst wearing the
14 vest one time, in a standing position, for 20-30 seconds. How does the video shed light on whether
15 he can sit for 4-6 hours in a car with a duty belt and ballistic vest pressing into his abdomen for
16 multiple consecutive days? Dr. Bhuller erroneously asserts “the retiree is able to backpack around
17 Idaho according to a video investigation, which reveals he has no difficulty performing in an outdoor
18 environment” (A88.) First, there is no video of Horst hiking, nor is there mention of Horst hiking in
19 the Investigative report narrative. Second, Horst has never said he is unable to hike. Third,
20 performing in an outdoor environment” is not, and has never been a limitation or incapacity for Horst.
21 The assertion is irrelevant to the issue in this hearing. Dr. Bhuller erroneously asserts there is a video
22 of Horst “running up the stairs” (A107.) There is no such video. Dr. Bhuller mentions Horst had a
23 gun in one video (A107.) Again, this is irrelevant as Horst does not take the position that he cannot
24 effectively handle a firearm. It is also significant that Dr. Bhuller lists the critical tasks of a highway
25 patrol officer in his report (A98.) However, he does not list sitting for long periods of time as a task
26 and doesn’t address the 14 critical tasks list (A56) at all in the report.

27 CalPERS argues the notations (CalPERS closing Brief Page 3 Lines 2-3, 20-22) showing
28 Horst competed in Jiu-Jitsu competitions in 2018 and 2022 are evidence he has recovered. The

1 argument is not persuasive. The competition in 2018 occurred prior to CalPERS granting the service
2 retirement. As for the competition in 2022, CalPERS has presented almost no evidence to the specific
3 facts of the event. Did Horst do anything inconsistent with his condition? Did he protect the area of
4 his medical condition? It is also of note that the competition is recreational. It is not life or death.
5 The participates are not trying to hurt each other. Horst can stop the match whenever he wants. He
6 can rest, warm up, and stretch. These are not factors Horst has control of at work. The competition
7 also does not involve sitting for long periods of time in a car wearing a duty belt and ballistic vest.
8 Horst also testified he had increased symptoms for a week after the competition and has not
9 participated in one since then (TT Vol. I 203-204.)

10 Dr. McKinney prepared a report dated 2/2/23 (Respondent's Ex. "M" B97-B99) addressing
11 CalPERS re-evaluation. Dr. McKinney's concerns regarding CalPERS re-evaluation determination
12 are set forth in part below:

13 "There is no effort to make the assessment on Mr. Horst's ability to do
14 his work as a law enforcement officer versus doing these activities in a
15 non combat duty setting (recreational)" (B97.)

16 "Mr. Horst had an issue with an inguinal hernia with residual pain and
17 referred pain, which made it uncomfortable to wear a belt so duty belt
18 was precluded. ... He was unable to use a vest while he was sitting
19 because physically where the vest would push into his body near the
20 hernia scar, which is an anatomical consideration. As such, this would
21 have been subjected to possible accommodation, but to my knowledge,
22 none was offered." (B97).

23 "Chronic pain would preclude him from combat duty. With respect to
24 treating the chronic pain, recommendations have been made in my
25 original report about him seeing a physician, pain management doctor
26 and he is trying to pursue those as discussed above. I will also make it
27 noted that traditional treatment for this kind of pain often involves
28 pharmacological medications, many of which would be precluded taking
as a law enforcement officers well as injections, which have an
incomplete history of improvement. In other words, neither of these
would offer a permanent long term solution. It was also this
consideration I took into account when I made my determination."
(A98.)

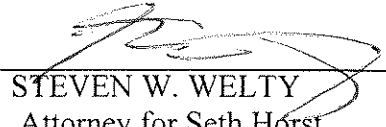
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1 In Dr. McKinney's opinion, the evidence produced by CalPERS does not show that Horst has
2 recovered from his incapacity. This opinion was relied on by CalPERS in granting the industrial
3 disability retirement at the onset, it should be continued to be relied on now.

4
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6 Dated: March 28, 2024

Respectfully submitted:

MASTAGNI HOLSTEDT, APC

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8 By: 
9 STEVEN W. WELTY
Attorney for Seth Horst

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PROOF OF SERVICE (C.C.P.§1013a)

*In the Matter of Reinstatement from Industrial Disability Retirement of Seth D. Horst
Ref. No.: 2022-1039*

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of 18 years and am not a party to the within action. My business address is 1912 I Street, Sacramento, CA 95811.

On March 28, 2024, I served the below-described document(s) by the following means of service:

✓ BY ELECTRONIC SERVICE [C.C.P. §1010.6(a)]:

Based on a court order or an agreement of the parties to accept electronic service, I caused a .pdf version of the below-described documents to be sent to the persons at the electronic mail addresses set forth below.

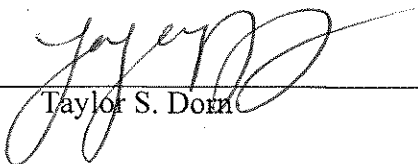
NAME/DESCRIPTION OF DOCUMENT(S) SERVED:

- **RESPONDENT’S ARGUMENT**

ADDRESSES OF SERVICE:

<p><i>Via Electronic Mail</i></p> <p>Board Services Coordinator California Public Employees’ Retirement System Post Office Box 942701 Sacramento, Ca. 94229-2701 Email: Board@calPERS.ca.gov</p>
<p><i>Via Electronic Mail</i></p> <p>Mehron Assadi CalPERS P.O. Box 2796, Sacramento, California 95812 Email: mehron.assadi@calpers.ca.gov</p>

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was executed on **March 28, 2024**, at Sacramento, California.



Taylor S. Dorn