



K██████ H██████
v.

DEPARTMENT OF THE CALIFORNIA
HIGHWAY PATROL

Appeal from Constructive Medical Termination

Case No. 10-0105
SPB Dec. No. 17-01

**BOARD RESOLUTION AND ORDER
ADOPTING PROPOSED DECISION &
PRECEDENTIAL DECISION
DESIGNATION**

Appellant, K██████ H██████ (Appellant) filed a constructive medical termination appeal against Respondent, California Highway Patrol (Respondent) after it refused to honor Appellant's request for reinstatement to her former position, a mandatory right resulting from CalPERS' determination that Appellant was no longer incapacitated from the condition that led to her disability retirement in 2004. The Board hereby adopts the attached Proposed Decision granting Appellant's appeal from the constructive medical termination.

Government Code section 21192¹ provides that a public employee who retired due to a disability but subsequently seeks reinstatement must obtain permission to do so by the California Public Employee Retirement System (CalPERS) board. CalPERS is further statutorily obligated to have the individual medically or psychologically examined to determine whether she remains incapacitated from the condition that led to the disability retirement.

If it is determined that the individual is no longer incapacitated from the condition that led to disability retirement, the Board finds that section 21193² unambiguously provides for mandatory reinstatement. To the extent there was any ambiguity in the

¹ All further statutory references are to the Government Code unless specified otherwise. Relevant portions of section 21192 are set forth in footnote 1 of the attached Proposed Decision.

² Relevant portions of section 21193 are set forth in footnote 2 of the attached Proposed Decision.

language of section 21193 or its application, such ambiguity should have been put to rest following the Second District Court of Appeal decision in *California Dept. of Justice v. Board of Administration of California Public Employees' Retirement System (Resendez)* (2015) 242 Cal.App.4th 133. As discussed in the attached Proposed Decision, *Resendez* plainly held that a law enforcement employer has a mandatory duty to reinstate the individual seeking reinstatement after CalPERS has concluded that she is no longer incapacitated; and, the employing department may not require the individual to undergo any further medical or psychological assessment or screening before reinstating her. (*Id.* at 624-625.)

The Board is sensitive to the unique challenges faced by the law enforcement agencies and the importance that these agencies maintain a corps of officers who conduct themselves in the highest standards one comes to expect from the law enforcement community. In this regard, the Board is also cognizant of the rigors behind the process of becoming a peace officer and the obligation that peace officers be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer. (Gov. Code, § 1031, subd. (f).)

However, as *Resendez* has made clear, reinstating an individual who has been cleared by CalPERS is not optional. As the courts are bound by the clear mandates in section 21193, so is the Board.

Resendez and the attached Proposed Decision outline certain measures that Respondent may take following reinstatement to assess whether the reinstated peace officer can perform the job and carry out his or her duties. To the extent that

Respondent remains concerned that such measures are insufficient, Respondent may want to consider seeking legislative amendments to achieve its objective.

ORDER

Based upon the Board's review of the attached Proposed Decision and the entire record in the above-captioned matter, the Board hereby orders that:

1. The attached Proposed Decision and Order is adopted in full; and
2. This Resolution and Order along with the adopted Proposed Decision be designated as precedential in accordance with the Board's authority under Government Code section 19582.5. This case is to be cited as SPB Dec. No. 17-01.


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STATE PERSONNEL BOARD

Kimiko Burton, President
Lauri Shanahan, Vice President
Maeley Tom, Member
Patricia Clarey, Member
Richard Costigan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Board Resolution and Order at its meeting on March 9, 2017.


SUZANNE M. AMBROSE
Executive Officer

ATTACHMENT

K ■ H ■
v.
DEPARTMENT OF THE CALIFORNIA
HIGHWAY PATROL

Case No. 10-0105

Proposed Decision

Appeal from Constructive Medical Termination

STATEMENT OF THE CASE

This matter came on regularly for proposed decision before State Personnel Board (SPB) Administrative Law Judge (ALJ) Bruce A. Monfross on December 15, 2016, upon submission of final briefs by the parties. Because the procedural background is fact-intensive and relevant to the legal analysis in this matter, it is set forth in detail in the Findings of Fact below.

Appellant K ■ H ■ (Appellant) was represented by Anthony M. Santana, Attorney, California Association of Highway Patrolmen.

Respondent California Highway Patrol (Respondent, Department or CHP) was represented by Deputy Attorney General IV Stephen A. Mesi, Department of Justice (DOJ).

Appellant filed an appeal from constructive medical termination with the SPB, contending that after the California Public Employees' Retirement System (CalPERS) issued a Decision terminating Appellant's disability retirement status and directing Appellant to be reinstated to the classification of CHP Sergeant on January 25, 2008, Respondent impermissibly refused to reinstate Appellant to her position.

Respondent contends it is unable to reinstate Appellant to her position because Appellant does not meet the requirements set forth in Government Code section 1031 (hereafter Section 1031) for appointment as a peace officer.

ISSUES

The issues to be resolved are:

1. Did Appellant establish she has a legally vested interest in her position as a CHP Sergeant that has never been legally terminated?
2. If so, did Appellant establish she was ready, willing, and able to work under circumstances that indicated she, in all good faith, wished to return to work and perform the essential functions of her job?
3. If so, did Respondent refuse to allow Appellant to return to work to her position for asserted medical reasons?
4. If so, what is the appropriate remedy?

FINDINGS OF FACT

A preponderance of evidence proves the following facts:

1. Appellant, who was employed as a CHP Sergeant, submitted an application for disability retirement to CalPERS in October 2003 due to an on-the-job injury. Appellant's application was granted on the basis of a psychological condition—Post Traumatic Stress Disorder (PTSD)—in August 2004. In April 2007 Appellant submitted a request for reinstatement from disability retirement with CalPERS, pursuant to Government Code section 21192 (hereafter Section 21192).¹ Psychiatrist William Goldsmith, M.D. (Dr.

¹ Section 21192 provides, "The [CalPERS] board ... may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board ... shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board" Upon the basis of the examination, the board ... shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency ... where he or she was employed and in the position

Goldsmith) conducted a psychiatric evaluation of Appellant in November 2007 on behalf of CalPERS. At the conclusion of the examination, Dr. Goldsmith determined Appellant was no longer substantially incapacitated from performing the duties of a CHP Sergeant.

2. On January 25, 2008, CalPERS informed Respondent of its Decision to reinstate Appellant to her position, pursuant to Government Code section 21193 (hereafter Section 21193).² Respondent subsequently informed CalPERS it was "informally" appealing CalPERS's Decision, and the CHP would conduct a testing process and background investigation, after which it would inform CalPERS as to whether Respondent would reinstate Appellant to her position.
3. On April 30, 2008, CalPERS informed Respondent that Appellant's reinstatement was mandatory and not contingent upon the normal hiring process for CHP officers; and any formal appeal of CalPERS's Decision to reinstate Appellant, had to have been made within 30 days of the date of mandatory reinstatement.

held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement."

² Section 21193 provides, "If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system ... [¶] ... If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position. ... [¶] ... If the recipient was an employee of a contracting agency other than a local safety member, with the exception of a school safety member, the board shall notify it that his or her disability has terminated and that he or she is eligible for reinstatement to duty. The fact that he or she was retired for disability does not prejudice any right to reinstatement to duty which he or she may claim."

4. Respondent thereafter requested that Appellant be psychologically evaluated by SPB's Psychological Screening Unit (PSU) to determine if Appellant met the requirements for appointment as a peace officer under Section 1031.³ David Steinberg, Ph.D. (Dr. Steinberg) interviewed Appellant in June 2008, after which he determined Appellant remained psychologically disabled and was not qualified for reinstatement to her position. The PSU subsequently concurred with Dr. Steinberg's conclusions.
5. Appellant appealed the PSU's determination to the SPB, and a two-hour hearing on the matter was conducted in January 2009. In April 2009 the SPB notified Appellant that her appeal concerning the PSU's findings had been denied. Appellant did not challenge SPB's Decision by filing a petition for a Writ of Mandate in the Superior Court.
6. On January 13, 2010, Appellant filed an appeal with the SPB from a constructive medical termination alleging Respondent failed to reinstate her to her former position following CalPERS's January 25, 2008, Decision reinstating her. After various motions were filed with, and considered by the SPB, an evidentiary hearing was scheduled for June 29 and 30, 2011, before an SPB ALJ.

³ Section 1031 provides, in pertinent part, "Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standards: [¶] ... [¶] (f) Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer ... (2) Emotional and mental condition shall be evaluated by either of the following: ... [¶] (B) A psychologist licensed by the California Board of Psychology who has at least the equivalent of five full-time years of experience in the diagnosis and treatment of emotional and mental disorders, including the equivalent of three full-time years accrued postdoctorate. The physician and surgeon or psychologist shall also have met any applicable education and training procedures set forth by the California Commission on Peace Officer Standards and Training designed for the conduct of preemployment psychological screening of peace officers." (Emphasis added.)

7. In the interim, in February 2010 CalPERS referred the CHP's "informal" appeal of CalPERS's Decision to reinstate Appellant to the Office of Administrative Hearings (OAH) for hearing before an OAH ALJ.⁴
8. On April 19, 2011, the OAH issued a Proposed Decision sustaining the CHP's appeal of CalPERS's Decision, and denying Appellant's reinstatement. The CalPERS Board rejected the OAH Proposed Decision in June 2011 and ordered the case remanded for further evidence.
9. Appellant's appeal before the SPB proceeded to a full evidentiary hearing on June 29 and 30, 2011, before an SPB ALJ.
10. On November 10, 2011, an Order was issued by the SPB Chief ALJ staying the issuance of the SPB's Decision for 30 days following the issuance of the final CalPERS determination at the conclusion of the OAH hearing.
11. In May 2012 the SPB was notified that: CalPERS had recently had an Independent Medical Examination (IME) conducted on Appellant; the IME doctor had issued a report; and a two or three-day hearing would be conducted before an OAH ALJ during the Fall of 2012 concerning Respondent's appeal from CalPERS's January 25, 2008, Decision reinstating Appellant to her position. The SPB was further notified CalPERS estimated its Decision concerning Respondent's appeal from Appellant's reinstatement would not issue until at least February 2013. As a result, on May 25, 2012, an SPB ALJ issued an Order directing the parties to submit a Status Report concerning Respondent's appeal to CalPERS, no later than November 28, 2012. The parties thereafter filed a series of Status Reports

⁴ It is unclear why it took from January 2008 to February 2010 for the matter to be forwarded to OAH for review.

with the SPB regarding Respondent's appeal of CalPERS's January 25, 2008, Decision.

12. On July 20, 2016, Respondent's counsel filed a Joint Status Report informing the SPB that Respondent's Petition for Reconsideration was expected to go before the CalPERS Board in August 2016.
13. On September 15, 2016, the parties filed a Joint Status Report with the SPB that included the Final Decision of the CalPERS Board, dated August 17, 2016, denying Respondent's Petition for Reconsideration and finding Appellant was no longer medically disqualified from performing the duties of a CHP Sergeant. The SPB thereafter scheduled the instant case for a Trial Setting Conference before the undersigned on October 31, 2016.
14. During the Trial Setting Conference, the parties stipulated they did not require further hearing days for the SPB matter, asserting instead that the case could be submitted after the parties had an opportunity to supplement the briefs previously submitted by the parties to the SPB in June 2011. The parties were ordered to brief the applicability of the Decision issued by the Second District Court of Appeal in *California Dept. of Justice v. Board of Administration of California Public Employees' Retirement System (Resendez)* (2015) 242 Cal.App.4th 133 to the facts of the instant case. The parties requested the SPB take into consideration all decisions previously issued by the OAH, CalPERS and the SPB, including the SPB's Decision in Case No. 08-3169N, concerning Appellant's appeals from medical termination, reinstatement from disability retirement, and constructive medical termination.

15. Briefing was submitted on December 15, 2016.

PRINCIPLES OF LAW AND ANALYSIS

In an appeal from constructive medical termination, Appellant bears the burden of proving the following by a preponderance of the evidence: (1) she asserted to her appointing authority she was ready, willing and able to work under circumstances that indicated she, in all good faith, wished to return to work and perform the essential functions of her job with or without a reasonable accommodation; (2) Respondent thereafter refused to allow Appellant to return to work to her position for asserted medical reasons, but did not comply with the procedural due process requirements set forth in Government Code section 19253.5 (hereafter Section 19253.5); and (3) Appellant has a vested interest in her position that has never been legally terminated either through resignation or other appropriate means in compliance with *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, due process requirements. (See also *J ■ B ■* (2002) Dec. No. 02-02 at pp. 15-16.)

Although the instant case was filed as an appeal from constructive medical termination, it is more properly an appeal from denial of reinstatement from disability retirement. As discussed in greater detail below, CalPERS has the authority under Government Code section 21992 (hereafter Section 21992) to determine that an employee who had been placed on disability retirement status is no longer incapacitated from performing the duties of the employee's position. However, it is the SPB, not CalPERS, that has the authority to order a department to reinstate an employee following a determination by CalPERS that an employee is not medically eligible for disability retirement, even if the department refuses to reinstate the employee for non-medical reasons. (*D.J.* (1996) SPB Dec. No. 96-03 at p. 5; *R.C.* (2004) SPB Dec. No.

04-03.) This authority is derived from the SPB's authority under the California Constitution to enforce the civil service statutes, and under Section 19253.5. (*D.J., supra*, SPB Dec. No. 96-03 at pp. 3-4.) In short, even though the instant case is not technically a medical termination, the SPB has the authority to rule on the underlying reinstatement issue in this matter.

Whether *Resendez* is Applicable to the Instant Case

The paramount question presented here is whether the findings of *Resendez*, are applicable to the facts of this case. In *Resendez*, a Special Agent Supervisor employed by the DOJ was placed on industrial disability retirement in December 2008 for a spinal condition resulting from several on-the-job injuries. *Resendez* applied for reinstatement from disability retirement to CalPERS in September 2009. On February 25, 2010, CalPERS informed *Resendez* and the DOJ that *Resendez* was eligible for reinstatement based on an orthopedic evaluation submitted to CalPERS. On March 6, 2010, the DOJ offered to reappoint *Resendez* to her position provided she successfully passed medical and psychological evaluations, and a background investigation. *Resendez* rejected the DOJ's offer.

On March 8, 2010, the DOJ filed an appeal from CalPERS's Decision to grant *Resendez* reinstatement. After a hearing before an OAH ALJ, in March and August 2012, the DOJ's appeal was denied. CalPERS adopted the OAH Decision on December 16, 2012.

Resendez filed an appeal from constructive medical termination with the SPB, asserting she was entitled to unconditional reinstatement to her position as a result of CalPERS's February 25, 2010, Decision. After a hearing before an SPB ALJ, the SPB issued a decision in February 2013 ordering the DOJ to re-employ *Resendez* in the

Special Agent Supervisor classification without conditions, and awarding Resendez backpay from the date of CalPERS's December 16, 2012, Decision.

The DOJ thereafter filed petitions for writs of administrative mandamus challenging both CalPERS's Decision and the SPB's Decision. Both petitions were consolidated and the trial court ultimately denied both petitions finding that: (1) CalPERS was only required to determine whether Resendez's orthopedic condition, upon which her application for disability retirement had been granted, still rendered her unable to perform the duties of her position, and was not required to review any additional standards for Resendez's re-employment under Section 1031; (2) Resendez's re-employment was mandatory because the DOJ had no discretion to deny Resendez employment under Section 21193, and the DOJ could not condition Resendez's re-employment on compliance with Section 1031; and (3) Resendez was entitled to backpay and benefits from the date of CalPERS's February 25, 2010, Decision reinstating Appellant to her position.

In affirming the trial court's decision, the *Resendez* Court determined that, under Section 21192, CalPERS was authorized to evaluate whether Resendez was still incapacitated, physically or mentally, based on a medical examination, and that the term "still incapacitated" "suggests the scope of the [CalPERS] board's evaluation is limited to determining whether the conditions for which disability retirement was granted continue to exist." (*Resendez, supra*, 242 Cal.App.4th at p. 141.) The Court further found that, after CalPERS determined Resendez was no longer incapacitated, the DOJ was required to reinstate Resendez to her position without conditions pursuant to Section 21193, with the Court specifically finding that, "Placing conditions on Resendez

prior to reinstatement would be contrary to the mandatory reinstatement provisions of Section 21193.” (*Id.* at p. 142.)

In so finding, the Court specifically determined that, “The appointing power still has authority to ensure peace officers are fit for duty and meet the standards required under Section 1031, but nothing in the statutory scheme permits the employer to condition reinstatement on a new background investigation under Section 1031.” (*Id.* at p. 143, citing *Hulings v. State Dept. of Health Care Services (Hulings)* (2008) 159 Cal.App.4th 1114, 1125 [finding that a peace officer who accepted employment with another employer and was subsequently rejected during probation, and thereafter exercised his mandatory reinstatement rights to his former position under Government Code section 19140.5, could not be required to undergo another background investigation prior to being reappointed to his former position].)

The Court further found that in those cases where the employer is not satisfied with the medical or psychological evaluation finding the employee again fit for duty, the employer must reinstate the employee, “then pursue an evaluation of her fitness-for-duty as a result of any other conditions and an updated background investigation under its usual procedures.” (*Ibid.*, citing *White v. County of Los Angeles (White)* (2014) 225 Cal.App.4th 690, 694, 705-706 [finding that an employee who takes leave under the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. § 2601 et seq.) is entitled to be restored to employment upon certification from the employee’s health care provider that the employee is able to resume work, and the employer is not permitted to seek a second opinion regarding the employee’s fitness for work prior to restoring the employee to employment].) In so finding, the Court specifically expressed “no opinion on the procedure for reinstatement of an employee who is known to have a potentially

disqualifying condition other than the condition for which the employee was granted industrial disability retirement." (*ibid.*, fn. 4.)

Respondent contends the findings of *Resendez* are inapplicable to the instant case for a variety of reasons. First, Respondent asserts the instant case is factually distinguishable because *Resendez* relied upon *Hulings* and *White*, neither of which are factually similar to the instant case. Respondent notes that *Hulings* involved mandatory reinstatement rights pursuant to Government Code section 19140.5, while *White* involved mandatory reinstatement rights under the FMLA.

Respondent is correct that the instant case involves mandatory reinstatement rights under Section 21193, as opposed to mandatory reinstatement rights under Government Code section 19140.5 and the FMLA. Nevertheless, the principles underlying those two Decisions are applicable to the instant case. The *Resendez* Court concluded, as did the Courts in *Hulings* and *White*, that the language of their respective statutes conferred mandatory reinstatement rights to the employee upon the satisfaction of certain statutorily specified conditions. Therefore, it is irrelevant that *Resendez* looked to cases involving analogous statutory schemes to reach its ultimate conclusion.

Here, the CalPERS Board exercised the authority conferred upon it by Section 21992 to determine Appellant was no longer incapacitated from performing the duties of a CHP Sergeant. After CalPERS reached that determination, and notified Respondent of that fact, Respondent had an absolute obligation under Government Code section 21993 (hereafter Section 21993) to either reinstate Appellant to her position with the CHP, or to have that Decision overturned by an administrative tribunal or a court of competent jurisdiction, neither of which occurred.

Respondent next asserts that none of the several examinations Appellant has undergone, since making her initial April 2007 request for reinstatement from disability retirement, have established Appellant is capable of performing the usual duties of a CHP Sergeant. Respondent contends that even Dr. Goldsmith, upon whom CalPERS relied in reaching its decision, acknowledged that there are no known cures for PTSD. Respondent further maintains that the CHP is not bound by the determinations of CalPERS because CalPERS has no authority to direct any state employer to appoint or reinstate an employee to any civil service classification. That is particularly so, Respondent claims, as the CHP and CalPERS have two different views of what constitutes a "disability" for purposes of peace officer employment.

Contrary to Respondent's assertion, CalPERS, exercising the discretion expressly conferred upon it pursuant to the provisions of Section 21192, determined Appellant was capable of performing the usual duties of a CHP Sergeant. If Respondent reasonably believed CalPERS had abused its discretion in making its determination, Respondent was entitled to either request that CalPERS reconsider its decision, or file a petition for a writ of administrative mandamus in the Superior Court challenging CalPERS's Decision, including seeking a stay of enforcement of the decision. (*Roccaforte v. City of San Diego* (1979) 89 Cal.App.3d 877, 886-886.) To the extent CalPERS's Final Decision has not been overturned by a court of competent jurisdiction, Respondent is required to reinstate Appellant to her position pursuant to Section 21993 and, as previously discussed, the SPB has the authority to order Respondent to do so.

Respondent also maintains that the *Resendez* Court's statutory construction is overly narrow and relies too heavily on the provisions of Section 21193, while giving

insufficient weight to the provisions of Section 1031, which was implemented 10 years after Section 21193. As an initial matter, such second-guessing and criticism of the *Resendez* decision by Respondent does nothing to change the ultimate conclusions reached by that court, which are binding on the SPB.

More importantly, Respondent is incorrect that *Resendez* gave too little credence to Section 1031 when reaching its findings. Instead, *Resendez*, citing to both *Hulings* and *White*, specifically noted that, although the DOJ was required to reinstate Resendez to her position pursuant to Section 21193, if the DOJ thereafter reasonably believed Resendez had any other condition that would preclude her employment as a peace officer pursuant to Section 1031, it could pursue an evaluation of her fitness-for-duty as a result of any other such potential conditions, including an updated background investigation. (*Resendez, supra*, 242 Cal.App.4th at p. 143.)

Therefore, Respondent had several viable options available to it to ensure that Appellant satisfied all the requirements of a peace officer under Section 1031 prior to assigning Appellant to perform peace officer duties. First, if Respondent disagreed with CalPERS's Final Decision that Appellant was no longer psychologically disqualified from performing the duties of a CHP Sergeant, Respondent had a clear remedy available to it—challenge that decision by filing a petition for a writ of administrative mandamus with the Superior Court and simultaneously seeking a stay of enforcement of CalPERS Decision.

Second, if Respondent reasonably believed Appellant suffered from some other mental or psychological infirmity that differed from the infirmity addressed in CalPERS's Decision, and which also rendered Appellant incapable of performing the duties of a CHP Sergeant, upon Appellant's reinstatement to her position pursuant to Section

21993, Respondent could have sent Appellant for a fitness-for-duty evaluation pursuant to the provisions of Section 19253.5.⁵ Respondent could have then sought to medically transfer, demote, or terminate Appellant pursuant to the provisions of Section 19253.5 if the fitness-for-duty evaluation had determined Appellant was unable to perform the duties of a CHP Sergeant due to that other medical or psychological condition. Equally importantly, Appellant would have been able to exercise her due process rights under Section 19253.5, subdivision (f), to challenge that medical action.

The foregoing, notwithstanding, Respondent could not, after reappointing Appellant to her position send Appellant out for a fitness-for-duty evaluation concerning the PTSD diagnosis previously addressed by CalPERS, absent a reasonable, good faith belief, based on credible information, Appellant's psychological condition had substantially deteriorated subsequent to the psychological evaluation relied upon by CalPERS when finding Appellant eligible for reinstatement.

Third and last, if Respondent reasonably believed Appellant was legally precluded from being assigned to perform the duties of a peace officer (e.g., because Appellant had been convicted of a felony during the time of her disability retirement), upon Appellant's reinstatement to her position pursuant to Section 21993, Respondent could conduct a limited inquiry to determine if Appellant was legally precluded from performing peace officer duties prior to assigning Appellant to perform such duties. At the conclusion of that limited inquiry, if it was determined Appellant was legally precluded from performing the duties of a peace officer, Respondent could seek to non-punitively transfer, demote, or terminate Appellant from her position pursuant to the

⁵ Section 19253.5, subdivision (a), provides, "An appointing power may require an employee to submit to a medical examination by a physician or physicians designated by the appointing power to evaluate the capacity of the employee to perform the work of his or her position."

provisions of Government Code section 19585 (hereafter Section 19585).⁶ Again, Appellant would be able to exercise her due process rights under Section 19585, subdivision (f), to challenge any such non-punitive action.

Respondent further criticizes *Resendez* as being a "majority of one" decision, and that courts in other states have reached contrary conclusions when assessing similar factual circumstances. While it may be that courts in other states have reached contrary conclusions when faced with similar facts, such an argument is unavailing here. The fact of the matter remains that *Resendez* is a published decision from the California Court of Appeal, Second District, and no other California Appellate Court, including the California Supreme Court, has disagreed with the findings and conclusions reached by the *Resendez* Court. As such, the SPB—and more importantly, Respondent—is obligated to follow the findings and conclusions of law set forth in that decision. (*Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347, 353 [finding that a trial court may not rule contrary to a published appellate opinion simply because it believes the appellate decision was wrongly decided].)

Respondent additionally contends that *Resendez* should not be applied retroactively since it would be unfair and contrary to the interests of justice to do so. However, "judicial decisions, even those overruling prior authority, have full retroactive effect." (*People v. Carter* (2005) 36 Cal.4th 1215; *In re Marriage of Brown* (1976) 15 Cal.3d 838.)

Although Respondent disagrees with the *Resendez* Court's interpretation of the manner in which the mandatory reinstatement provisions of Section 21993 intersect with

⁶ Section 19585, subdivision (b) provides, in pertinent part, "An appointing power may terminate, demote, or transfer an employee who fails to meet the requirement for continuing employment that is prescribed by the board on or after January 1, 1986, in the specification for the classification to which the employee is appointed."

the peace officer standards set forth in Section 1031, it cannot reasonably be determined that the *Resendez* Decision was so unexpected that a reasonable person could not have foreseen the ultimate findings reached by the Court. Indeed, both *Hulings*, which was decided in 2008, and *White*, which was decided in 2014, expressly found that the mandatory reinstatement provisions of their respective statutes were just that—mandatory. *Resendez* was no different in reaching a similar conclusion. Accordingly, applying the findings of *Resendez* retroactively is neither unfair nor contrary to the interests of justice.

Finally, Respondent contends that, because Appellant did not challenge the SPB's 2009 finding that she was not qualified for appointment to the CHP Sergeant classification, Appellant is barred from relitigating that issue in the instant forum pursuant to the legal doctrines of collateral estoppel and res judicata.

Respondent is correct that the SPB conducted a psychological evaluation of Appellant in 2009 at Respondent's behest, and that the SPB thereafter issued a decision finding Appellant was not psychologically qualified to perform the duties of a CHP Sergeant. What Respondent fails to take into consideration, however, is that it had no authority to order Appellant to undergo the evaluation conducted by SPB's PSU.

As previously discussed, and as *Resendez* makes clear, Respondent was required to reappoint Appellant to her position pursuant to Section 21993 after CalPERS found Appellant again eligible to perform the duties of that position. Thereafter, if Respondent reasonably believed, based on credible information, Appellant's psychological condition had substantially deteriorated subsequent to the psychological evaluation relied upon by CalPERS, Respondent could then send Appellant for a fitness-for-duty examination pursuant to the provisions of Section 19253.5. Based on

the results of that examination, Respondent could then seek to medically demote, transfer, or terminate Appellant pursuant to the provisions of Section 19253.5.⁷ However, Respondent failed to reappoint Appellant to her position, and thereafter, failed to follow the provisions of Section 19253.5 when sending Appellant for examination by the SPB's PSU.

Moreover, an appointing authority cannot order a non-employee to undergo a fitness-for-duty examination.⁸ Because Respondent had not reappointed Appellant to her position, it had no authority to require Appellant to undergo the psychological evaluation conducted by the SPB's PSU in 2009. Since the psychological evaluation of Appellant conducted by the SPB's PSU was not a fitness-for-duty examination, performed in accordance with the requirements of Section 19253.5, subdivision (a), any decision issued by the SPB concerning that psychological evaluation was invalid on its face as an ultra vires act, as there was no other legal authority for Respondent to require Appellant to undergo the psychological evaluation. (*Land Waste Management v. Contra Costa County Bd. of Supervisors* (1990) 222 Cal.App.3d 950, 958.)

In addition, even if it were determined that the 2009 psychological evaluation conducted by the SPB's PSU at Respondent's behest did constitute a fitness-for-duty examination conducted pursuant to the provisions of Section 19253.5, the fact remains that if Respondent thereafter wished to deny Appellant employment based on the results of that evaluation it was specifically required to serve Appellant with a notice of medical action pursuant to the provisions of Section 19253.5, and to inform Appellant of

⁷ Because Appellant had a vested right to disability retirement benefits, pursuant to Section 19253.5, subdivision (l), Respondent would have been required to apply for disability retirement benefits on Appellant's behalf with CalPERS, prior to attempting to terminate Appellant's employment for medical reasons.

⁸ Section 19253.5, subdivision (a) provides, in pertinent part, "An appointing power may require an employee to submit to a medical examination" (Emphasis added.)

her appeal rights pursuant to the provisions of that statute. Respondent's failure to do so would serve to nullify Respondent's attempt to deny Appellant employment on that basis. (*W ■ P ■* (1995) SPB Dec. No. 95-12 at pp. 14-17.) Consequently, Appellant's appeal is not barred by the doctrines of collateral estoppel or res judicata.

Given all of the foregoing, it is found that the legal findings and conclusions set forth in *Resendez* are applicable to the instant case. As a result, upon receipt of CalPERS's January 25, 2008, Decision that Appellant was once again eligible to perform the duties of a CHP Sergeant, Respondent was required to either reappoint Appellant to that position pursuant to the provisions of Section 21993, or to legally challenge that decision. Respondent eventually did challenge that determination and, after a lengthy administrative review and hearing process, the CalPERS Board ultimately rejected Respondent's appeal on August 17, 2016. At that time, Respondent was once again required to either reappoint Appellant to her position as a CHP Sergeant, or to file a petition for a writ of administrative mandamus concerning CalPERS's Final Decision, and seek a stay of enforcement of that decision. To date, Respondent has not filed any appeal of CalPERS's Final Decision with the Superior Court.

Accordingly, Appellant is entitled to immediate reinstatement to the CHP Sergeant classification with all applicable backpay and benefits.

CONCLUSIONS OF LAW

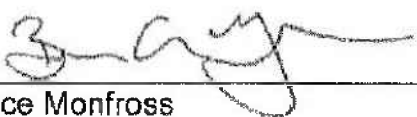
1. Pursuant to Section 21993, Respondent was required to reinstate Appellant to her position as a CHP Sergeant as of the date of the determination by CalPERS that Appellant was once again eligible to perform the duties of a CHP Sergeant.

2. Respondent impermissibly refused to reappoint Appellant to her position as a CHP Sergeant for asserted medical reasons, without affording Appellant the due process protections mandated by Section 19253.5.
3. Respondent is entitled to reinstatement to her position as a CHP Sergeant, effective January 25, 2008, as well as to all applicable backpay and benefits owed to her from that date until the actual date of her reinstatement.⁹

ORDERS

1. The Appellant's appeal is **GRANTED**. The CHP shall immediately reinstate K ■ H ■ to her position as a CHP Sergeant.
2. The Department of the CHP should have reinstated K ■ H ■ to her position as a CHP Sergeant on January 25, 2008. As a result, the Department of the CHP shall pay to K ■ H ■ all backpay and benefits owed to her from January 25, 2008, to the date of her actual reinstatement.
3. This matter is referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party, within one year of the effective date of the SPB's Decision, in the event that the parties are unable to agree as to the salary and benefits due Appellant.

DATED: January 4, 2017



Bruce Monfross
Administrative Law Judge
State Personnel Board

⁹ See *Resendez, supra*, 242 Cal.App.4th 133, affirming the trial court's decision directing the payment of backpay and benefits from the date of CalPERS's initial decision finding the employee eligible for reinstatement to her position.

PROOF OF SERVICE

Case Name: K [REDACTED] H [REDACTED] v. Department of the California Highway Patrol

Case No: 10-0105

SPB Dec. No: 17-01

I am over the age of 18 years and not a party to this action. I declare that I am employed by the California State Personnel Board, located at 801 Capitol Mall, Sacramento, CA 95814.

On March 20, 2017, I served the following document(s) on the below-mentioned addressee(s):

BOARD RESOLUTION AND ORDER ADOPTING PROPOSED DECISION & PRECEDENTIAL DECISION DESIGNATION

I served the above document(s) by enclosing them in an envelope and placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with the State Personnel Board's Practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business, in the United States Postal Service in a sealed envelope with postage fully prepaid.

Anthony M. Santana, Esq.
California Association of Highway Patrolmen
2030 V. Street
Sacramento, CA 95818
Complainant's Representative

Highway Patrol
Legal Affairs Section 032
601 North 7th Street
Sacramento, CA 95811
Respondent

Stephen Mesi
Department of Justice (DOJ)
Attorney General of California
300 South Spring Street, Suite 1700
Los Angeles, CA 90013
Respondent's Representative

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 20, 2017, at Sacramento, California.



Constance Rubio
Legal Department