RECOMMENDED ACTION AND JUSTIFICATION:

Adopt a Resolution accepting the Administrative Law Judge’s proposed decision to deny the appeal by former Fire Chief Blaine Shultz regarding his industrial disability retirement application. Mr. Shultz applied for a service retirement pending an industrial disability retirement. CalPERS requires that the governing agency, i.e., the Board of Supervisors, make the determination if the industrial disability retirement should be approved based on whether the former Fire Chief is disabled or not disabled within the meaning of PERS law. On March 27, 2007, the Board adopted a Resolution certifying that he was not disabled. Mr. Shultz appealed the Board’s decision. A hearing was set before an Administrative Law Judge in accordance with PERS’ process to determine if the industrial disability retirement was properly denied. The Judge’s decision was recently received and the Judge affirmed the County’s decision to deny the industrial disability retirement.

BACKGROUND AND HISTORY OF BOARD ACTIONS:

On March 27, 2007, the Board adopted a Resolution certifying that the former Fire Chief is not disabled within the meaning of CalPERS law.

ALTERNATIVES AND CONSEQUENCES OF NEGATIVE ACTION:

A negative action would result in the Board not accepting the ALJ’s decision affirming the Board’s previous action. The Board would then need to make a decision on how to move forward with the ALJ’s decision.

Financial Impact? ( ) Yes ( ) No
Budgeted in Current FY? ( ) Yes ( ) No ( ) Partially Funded
Amount in Budget:
Additional Funding Needed:
Source:
Internal Transfer
Unanticipated Revenue
Transfer Between Funds
Contingency
( ) General ( ) Other

Annual Recurring Cost:

List Attachments, number pages consecutively
Resolution

CLERK’S USE ONLY:
Res. No. 88-178
Vote – Ayes: ___ Noes: ___
Absent: ___
Approved
( ) Minute Order Attached ( ) No Action Necessary

The foregoing instrument is a correct copy of the original on file in this office.

Attest: MARGIE WILLIAMS, Clerk of the Board
County of Mariposa, State of California

By: _______________________________________
Deputy

COUNTY ADMINISTRATIVE OFFICER:
Requested Action Recommended
No Opinion
Comments:

CAO: ___________________________________
RESOLUTION NO. 08-178

RESOLUTION ACCEPTING THE ADMINISTRATIVE LAW JUDGE’S DECISION TO DENY BLAINE SHULTZ’S INDUSTRIAL DISABILITY RETIREMENT APPLICATION

WHEREAS, CalPERS law requires that the governing agency either approve or deny an industrial disability retirement application for a safety employee; and

WHEREAS, a request to approve an industrial disability retirement for former Fire Chief Blaine Shultz was received; and

WHEREAS, the Board of Supervisors adopted Resolution No. 07-115 certifying that Mr. Shultz was not disabled within the meaning of CalPERS law; and

WHEREAS, Mr. Shultz appealed the Board’s decision before an Administrative Law Judge (ALJ) in accordance with the process outlined by CalPERS; and

WHEREAS, the ALJ’s proposed decision has been received and after hearing this matter and reviewing the evidence presented, the ALJ has denied the disability retirement application of Mr. Shultz;

NOW, THEREFORE, BE IT RESOLVED, that the Board of Supervisors of Mariposa County does hereby find and determine that for all the reasons set forth in the ALJ’s proposed decision, the Board accepts the ALJ’s decision in its entirety and hereby affirms the decision to deny the industrial disability application for Blaine Shultz.

PASSED AND ADOPTED by the Mariposa County Board of Supervisors this 6th day of May 2008 by the following vote:

AYES: ABORN, TURPIN, FRITZ, PICKARD
NOES: NONE
ABSENT: BIBBY
ABSTAINED: NONE

Lyle Turpin, Chair
Mariposa County Board of Supervisors

ATTEST:

Margie Williams, Clerk of the Board

APPROVED AS TO FORM:

Thomas P. Guarino, County Counsel
TO: Board of Supervisors
FROM: Richard J. Benson, County Administrative Officer
SUBJECT: Proposed Decision - Blaine Shultz's Disability Retirement Application
Cc: Tom Guarino

Attention item #5 of the May 6, 2008 agenda is requesting the adoption of a Resolution relative to the proposed decision by the Administrative Law Judge who heard Blaine Shultz's disability retirement application issue. Mr. Shultz has sent a letter in response to this item and attached is a copy of that letter. Also attached is a copy of the Judge's proposed decision for your review and information.

attachments
May 4, 2008

Members of the Mariposa County Board of Supervisors

On Tuesday, May 6, 2008, an attention item will be placed before you for your approval. I have requested that Richard Benson, County Administrative Officer provide each of you a copy of this memorandum for your review and consideration. I am requesting that you deny the action and place me on the agenda May 27, 2008 or a date in June 2008.

Your Board has expended a tremendous amount of Mariposa County funds defending the denial of an appropriate and warranted industrial disability retirement. I was injured on the job performing a task for you. I am now permanently disabled as determined by the State of California. My injuries worsen the longer I live, which now results in an inability to sit in a car for longer than an hour, to stand without pain and to be relegated to limiting my movements to avoid twisting, bending and lifting. A plaque and platitudes memorialize my service and the constant pain reminds me of just how meaningless those words really were.

Aside from my physical status, the most difficult issue is that of your absolute disregard of fair play and ethics. During my appeal hearing Mr. Benson testified that he made no effort to contact me, nor to investigate my injury, nor to contact either Richard Inman or Mike Coffield to determine the circumstances around my retirement. Further, he testified that he had no information on my role as Fire Chief, and my duties in the field. He stated that his only effort was to contact legal counsel to determine if the County could defend the denial of these benefits.

Your Board's denial and willingness to expend funds to support that process should raise some concern about your priorities and treatment of employees of Mariposa County. Perhaps this is the time for you to question the process, to read the transcripts of the hearings and determine if you and your administrative officer should have done the right thing and performed a proper investigation prior to adopting a course of action establishing the employee as the adversary. On Tuesday, May 6, 2008 you can do the right thing and demonstrate that the buck truly stops with you. Deny the item and provide a place on the agenda.

Respectfully submitted,

Blaine Shultz
BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Application for
Industrial Disability Retirement of:

BLAINE SHULTZ,

Respondent,

v.

COUNTY OF MARIPOSA,

Petitioner.

OAH No. 2007060699

PROPOSED DECISION


On November 5, 2007, respondent represented himself. Petitioner County of Mariposa was represented by Frances E. Rogers, Liebert, Cassidy and Whitmore, Attorneys at Law. After documentary and testimonial evidence was received respondent requested a continuance to secure the appearance of his doctor to testify. On the condition that the matter would be heard before the second week of December 2007, the petitioner did not object to that request, and the parties agreed to continue the matter to December 3, 2007.

Respondent contacted Barry J. Bennett, Bennett & Sharpe, Attorneys at Law, to represent him. On November 13, 2007, Mr. Bennett wrote Ms. Rogers and the undersigned to advise that the scheduled date of December 3, 2007, would not work for him because he would be returning from vacation on that date. He wrote further that he had contacted Ms. Rogers to determine if she would object to a further continuance, and that she had no objection to continuing the matter past her scheduled maternity leave provided that the undersigned “remain the Judge in this matter, since you had opened the hearing previously.” In fact, the matter had been partially heard, rather than “opened,” and there was no consideration of changing the assigned judge mid-hearing, even if such were permitted. On November 19, 2007, Ms. Rogers wrote Mr. Bennett and the undersigned that she would object to a change in assigned judge because the hearing had commenced, and would leave it to the undersigned whether the matter should be further continued.
The undersigned agreed to a continuance to March 2008, as the parties agreed, and the matter was rescheduled for March 17, 2008. On November 29, 2007, Mr. Bennett was served with the Notice of Hearing After Grant of Continuance.

On March 14, 2008, the last work day before the scheduled hearing, Mr. Bennett faxed to the Office of Administrative Hearings a request for a continuance on the grounds that respondent’s doctor had a conflict and would not be available to testify. Ms. Rogers opposed the request. The request for a continuance was denied by Presiding Judge Michael Cohn as untimely and lacking good cause.

On March 17, 2008, respondent again represented himself and requested reconsideration of the denial of the request for a continuance on the grounds that he contacted the doctor’s office in mid-January and was told a $5,000 prepayment was required to arrange for his testimony. In mid-February they negotiated a half-day of testimony for $2,500, but respondent did not pay the sum at that time. Respondent traveled to California from his residence in Hawaii shortly before the scheduled hearing date, and called the doctor’s office on March 13 or 14, 2008, to arrange to bring a check. The receptionist told him the doctor was on call the date of hearing, March 17, 2008. Respondent acknowledged that neither he nor Mr. Bennett served the doctor with a subpoena to compel his attendance. The request for reconsideration was denied as untimely, lacking good cause, and because of the cost and inconvenience of again resetting the matter.

Additional documentary and testimonial evidence was received on March 17, 2008, and the record remained open for receipt of the parties’ closing briefs. Respondent’s brief, which was written by Mr. Bennett, was received March 31, 2008, and marked as Exhibit C. The County’s brief was received March 31, 2008, and marked as Exhibit 14. The record was closed and the matter submitted on March 31, 2008.

FACTUAL FINDINGS

1. Respondent Blaine Shultz was employed by the County of Mariposa Fire Department as Fire Chief/Emergency Planning Coordinator. In consequence of that employment respondent is a safety employee subject to the provisions of Government Code section 21151.


3. Until 2006 respondent’s job duties as the County’s Fire Chief/Emergency Planning Coordinator were to plan, coordinate, direct and evaluate the services, programs and activities of the Fire Department; to serve as County Fire Marshall and oversee fire prevention, suppression and investigation operations and the enforcement of all fire and
related building codes; to prepare and implement the County’s emergency plan as the Emergency Planning Coordinator; and to perform related duties and responsibilities as required.

Respondent testified that the County’s Fire Department has only two paid employees, one of whom is the Fire Chief. The fire fighters are volunteers. He opined that county residents receive reduced fire insurance rates because two duty chiefs, of whom one must be a paid employee, respond to fires.

4. On March 5, 2004, respondent was the incident commander at a structure fire. Respondent testified that the firefighter volunteers did an extraordinary job of saving 50 percent of the mobile home. He described that the majority of his job was to stand outside and supervise, and to document the cause of the fire once the fire was put out. On his way out of the burnt structure respondent slipped on a wet sidewalk and put his right leg out to break his fall. He injured his back and experienced immediate pain. Respondent went home after the incident but returned to work the next day, although he was in pain, and documented the injury.

5. Sandra Laird has been a County administrative analyst since 1999, and her responsibilities include overseeing personnel in the risk management office, handling worker’s compensation claims, and maintaining personnel files including workers’ compensation and disability retirement files for safety members. Ms. Laird is the County’s liaison with Tristar, the third party workers’ compensation claims administrator.

6. Respondent filed a workers’ compensation claim for the injury to his back. He received treatment, including rehabilitation, and was evaluated by various physicians. X-rays and an MRI were performed. During the progress of Tristar’s handling of respondent’s workers’ compensation claim the County did not receive the medical reports completed by evaluators, but Tristar forwarded summaries of that information.

Eventually Tristar forwarded to the County a summary of the February 9, 2006, medical report of Morris Senegor, M.D., the Qualified Medical Examiner. The summary stated that respondent’s status was permanent and stationary, and included the doctor’s rating accompanied by a dollar figure. In the February 9, 2006 report Dr. Senegor found respondent permanent and stationary with a permanent disability rating of 36%, or $37,550, with a recommendation for future medical. Dr. Senegor found that respondent would be subject to permanent work restrictions of no lifting over 20 pounds, no continuous sitting/standing for over one hour at a time, and no excessive bending/twisting/stooping. Respondent was not found to be a qualified injured worker.

Ms. Laird submitted the information from Tristar regarding the extent of respondent’s disability and work limitations to the Board for settlement of the claim. The Board approved the claim settlement on those terms. Ms. Laird noted that in respondent’s case the County was able to accommodate the work restrictions identified by Dr. Senegor. In fact, between
his injury in March 2004 and March 2006 respondent had been working full-time as the Fire Chief/Emergency Planning Coordinator.

7. By a written offer dated March 10, 2006, pursuant to Labor Code 4658.6, subdivisions (a) and (b), the County offered respondent modified work as a Fire Chief/Emergency Planning Coordinator with the permanent restrictions of no lifting over 20 pounds, no continuous sitting/standing for over one hour at a time, and no excessive bending/twisting/stooping. On March 21, 2006, respondent signed the offer.

From March 21, 2006, respondent continued to work in the modified Fire Chief/Emergency Planning Coordinator position for approximately nine months, until his service retirement on December 6, 2006. In that modified position respondent maintained the same rank, title, salary, benefits, and opportunities for advancement as he had prior to his injury.

Respondent testified that he agreed to continue to cover operational duty call to allow the County time to obtain a replacement Fire Chief. He told Mr. Inman of his concerns that he might have another injury, and that he would exercise care while working. Respondent agreed to work until the end of 2006, although Mr. Inman expressed that he wanted more time to hire respondent’s successor. On March 23, 2006, respondent wrote to the Board of Supervisors and Rich Inman, the County Administrative Officer, that he intended to retire on December 5, 2006.

Respondent acknowledged that he worked full-time in the modified Fire Chief/Emergency Planning Coordinator position without incident or further injury, and the only time off he took was for rehabilitation appointments. He was able to successfully perform the job within the specified work restrictions, and he was never required to pick up a fire hose, pick up or carry a person, extricate a victim from a fire, etc. He noted that before and after the injury his responses to calls were to supervise others and the operation, not to fight a fire. Between the date of his injury, and his December 2006 retirement respondent worked 2.5 years as a full-time Fire Chief/Emergency Planning Coordinator.

8. County Administrative Officer Richard Benson spoke with respondent, who was at his home in Hawaii, by telephone a few days before the March 27, 2007 Board of Supervisors meeting at which respondent’s application for industrial disability retirement was considered. Respondent asked if the County had the information Dr. Senegor sent to the worker’s compensation carrier and Mr. Benson said yes, and asked if he had any other material supporting his application for disability retirement. Respondent confirmed that if Mr. Benson had Dr. Senegor’s information about his disability and restrictions then he had it all. Mr. Benson told respondent if he had anything else to be sure to give it to the County. Respondent sent a letter dated March 26, 2007 to the Board.

9. On March 27, 2007, the Board of Supervisors considered respondent’s application for industrial disability retirement at its regular meeting. The Board had before it Mr. Benson’s recommendation of Benson and the March 26, 2007 letter from respondent.
The County Administrative Officer's recommendation noted that, based on the medical reports submitted in connection with the workers' compensation claim, respondent could have continued working in his capacity and was not disabled within the meaning of the Public Employees' Retirement Law. In preparing that recommendation for the County Administrative Officer Ms. Laird relied on the medical summaries received from Tristar.

With regard to the modified duty to which he agreed in March 2006, respondent's letter stated: "This limitation directly conflicts with the position duty statement." He also wrote that he was "at risk of further injury even within the guidelines of the stipulation" and that his intention was to "insure an orderly transition" in hiring his replacement. He also wrote:

My request of you is to reject the finding of no incapacitation as it does not reflect adequately on the fact that I was no longer able to meet your standards as Fire Chief, and that I made extraordinary and personally risky effort for eight months to contribute to the County and its' fire department. I am requesting that you grant me the disability retirement in consideration of these facts.

The Board denied respondent's application for industrial disability retirement, as reflected in its adoption of Resolution 07-115. Respondent filed a timely appeal of that denial and the matter was set for hearing.

10. Daniel L. Michael was employed with the County Fire Department in 1965 and was appointed Deputy Fire Chief in approximately 2003. He retired in 2005. Mr. Michael was present when respondent was injured in 2005. Respondent thereafter discussed his health concerns, specifically his fear that if he suffered a serious fall he might be paralyzed or incontinent.

LEGAL CONCLUSIONS

1. By reason of his employment, respondent is a local safety member of CalPERS and eligible to apply for disability retirement under Government Code section 21151.¹

2. To qualify for disability retirement, respondent must prove that, at the time he applied, he was "incapacitated physically or mentally for the performance of his ... duties ....." (Gov. Code, § 21156.) As defined in Government Code section 20026.

¹ Government Code section 21151, subdivision (a), provides:
Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.
“[d]isability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

3. In Mansperger v. Public Employees’ Retirement System (1970) 6 Cal.App.3d 873, 876, the court interpreted the term “incapacity for performance of duty” as used in Government Code section 20026 (formerly section 21022) to mean “the substantial inability of the applicant to perform his usual duties.” (Italics in original.) As the court explained in Hosford v. Board of Administration (1978) 77 Cal.App.3d 855, 863, prophylactic restrictions imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. An applicant for disability retirement must submit competent medical evidence to establish that, at the time of application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because “aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [the sheriff’s] condition are dependent on his subjective symptoms.”].)

Mansperger, Hosford and Harmon are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date he applied for disability retirement, he was permanently and substantially unable to perform the usual duties of a Fire Chief/Emergency Planning Coordinator as they existed at the time of his application. Respondent failed to present such evidence. He acknowledged that he performed the job for 2.5 years on a full-time basis after his injury, and that he worked without incident within the modifications to which he agreed. Respondent’s application for disability retirement must, therefore, be denied.

4. As set forth in Factual Finding 8, respondent urged the Board of Supervisors to “grant [him] the disability retirement in consideration of” his “extraordinary and personally risky effort for eight months to contribute to the County and its fire department.” Disability retirement benefits are not a reward to be meted out to helpful employees. Rather, such benefits are provided only when the local safety employee has proven by a preponderance of evidence that, at the time he applied, he was “incapacitated physically or mentally for the performance of his . . . duties . . .” (Gov. Code, § 21156.) Respondent’s motivation for working an additional eight months after the settlement of his workers’ compensation case is not a factor which bears on the legal and factual issues in this case.
ORDER

The application of respondent Blaine Shultz for disability retirement is DENIED.

Dated: April 3, 2008

M. AMANDA BEHE
Administrative Law Judge
Office of Administrative Hearings
TO: RICHARD J. BENSON, CAO

FROM: MARGIE WILLIAMS, Clerk of the Board

SUBJECT: Discussion and Possible Further Action Regarding Continuation of the Local Emergency Due to Landslides on Highway 140 Enroute to Yosemite National Park

RESOLUTION 08-177

THE BOARD OF SUPERVISORS OF MARIPosa COUNTY, CALIFORNIA

ADOPTED THIS Order on May 6, 2008

ACTION AND VOTE:

Discussion and Possible Further Action Regarding Continuation of the Local Emergency Due to Landslides on Highway 140 Enroute to Yosemite National Park (County Administrative Officer)

BOARD ACTION: Rick Benson recommended that the local emergency be continued; and he advised of the Essential Access Celebration that CalTrans scheduled for this Friday for the new temporary bridge project and that the work started last week on this project. He advised that he will be participating with CalTrans with their weekly meetings.

Input from the public was provided by the following:

Dick Hutchinson stated it has taken two years for this new interim project; however, this is not solving the problem and he feels it is another bandage. He feels the traffic lights and pull-outs need to be addressed for emergency access; and he feels that we need to keep the pressure on for a permanent fix.

Rick Benson advised that CalTrans has scheduled a public workshop on the permanent fix for May 21st at the Government Center and May 22nd in El Portal, from 4 to 7 p.m. (M)Aborn, (S)Fritz, Res. 08-177 was adopted finding the local emergency due to the landslides on Highway 140 enroute to Yosemite National Park continues to exist, and continuing the local emergency based on the findings/Ayes: Aborn, Turpin, Fritz, Pickard; Excused: Bibby.

Cc: Dana Hertfelder, Public Works Director
File