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GOVERNMENTAL ENTITIES DIFFER IN INTERPRETATION AS TO THE APPLICABILITY OF GOVERNMENT CODE §1031 RELATIVE TO THE ISSUE OF RE-EMPLOYMENT

By SCOTT O'MARA

Throughout the state of California, there typically three types of government bodies which administer retirement benefits for safety people — CalPERS; the County Employees' Retirement System of 1937, called the County Employees' Retirement Act of 1937; government entities created by certain municipalities which have their own systems. All these systems have had similar issues raised relative to eligibility for a disability retirement and whether that eligibility is impacted by an employer's inability to accommodate an injured worker to allow him/her to return to their employment situation when one of the various retirement systems has determined the worker indeed is not disabled from the performance of his/her substantial duties.

The State Personnel Board has issued a decision regarding a law enforcement member and Government Code §1031 — a decision which has direct impact on state employees, and potentially will have an overflow impact on county and city employees. The worker involved is a California Highway Patrol officer who sought to return back to work as a peace officer. In the process of showing that he was no longer physically incapacitated from performing his usual and customary duties, he was placed in a situation where he had to prove not only that he met the CalPERS standard regarding the physical ability to return to work, but also could pass a psychological screening required of peace officer candidates pursuant to Government Code §1031. The officer underwent the testing and the results led to two different opinions — one opinion being that he could return to work, and the other being that he could not do so based on the psychological screening.

CalPERS determined independently that the officer was no longer incapacitated from performing his substantial duties and therefore approved his reinstatement from the industrial disability retirement. CalPERS' position was that the officer had *mandatory* rights to his former position. It should be noted that the officer obtained a second opinion from an outside professional who recommended reinstatement.

Despite that, the Department attempted to disregard the determination of CalPERS, stating that the CHP had the absolute right to determine the officer's capacity, pursuant to Government Code §1031, and that their determination was binding. They relied on the premise that §1031 sets a minimum standard that is imposed upon all peace officers. The member's view was that the determination by CalPERS that he is substantially able to perform his usual duties was the standard, and that the Department's denial was a constructive medical determination regarding his employment and constituted a violation of his civil service reinstatement rights.

The case spoke to the psychological screening, which again is a mandatory *pre-employment* assessment of the psychological fitness of candidates for employment as peace officers. The emphasis is on *pre-employment*. The California Highway Patrol did not have routine screening to determine the physical or psychological fitness of its officers, as the only time the psychological screening was used was prior to the hiring of a new employee. In this case, a unilateral decision was made to ignore the standard practice and use the screening for no reason other than the fact that the worker was returning to his employment.

The Board Decision and Order from the State Personnel Board emphasized that CalPERS members have a right to reinstatement to their former position, and this right is a *mandatory* right. It is not a fictional creation, but a statutory obligation and right created by the Legislature. Government Code §19143 states:

> At the termination of any temporary separation, except termination of a permanent or probational employee by layoff and termination by displacement, as defined by board regulation, the employee shall be reinstated to his or her former position, as defined in Section 18522.

Again, the position is that the statutory scheme mandates reinstatement upon a finding that the employee is no longer incapacitated. The word "mandates" is very significant.

The case goes on to review the concept that pursuant to the Government Code, a disability retirement is a temporary separation from employment, and that temporary separation such as a disability retirement does not result in the loss of permanent civil service status. Therefore, the employee, as a civil servant, has a proprietary interest in the continuation of his or her job, and the right to mandatory reinstatement is intended to *protect* the employee who has already achieved permanent civil service status. Again, the concept is that civil service status must be considered in the re-employment.

The Court then further reviewed the issue of whether, irrespective of the injured worker's mandatory reinstatement rights held prior to the disability retirement, the Department could condition his return to employment by requiring his submission for further psychological testing. The Court considers Government Code §1031(f), which states that the officer must:

> 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.

The Court distinguished the civil service employee, again restating that his disability was a temporary — not a permanent — separation from employment. Therefore, he maintained his civil service status, creating a different standard which must be applied by the Department. The CHP again tried to abrogate this, arguing that the obligation for capacity extends throughout the officer's career, and that the break in service did not afford him the same rights he would hold without said break, and that §1031 gave the Department the right to continually review the capacity of its members.

Of interest again is that the California Highway Patrol does not have a policy and procedure to utilize for all members for annual compliance regarding §1031. Therefore, the Board came back and held that the CHP was selectively applying the standards of §1031 to the mandatory reinstatement from disability, while ignoring situations where there also may be concerns about returning officers yet the standards of §1031 are not applied to them and to all employees. The Retirement Board cited the appellate decision which reflected this point.

Therefore, the background check in the §1031 standard cannot be initiated by the mandatory reinstatement, and the employee seeking reinstatement must be treated like other employees. As a result, the returning employee's continued employment should not subject that employee to conditions not otherwise imposed upon all current working employees. The Court acknowledged that in certain situations an employee's fitness or suitability for retained employment may warrant the employer to perform a fitness evaluation *if the circumstances warrant such a referral.* A return to the Department from a disability retirement does not satisfy the threshold for the fitness evaluation.

This case gives a significant view as to the limitations employers have in their unilateral reluctance to re-embrace employees who seek to retire, and/or when there is a potential conflict in medical opinions.

The Court then reviews a very significant 1990 case — *Phillips v. County of Fresno* — and ties that in relative to fitness evaluations. In this case, the Fresno County Employees' Retirement Association (*i.e.*, Retirement Board) determined that an employee was not substantially incapacitated from the performance of his usual job duties, either from a physical or psychiatric standpoint. The Sheriff's Department determined that Phillips' injuries created too many liabilities, and he needed a secondary release from a doctor over and beyond what the Retirement System determination was. Deputy Phillips sought reinstatement based upon the Retirement Board's determination, and back wages during the time this process was being litigated.

Government Code §31725 was enacted to eliminate serious economic impact upon an injured worker which can occur from inconsistent decisions between the employer and the Retirement Board, which potentially can leave an employee without a source of income from either retirement or work. This "nowhere-land" in which some individuals have found themselves exists because of the uncertainty as to which standard should be utilized to determine an injured worker's disability or lack thereof.

Some employers have taken the posture that even if the Retirement System — whether it be CalPERS, the County Employees' Retirement Act, or some other municipal entity — has found a worker eligible to return to his or her job, it is not the final determining factor, and the employer indeed has the right or obligation — particularly under Government Code §1031 — to ensure the worker meets certain minimum standards for a public safety officer and "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". This section goes on to state that physical condition shall be evaluated by a licensed physician and surgeon, and emotional and mental condition shall be evaluated by either a physician and surgeon who holds a valid California license to practice medicine or a psychologist licensed by the California Board of Psychology.

The Court in several decisions has acknowledged that the employer/Retirement System cannot deny a disability retirement on the basis of no disability and then through another arm of the employment entity (such as the sheriff, police chief, or Highway Patrol commissioner) claim that there is a disability which justifies denying employment income to the worker. If the employer and the Retirement Board do not agree that the employee is entitled to a disability retirement, the employer's recourse is to seek judicial review of the Retirement Board's decision. If this review is not pursued, the employee must be reinstated, with the strong possibility the employer will have to pay back wages and other ancillary benefits for the period of time they denied re-employment, pursuant to *Phillips v. County of Fresno.*

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THE LAW OFFICES OF

SCOTT A. O'MARA

O'MARA & PADILLA

2370 5th Ave., San Diego, CA 92101
4200 Latham St. – Ste. B, Riverside, CA 92501-1766
12770 High Bluff Dr. #200, San Diego, CA 92130

1-800-LAW-1199 (1-800-529-1199)
619-583-1199
951-276-1199
www.law1199.com

BOBBITT, PINCKARD & FIELDS, A.P.C.

8388 Vickers St., San Diego, CA 92111
4200 Latham St. – Ste. B, Riverside, CA 92501-1766
858-467-1199
www.coplaw.org

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