

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Respondent Eric L. Reason (Respondent), employed as a Custodian II with the Marin County Schools (Novato Unified School District), filed an application for disability retirement on the basis of orthopedic (neck, back and shoulder) conditions.

As a Custodian II, Respondent was responsible for maintaining and cleaning school facilities and for arranging furniture and equipment as needed for classrooms and school events. He testified that, on a daily basis, he was required to collect trash and carry bags weighing between 50 and 100 pounds to a dumpster. At the dumpster, he had to lift the bags over his head to deposit them into the dumpster. In addition to general maintenance and cleaning, he was required to set up and take down heavy wooden tables during the student lunch period. To position the tables, he would have to lift them over curbs as he rolled them into and out of the lunch facility.

Respondent testified that he initially strained his upper back while lifting a waste can weighing nearly 100 pounds, above shoulder to dump it. He was off work for nearly a month, but eventually returned to full duty. He had a second injury at work to his upper back when he threw a heavy trash bag into the dumpster. Following this injury he has not been able to return to work. He testified that he would be unable to perform his duties as a school custodian because he experiences constant pain in his right arm and shoulder and neck and back. He testified that the work injuries were particularly debilitating because they exacerbated existing injuries to his neck and back that had been caused by previous motor vehicle accidents.

In order to be eligible for disability retirement, an individual must demonstrate through competent medical evidence that he or she is substantially incapacitated from performing the usual and customary duties of his or her position. The injury or condition that is the basis for the claimed disability must be permanent or of an uncertain and extended duration.

CalPERS relied on the opinion of Independent Medical Evaluator (IME), Joseph McCoy, M.D., a board certified orthopedic surgeon, in denying Respondent's disability retirement application. Dr. McCoy examined Respondent, reviewed x-rays and reports of MRIs and reports by Respondent's treating physician as well as those by physicians who evaluated Respondent in connection with his workers' compensation case. He concluded that Respondent was not substantially incapacitated from the performance of his duties as a Custodian II. Respondent appealed the denial and a hearing was held before an impartial Administrative Law Judge (ALJ).

Dr. McCoy was present to testify at the hearing. Mr. Reason was also present to testify on his own behalf and to cross examine Dr. McCoy.

Dr. McCoy testified that he could not find any objective basis for Respondent's reported excruciating pain in his right shoulder, arm and hand. He agreed that Respondent probably had degenerative disc disease of the cervical spine due to his age and to his

status as a long-time smoker. However, he did not identify any specific objective findings that would explain the degree of discomfort or exaggerated pain that Respondent displayed. For instance, Dr. McCoy stated that there was no asymmetry or atrophy in the arms, nor spasm in the shoulders. He stated that, if Respondent really suffered the degree of pain he described, he would expect to find muscle wasting on the right side and smaller measurement than on the left because Respondent would naturally favor the right and use the left instead. However, he noted that Respondent's arm measurements were virtually the same, with a slightly larger measurement on the right. He explicitly disagreed with the report of a workers' compensation doctor that Respondent had substantial atrophy of his right arm. Dr. McCoy also noted that MRI reports spanning three years did not demonstrate any significant change in Respondent's cervical spine over time. Thus, he could not find objective basis for Respondent's claimed severe limitations.

The ALJ found Dr. McCoy's testimony and analysis persuasive particularly since Dr. McCoy is an orthopedic surgeon whose expertise involves evaluation and treatment of neck, back and limbs. Dr. McCoy questioned the qualifications of Dr. Carpenter, a chiropractor and the primary care physician, and Dr. Martinovsky, a pain management specialist, to evaluate orthopedic injuries or determine appropriate treatment. While he agreed with the workers' compensation evaluators that Respondent had tendinitis in his shoulder, Dr. McCoy testified that this is a very treatable condition which is not permanently disabling.

The ALJ denied Respondent's appeal. She noted that although Respondent was injured at work and had pain, the preponderance of the medical evidence demonstrated that Respondent's subjective complaints are out of proportion to the objective medical findings.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board should adopt the Proposed Decision. Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

February 21, 2013



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PATRICIA B. MILES  
Senior Staff Attorney