

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Christina Merino was employed by the San Diego Unified School District (District) as a Custodial Crew Leader. The District contracted with CalPERS to provide retirement benefits to their employees. By virtue of her employment, Respondent was a local miscellaneous member of CalPERS. Respondent submitted an application for disability retirement on the basis of a claimed internal condition (ulcerative colitis). CalPERS staff reviewed applicable medical records and a written description of Respondent's usual and customary job duties. Gabriel Fabella, M.D., a board-certified Internist, reviewed medical records regarding Respondent, reviewed a written job description and performed an Independent Medical Examination (IME) of Respondent. Dr. Fabella prepared a written report which contained his observations, findings and ultimate conclusion that Respondent was not substantially incapacitated from performing the usual and customary duties of her position as a Custodial Crew Leader for the District. CalPERS staff denied Respondent's application for disability retirement. Respondent appealed this determination and a hearing was held on December 5, 2013.

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

At the hearing, Respondent called as a witness a Custodial Services Supervisor employed by the District who was familiar with the usual and customary job duties of a Custodial Crew Leader. The Custodial Services Supervisor testified that Respondent's position was physically demanding, involving lifting and carrying of cleaning equipment and supplies weighing sometimes in excess of 35 pounds. The supervisor described the usual and customary duties as being physically rigorous in all aspects.

Respondent also called a co-worker, who described the lifting, pulling, and carrying requirements of the Custodial Crew Leader position. The co-worker agreed with the supervisor that Respondent's position was physically demanding and rigorous.

Thomas Bruff, M.D. testified at the hearing on behalf of Respondent. Dr. Bruff stated that he was board-certified in Occupational Medicine. Dr. Bruff described his review of relevant medical records regarding Respondent and his examination of Respondent, the most recent occurring in April 2013. Dr. Bruff testified that, in his opinion, Respondent cannot perform the usual and customary duties of the position of Custodial Crew Leader because of a permanent weakness in her abdominal muscle structure, which is the result of numerous surgical procedures Respondent has had in order to treat her ulcerative colitis condition.

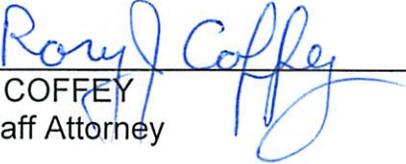
Respondent offered into evidence a declaration from Dr. Elias, who had reviewed applicable medical records regarding Respondent and examined Respondent in March 2013, for purposes of a Fitness for Duty Evaluation. Dr. Elias' opinion, as contained in the declaration, was that Respondent should not be required or permitted to lift and/or carry objects weighing more than 25 pounds. Like Dr. Bruff, Dr. Elias stated that Respondent could not perform her usual and customary duties as a result of residual muscle weakness following three abdominal surgeries.

Dr. Fabella was present at the hearing during the testimony of the District's Custodial Services Supervisor, the testimony of Respondent's custodial co-worker and the testimony of Dr. Bruff. Dr. Fabella testified that, based upon a clearer, better, more comprehensive understanding of the physical requirements of the position, he was changing his opinion, as previously contained in the written report following his examination of Respondent. Dr. Fabella testified that his opinion is that Respondent is substantially incapacitated from performing the usual and customary duties of the position of Custodial Crew Leader for the District.

After considering all of the documentary evidence and testimony of witnesses, the Administrative Law Judge (ALJ) found and concluded that competent medical evidence did demonstrate that Respondent was and is substantially incapacitated from performing her usual and customary duties as a Custodial Crew Leader.

The ALJ concluded that Respondent's appeal should be granted. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

February 20, 2014



RORY J. COFFEY
Senior Staff Attorney