

**ATTACHMENT C**  
**RESPONDENT(S) ARGUMENT(S)**

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From: Debra Taylor  
Legal Secretary to Thomas Hoegh

Re: Nathan Stough v. Department of Correctins Deuel Vocations Institution, et al.  
Case No.: 2012-0972  
OAH No.: 2013030712

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Number of Pages, Including Cover Sheet: 7

**M**essage: Herewith is Respondent's Argument.



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7  
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 9 NATHAN E. STOUGH

10  
 11 **BOARD OF ADMINISTRATION**  
 12 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

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

) CASE NO. 2012-0972  
 ) OAH NO: 2013030712

15 NATHAN E. STOUGH,  
 16 Respondent

) RESPONDENT NATHAN STOUGH'S  
 ) WRITTEN ARGUMENT AGAINST THE  
 ) PROPOSED DECISION

17 and

18 DEPARTMENT OF CORRECTIONS DEUEL  
 19 VOCATIONAL INSTITUTION, CALIFORNIA  
 20 DEPARTMENT OF CORRECTIONS AND  
 21 REHABILITATION,

22 Respondent.

23  
 24 **TO THE BOARD OF ADMINISTRATION OF THE CALIFORNIA PUBLIC EMPLOYEES'**  
 25 **RETIREMENT SYSTEM, AND TO ALL PARTIES HEREIN, THEIR ATTORNEYS OF**  
 26 **RECORD**

27 **COMES NOW RESPONDENT NATHAN STOUGH AND HEREBY SUBMITS HIS**  
 28 **WRITTEN ARGUMENT AGAINST THE PROPOSED DECISION OF THE HONORBLE**  
**KARL S. ENGEMAN AS FOLLOWS:**

29 **I. THE REPORT OF DR. DANIEL D'AMICO RELIED ON BY THE**  
 30 **ADMINISTRATIVE LAW JUDGE IS NOT SUBSTANTIAL EVIDENCE- IT IS**  
 31 **REPLETE WITH INCONSISTENCIES AND MISSTATEMENTS.**

1 The Public Employee's Retirement System (Cal PERS) submitted the report of Dr. Daniel  
2 D'Amico in support of their position that Correction Officer Stough's appeal of the denial of his  
3 disability retirement application should be denied. Respondent Stough submits that Dr. D'Amico's  
4 report and testimony is not substantial evidence as set forth herein.

5 Dr. D'Amico testified that he conducted the evaluation of Mr. Stough on September 19, 2012.  
6 At the time he interviewed Mr. Stough, he reviewed the medical files available at that time, including  
7 the records of Dr. Pricco and other medical records that had been marked as Respondent's Exhibits  
8 through 15, marked for identification at the administrative hearing, and that he relied on the same in  
9 preparing his report setting forth his opinions and conclusions introduced and received into evidence  
10 as Petitioner's Exhibit 7, the report of Dr. D'Amico.

11 Dr. D'Amico's report, Exhibit 7, has numerous inconsistencies and misstatements. In the  
12 history section on page 1 of the report, Dr. D'Amico indicates there was an altercation with some  
13 prisoners and that Mr. Stough fell forward and struck both knees on the cement floor. There is no  
14 support in the records for this statement. Mr. Stough only struck the right knee on the floor, and there  
15 was an altercation with only one inmate.

16 At page 2 of the report under the treatment section, Dr. D'Amico indicates that Mr. Stough  
17 was given modified duty and that he was not allowed to return to work with these limitations after a  
18 period of time. This did not occur. Mr. Stough continued to work for almost two months at his  
19 request without restrictions, and when he was unable to continue working due to the severe pain, he  
20 was given modified work restrictions by Dr. Pricco, but was never permitted to work modified duty  
21 even after requesting that the modified duty restrictions be lessened. This history is clear from the  
22 medical records that Dr. D'Amico reviewed, but Dr. D'Amico chose to either ignore it or misrepresent  
23 it.

24 At page 3 of the report under past/subsequent medical history, Dr. D'Amico indicates that Mr.  
25 Stough was working in an isolated area when he took an inmate to the ground. This is incorrect. Mr.  
26 Stough was not working in an isolated area. He was working with another correctional officer, and  
27 his lieutenant and a third correctional officer was in the vicinity and observed the incident. By failing  
28 to get an accurate history, or misrepresenting what he knew had occurred, Dr. D'Amico is misleading

1 the reader to infer that Mr. Stough may have fabricated the incident.

2 Dr. D'Amico indicates in the same section on page 3 that Dr. Pricco pulled Mr. Stough off  
3 work and he never went back to work. This is incorrect. As stated above, initially, Dr. Pricco  
4 released Mr. Stough to return to work full duty at Mr. Stough's request. Mr. Stough then worked full  
5 duty for almost two months until his right knee pain became unbearable to the point where he was no  
6 longer able to perform his usual and customary duties.

7 Under the examinee's present complaint section on page 3, Dr. D'Amico indicates that Mr.  
8 Stough was taking anti-inflammatory medication. Since this incident, Mr. Stough has been taking  
9 mild narcotic pain medications including Vicodin. Dr. D'Amico fails to state this fact. At page 4 of  
10 his report, Dr. D'Amico indicates that there was a review of systems which was negative. However,  
11 in the diagnosis section at page 7 of Dr. D'Amico's report, Dr. D'Amico diagnosed a rule out etiology  
12 of isoimmune condition such as pseudogout, for which there is no indication within the body of his  
13 report. Later in his discussion section of the report, Dr. D'Amico spends most of the discussion  
14 section speculating without any medical foundation, that Mr. Stough's right knee problems are being  
15 caused by an unknown and undiagnosed isoimmune disorder for which there is no medical basis.  
16 Please see page 7 of Dr. D'Amico's report.

17 At page 4 of the physical examination section of the report, Dr. D'Amico noted that Mr.  
18 Stough has discomfort with deep knee bends about two-thirds of the way down. Dr. D'Amico also  
19 noted that Mr. Stough has slight atrophy of the right thigh, the circumference immediately above the  
20 knee cap at the suprapatellar is three-eighths of an inch less in circumference on the right leg than  
21 compared to the left. Dr. D'Amico noted mild patellofemoral crepitation and pain and pressure on the  
22 knee when Mr. Stough attempted to do quadriceps.

23 Dr. D'Amico then conducted further tests on the knee that by his testimony on cross  
24 examination are associated with posterior, anterior, and collateral ligament function which were  
25 normal. On cross-examination, Dr. D'Amico admitted that Mr. Stough's right knee complaints and  
26 symptoms are not related to any injury to the ligaments of the right knee, such that these ligament tests  
27 were as expected normal. On cross-examination, Dr. D'Amico admitted that whatever injury Mr.  
28 Stough would have to his right knee would have occurred as a result of blunt forced trauma to the

1 knee cap, i.e. the knee striking the cement floor, which would affect the patellofemoral joint, not  
2 anything else in the knee.

3 On cross-examination, Dr. D'Amico admitted that a slight atrophy of Mr. Stough's right thigh  
4 is an objective finding, and that mild patellofemoral crepitation of Mr. Stough's right knee is an  
5 objective finding.

6 Although Dr. D'Amico disputed the relevance of the findings on the MRI, and also refused to  
7 comment on the same since he had not personally reviewed the films, Dr. D'Amico did admit that  
8 radiologist's MRI report findings of grade 2 degenerative changes in the medial meniscus, mild  
9 subluxation of the patella and a small joint effusion can be considered objective findings. Dr.  
10 D'Amico testified that he was not comfortable relying on the radiologist report on the MRI studies,  
11 but that he did not request the MRI films so that he could review them himself.

12 In the discussion section of his report, Dr. D'Amico makes no effort to discuss Mr. Stough's  
13 subjective complaints of pain, correlate them with the objective findings, including the atrophy,  
14 crepitation, and the findings on MRI, and whether or not Mr. Stough can indeed perform the  
15 extraordinary, arduous, physical requirements of his job as a correctional officer, which by Dr.  
16 D'Amico's own admission require working overtime, wearing protective clothing and breathing  
17 apparatus, ability to disarm, subdue and apply restraints to inmates, defend himself against an inmate  
18 armed with weapons, run in an all out effort while responding to alarms and serious incidents and  
19 varying distances up to 400 yards, climb up frequently, descend or climb a series of steps or stairs and  
20 ladders, crawl and crouch occasionally, lift and carry continuously to frequently, up to 100 pounds  
21 with essential functions including the ability to lift and carry an inmate, and physically restrain an  
22 inmate including wrestling an inmate to the floor.

23 In the conclusion section of his report, Petitioner's Exhibit 7, Dr. D'Amico admitted that Mr.  
24 Stough fully cooperated and put forth his best effort during the examination. Please see page 8. Dr.  
25 D'Amico admitted that Mr. Stough has a knee condition that is now stabilized. Please see page 8 of  
26 the report.

27 In short, it appears that Dr. D'Amico simply ignored the objective findings of injury, ignored  
28 the extreme arduous nature of the correctional officer job, and failed to comprehend the difficulties

1 that Mr. Stough would encounter if he attempted to return to work and perform these duties. Dr.  
2 D'Amico's report is clearly result driven, he was hired to conclude that Mr. Stough's right knee  
3 condition does not permanently incapacitate Mr. Stough from performing the essential duties of his  
4 job as a correctional officer despite the findings of his treating Dr Pricco, who has no interest in the  
5 outcome of this matter, who examined and evaluated Mr. Stough over the course of a year, and  
6 imposed work restrictions on Mr. Stough based on his examination and evaluation of Mr. Stough that  
7 the State of California Department of Corrections was unable and unwilling to accommodate given  
8 the extraordinary physically demanding and arduous nature of the work that must be performed by  
9 correctional officers.

10 **II. THE EVIDENCE TAKEN AS A WHOLE ESTABLISHES THAT RESPONDENT**  
11 **STOUGH IS PERMANENTLY DISABLED/ INCAPACITATED FROM**  
12 **PERFORMING THE ESSENTIAL DUTIES OF A CORRECTIONAL OFFICER**

13 Mr. Stough is permanently incapacitated from performing his duties as a correctional Officer.  
14 In *Mansperger v. Public Employee Retirement System* (1970) 6 Cal. App.3d 873, the court held that  
15 "incapacitated for the performance of duty" within section 21022 of the Government Code means that  
16 substantial inability of the applicant to perform [her] usual duties. *Id.* at 876.

17 The applicant must meet his burden of proof by establishing facts by a preponderance of the  
18 evidence. *Glover v. Board of Retirement* (1989) 214 Cal. App. 3d 1327, 1332. The evidence that is  
19 deemed to preponderate must amount to "substantial evidence." *Weiser v. Board of Retirement* (1984)  
20 152 Cal. App. 3d 775, 783. "Substantial evidence" is relevant evidence that a reasonable mind might  
21 accept as adequate to support a conclusion. *Hosford v. State Personnel Board* (1977) 74 Cal. App. 3d  
22 302, 307. To establish a medical disability, medical opinion evidence is required. *Peter Kiewit Sons v.*  
23 *Industrial Acc. Com.*, (1965) 234 Cal. App. 3d 905, 910. However, a medical expert opinion is worth  
24 no more than the reasons upon which it is based. *Neumann v. Bishop* (1976) 59 Cal. App. 3d 451, 463.

25 Mr. Stough is unable to do most of the essential duties of a correctional officer at Deuel  
26 Vocational Institution, an over crowded level 4, hardened criminal penal institution for which there is  
27 no modified or light duty as a correctional officer. Mr. Stough cannot continuously stand, walk, climb  
28 stairs, crouch, kneel, lift and carry inmates, protect inmates, prison staff and other correctional officers

1 from violent inmates, eight to sixteen hours a day depending on mandatory over time.

2 Mr. Stough's treating doctors Pricco and Walthour recognized this, as did the return to work  
3 coordinator, Gloria Montes de Oca. The correctional officer job is extremely arduous. Placing a  
4 physically unfit correctional officer in the prison environment with inmates that have violent  
5 propensities and nothing to lose is a recipe for disaster, a disaster that the Department of Corrections  
6 and their selected medical personnel recognized and respected.

7 Based on the objective evidence, as set forth above, Drs. Pricco and Walthour concluded that  
8 Mr. Stough will not be able to return to his normal work duties as a correctional officer. Dr. Pricco  
9 imposed permanent modified work duty with limited lifting of 30 pounds, limited squatting and no  
10 prolonged walking. Dr. Pricco indicated that Mr. Stough may do jobs involving intermittent sitting,  
11 standing and walking. Please see Respondent's Exhibit 13 marked for identification at the  
12 administrative hearing.

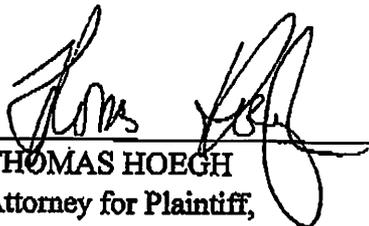
13 Dr. D'Amico declined to acknowledge any of Mr. Stough's objective findings of injury and  
14 disability, he declined to consider Mr. Stough's slight atrophy of the right thigh, where the  
15 circumference immediately above the knee cap at the suprapateller is three-eighths of an inch less in  
16 circumference on the right leg then compared to the left. Dr. D'Amico declined to consider the mild  
17 patellofemoral crepitation and pain and pressure on the knee when Mr. Stough attempted to do  
18 quadriceps. Dr. D'Amico declined to consider the MRI findings of grade 2 degenerative changes in  
19 the medical meniscus, mild subluxation of the patella and a small joint effusion. By D'Amico's own  
20 admission, all of these are and should be considered objective findings.

21 **III. CONCLUSION**

22 The weight of the evidence, looked at in its totality, strongly supports the conclusion that Mr.  
23 Stough is incapacitated from performing the essential functions of his job as a State of California  
24 Correctional Officer.

25 Dated: December 15, 2013

26 By:

  
THOMAS HOEGH  
Attorney for Plaintiff,  
NATHAN STOUGH