ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

The hearing on this case was completed March 6, 2014. Following the hearing, a Proposed Decision was issued on April 7, 2014. The Proposed Decision was in favor of CalPERS (reinstatement of Respondent to his usual duties as Supervising Cook). The Board voted to adopt the Proposed Decision on May 21, 2014. Robert Valenzuela (Respondent) submitted this Petition for Reconsideration on May 29, 2014.

Respondent was employed by the Department of Corrections and Rehabilitation (Respondent Corrections) as a Supervising Cook. Respondent submitted an application for industrial disability retirement, on the basis of a disabling orthopedic condition on his left side. Initially CalPERS granted the disability in 2002.

As part of CalPERS' review of his ongoing medical condition, Respondent was sent for an Independent Medical Examination (IME) to Orthopedic Surgeon Dr. Neil Halbridge. Dr. Halbridge reviewed Respondent's medical records, surveillance video, and performed a comprehensive exam. Following his examination and review of all documentation, Dr. Halbridge opined that Respondent is not substantially incapacitated from performance of his usual job duties.

Respondent testified on his own behalf at hearing. He did not call any physicians or other medical professionals to testify.

The Administrative Law Judge (ALJ) found that CalPERS bears the burden to show by a preponderance of the evidence (based on competent medical evidence) that Respondent is no longer substantially incapacitated and should be involuntarily reinstated to his former position (Gov. Code sections 21191 and 21192). The ALJ found that CalPERS met its burden of proof, based on Dr. Halbridge's medical opinion and Respondent's activities as shown on the surveillance DVDs. The ALJ further found that Respondent's workers' compensation doctor's report and his unsubstantiated claims of left side pain provided no objective, competent medical evidence to support his claim of continued disability.

The ALJ concluded that Respondent failed to establish that he is substantially unable to perform his usual job duties, and therefore, is not entitled to continue receiving disability retirement. The ALJ concluded that Respondent's appeal should be denied and that he should be reinstated to his former usual job duties as a Supervising Cook.

Respondent's grounds for reconsideration in his petition are based on disagreement with the ALJ's findings, and disagreement with the ALJ's findings regarding Dr. Halbridge's IME report. Respondent had the opportunity to fully present his case; he did testify on his own behalf and presented documentary evidence at hearing.

CalPERS staff addresses Respondent's arguments below:

With respect to Respondent's disagreement with the ALJ's findings of fact and legal analysis, it is clear from the Proposed Decision that evidence was taken, and numerous exhibits were submitted on the issue of Respondent's claimed disability. The ALJ simply found against Respondent. Respondent has not raised any new evidence or change in circumstances which would warrant reconsideration.

Respondent disagrees with Dr. Halbridge's findings following medical examination, review of records and review of surveillance video. Dr. Halbridge reviewed the surveillance video, which showed Respondent able to perform various tasks with his left hand, arm and shoulder, all without any difficulty. Although Respondent claimed that he cannot use his left arm, the ALJ specifically found that the surveillance video contradicted Respondent's claims. Moreover, Respondent's treating and workers' compensation doctors had not reviewed the surveillance video.

The ALJ found that CalPERS had established through competent medical evidence that Respondent's left arm no longer substantially incapacitates him from performance of his usual and regular duties as Supervising Cook. Dr. Halbridge's report, which was based on review of medical records and surveillance video, showed this. The ALJ found that Dr. Halbridge convincingly opined that there are no job duties that Respondent cannot perform because of his physical condition, and that he is not substantially incapacitated from the performance of his duties. Since Respondent's physician did not review the surveillance video showing Respondent using his left arm without difficulty, his opinion was not given the weight of Dr. Halbridge.

For all of the reasons stated above, staff argues the Board deny the Petition for Reconsideration and uphold its decision.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Petition for Reconsideration are minimal. Respondent may file a Writ Petition in Superior Court seeking to overturn the decision of the Board.

June 18, 2014

Elizabeth Yelland

ELIZABETH YELLAND
Senior Staff Attorney