

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION WITH MODIFICATION

Respondent Jonathan Drucker (Respondent) applied for Industrial Disability Retirement based on an orthopedic (back) condition. By virtue of his employment as Park Peace Officer Supervisor I (Lifeguard), he is a state safety member of CalPERS. CalPERS determined that Respondent was not disabled, and he appealed. A hearing on Respondent's appeal was completed on August 7, 2014. Respondent represented himself at hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process handbook. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) to board-certified Orthopedic Surgeon Dr. Peter Gleiberman. Dr. Gleiberman interviewed Respondent, reviewed his work history and job description, obtained a history of his back problems, past and present complaints, and reviewed his past medical records. Dr. Gleiberman also performed a comprehensive IME examination.

In his report, as well as in his testimony at hearing, Dr. Gleiberman concluded that Respondent was not able to function as a true lifeguard because he could not respond to emergency situations. Dr. Gleiberman believed Respondent should be restricted from pulling someone out of the water, from any heavy lifting or forceful pulling, from subduing a suspect, from any dangerous situations, from lifting over 25 pounds and from carrying a gun. Dr. Gleiberman did not think Respondent should be responsible for public safety because of the possibility of his back "seizing up." However, Dr. Gleiberman also opined that Respondent could do administrative work. Based on Respondent's job duties, Dr. Gleiberman ultimately concluded that Respondent was not substantially incapacitated from performing his duties, since most of Respondent's duties were supervisory and administrative in nature.

At hearing, Respondent testified at length about his actual duties, the type of responses needed in the Western Malibu Sector where he was stationed, and the lifeguard staffing in that sector. Respondent did not dispute the Duty Statement description of his normal and usual duties, but disagreed with the conclusion that he could continue in his position because he could still perform the administrative and supervisory duties. During the peak-season, the staffing levels in the Western Malibu Sector were such that Respondent could shield himself from emergency and life-saving duties. However, during the off-season, the staffing did not allow for such insulation. Respondent testified that, fortunately, during the last season of his employment while his back was injured, he did not have to respond to an emergency

been ineffective and would have endangered his own life and the life of the person whom he would have been trying to rescue.

The Administrative Law Judge (ALJ) found that Respondent was a credible witness and agreed with him regarding the importance of first responder duties. The ALJ found that the primary responsibility of a lifeguard supervisor is saving lives. Lifesaving is not secondary to the management or supervisory aspects of the position; it is the opposite. While the administrative tasks are necessary for maintaining the organized functioning of the lifeguard station, none is as essential as the lifesaving duties. The fact that emergency situations may not occur every day does not mean a lifeguard/supervisor does not need to be physically capable of responding to one every day.

The ALJ concluded that Respondent's inability to perform the essential duties of a lifeguard/supervisor entitles him to an Industrial Disability Retirement. Based on that conclusion, the ALJ granted Respondent's appeal.

Pursuant to Government Code section 11517(c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." In order to avoid ambiguity, staff recommends inserting the word "Industrial" before the words "disability retirement" in the case caption, on page two in the "Issue" section and paragraphs two and three on page two, on page five in paragraph 20, on page eight in paragraph 37, on page nine in paragraph 39, and on page 12 in paragraphs 15 and 16 and in the "Order" section of the Proposed Decision. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision, as modified above.

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.

October 15, 2014



CHRISTOPHER C. PHILLIPS
Staff Attorney