

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

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

Stockton Unified School District (Respondent District) employed John Penaflor (Respondent Penaflor) as a School Police Officer II. By virtue of his employment, Respondent Penaflor is a school safety member under Government Code sections 20063 and 20444.

Respondent District applied for industrial disability retirement on behalf of Respondent Penaflor. Respondent District stated his disability was low back strain, degenerative disc disease, lumbosacral spine, and post lumbar radiculopathy/left shoulder strain. These conditions occurred as a result of a motor vehicle accident while on the job. Respondent Penaflor also signed and submitted an application for industrial disability retirement which was substantially similar to the Respondent District's application.

CalPERS arranged for Respondent Penaflor to be examined by an Independent Medical Examiner, Dr. Mehta, a Board-Certified Orthopedic Surgeon. Dr. Mehta initially found that Respondent Penaflor was substantially incapacitated from the usual and customary duties of a School Safety Officer. However, Dr. Mehta changed his opinion after reviewing the sub-rosa videotapes taken of Respondent Penaflor.

After reviewing Dr. Mehta's reports and other medical evidence, staff denied Respondents' applications for industrial disability retirement. Respondents appealed the decision and a hearing was held on July 15, 2014.

Under the applicable court rulings construing disability under the California Public Employees' Retirement Law (PERL), Respondent Penaflor has the burden of showing that he is substantially incapacitated from performing the usual and customary duties in his position as a School Police Officer II. Prophylactic restrictions and risk of possible future injury cannot support a finding of disability. (*Mansperger v. Pub. Employees' Ret. System* (1970) 6 Cal.App.3d 873; *Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.)

Prior to the hearing, CalPERS discussed the procedure with counsel for Respondent District, who was also representing Respondent Penaflor in this matter. The parties exchanged documents prior to the hearing and discussed who would be called as witnesses.

At the hearing, Respondent Penaflor testified as to how he was now more limited in his physical activities as a result of the car accident. Respondent Penaflor testified he could bench press 350 to 400 pounds before the accident and lift 250 pounds over his head. Now he can only bench press 135 pounds without pain and lift 70 pounds over his head. He cannot push or pull over 50 to 100 pounds. Respondent Penaflor attempted to discredit the sub-rosa video that showed him moving heavy objects including an Aquafina refrigerator while reorganizing his garage by claiming that because the refrigerator was sitting on wood slats it was easier to move.

Dr. Corky Hull, who is not an orthopedic surgeon, testified for Respondents. While he was listed as Respondent Penaflor's treating physician, he testified that he had never actually examined Respondent Penaflor until counsel asked him to do so in preparation for the hearing.

Dr. Hull examined Respondent Penaflor on June 18, 2014 for the first and only time. Dr. Hull had no personal knowledge as to Respondent Penaflor's condition at the time he applied for industrial disability retirement because Dr. Hull had not examined Respondent Penaflor. Dr. Hull's knowledge came from review of medical reports and a possible conversation with other doctors. He opined Respondent Penaflor was substantially incapacitated from his usual and customary duties on the basis of his orthopedic injuries.

Respondent District also argued that CalPERS did not have authority to make the determination on Respondent Penaflor's disability because he was a local safety officer.

At hearing, Respondent District conceded that if Respondent Penaflor was a school safety member then CalPERS determined his disability.

Respondent Penaflor is a "local safety member," under Government Code § 20420, which defines "local safety member" to include "all local police officers, local sheriffs, firefighters, safety officers, county peace officers, and **school safety members**, employed by a contracting agency who have by contract been included within this system." (*Emphasis added*). However, Respondent Penaflor is also a "school safety member" pursuant to Government Code section 20444. By virtue of being a "school safety member," Respondent Penaflor is in the category of members whose disability applications are evaluated by the Board, pursuant to Government Code § 21156.

Government Code § 21156 provides:

(a)(1) If the medical examination and other available information show to the satisfaction of the board, **or in case of a local safety member, other than a school safety member**, the governing body of the contracting agency employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service. (*Emphasis added.*)

After extensive briefing, the Administrative Law Judge (ALJ) found CalPERS had the sole and exclusive jurisdiction to decide whether Respondent Penaflor was substantially incapacitated from his usual and customary duties as a School Police Officer II.

The ALJ also opined that Respondents had not met their burden to prove Respondent Penaflor was substantially incapacitated from his usual and customary duties as a School Police Officer and Respondents' appeals should be denied.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board 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.

October 15, 2014

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