

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

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

Respondent Glenn Nagel (Respondent) applied for Industrial Disability Retirement based on an orthopedic condition (back). By virtue of his employment as a Traffic Officer for the California Highway Patrol (CHP), Respondent is a state safety member of CalPERS. The hearing was completed on October 10, 2014, and Respondent was represented by counsel at the hearing.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) to Orthopedic Surgeon Dr. Robert Henrichsen. Dr. Henrichsen took an oral history, reviewed Respondent's intake questionnaire, reviewed Respondent's medical records and job descriptions and obtained a history of his past and present complaints.

Dr. Henrichsen performed a comprehensive orthopedic examination of Respondent, including his back, shoulders, upper and lower extremities, hips, legs and feet. Dr. Henrichsen diagnosed age appropriate disc degenerative changes, and pain. Dr. Henrichsen opined that Respondent experienced a strain and sprain when he lifted the top of a damaged vehicle in December 2011, from which he should have recovered, or at least greatly improved. Dr. Henrichsen opined that the objective findings relating to Respondent's spinal condition do not support his subjective complaints of pain and disability. Dr. Henrichsen does not believe that the findings after examination rise to the level of substantial incapacity, and that Respondent can perform his duties as a Traffic Officer for the CHP.

Following his examination and review of all documentation, Dr. Henrichsen concluded that Respondent is not incapacitated from performing his usual duties. More specifically, he can do all of the 14 critical tasks listed for CHP officers. Dr. Henrichsen's opinion is confirmed by diagnostic studies, range of motion testing, and absence of atrophy which might otherwise confirm disuse of muscles for an extended period of time because of chronic pain. Dr. Henrichsen could not find any orthopedic or neurological impairment that prevents Respondent from performing his usual duties as a Traffic Officer for the CHP.

At the hearing, Dr. Henrichsen testified to his examination and reports. Dr. Henrichsen's medical opinion is that Respondent is not substantially disabled, even if he is experiencing some pain.

Respondent testified on his own behalf and called his Pain Management physician to testify on his behalf. The Administrative Law Judge (ALJ) found Dr. Henrichsen the more persuasive expert on the question of Respondent's substantial capacity to perform his usual duties. Respondent's physician testified based on information he received from Respondent's physical therapist rather than his own examination. Also the ALJ found that there was no evidence that Respondent's physician reviewed the 14 critical tasks list.

The ALJ found that Respondent bears the burden to show by a preponderance of evidence (based on competent medical evidence) that his physical condition rendered him substantially incapacitated for the performance of his usual duties. The ALJ found that Respondent is physically capable of performing all of the usual duties associated with his position as a CHP Traffic Officer, including the 14 critical tasks identified by the CHP. The ALJ found that Respondent failed to establish on the basis of competent medical opinion that he has a physical disability of permanent or extended and uncertain duration that incapacitates him for the performance of his required duties as a CHP Traffic Officer.

The ALJ concluded that Respondent's appeal 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.

December 17, 2014

  
ELIZABETH YELLAND  
Senior Staff Attorney