ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent David Galloway (Respondent Galloway) was employed by the California Highway Patrol (CHP) as a State Traffic Officer. By virtue of his employment, Respondent Galloway was a state safety member of CalPERS. Respondent Galloway was injured in a motor vehicle accident while on duty, suffered an injury to his right knee, received medical care and ultimately applied for and was approved to receive industrial disability retirement (IDR) in 2006. In 2011, Respondent Galloway submitted an application for reinstatement, seeking to be returned to his position as a Traffic Officer with CHP. CalPERS reviewed relevant medical reports and a written job description. Mark Mikulics, M.D., a board certified Orthopedic Surgeon, reviewed medical reports regarding Respondent Galloway, reviewed a written job description and performed an independent medical examination (IME) of Respondent Galloway. In a written report, Dr. Mikulics detailed his observations, findings and conclusions, and expressed an opinion that Respondent Galloway was no longer substantially incapacitated because of the condition of his right knee and that he could, therefore, return to his previous position with CHP. In 2012, CalPERS determined that Respondent Galloway was no longer substantially incapacitated from performing the usual and customary duties of a CHP officer and should be reinstated to his position with CHP. Notice of CalPERS' determination was sent to both Respondent Galloway and CHP. CHP advised that it was "informally appealing" CalPERS' determination, citing Government Code section 1031(f). The matter was the subject of hearing on March 6, March 18, April 3 and April 27, 2015. The parties submitted post-hearings briefs and the matter was submitted to the administrative law judge (ALJ) on June 26, 2015.

Prior to the hearing, CalPERS explained the hearing process to Respondent Galloway and the need to support his case with witnesses and documents. CalPERS provided Respondent Galloway with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process. CHP was represented by the Attorney General's Office.

Respondent Galloway testified that in the approximate five (5) years between when he was approved to receive IDR (2006) and when he applied for reinstatement to the CHP (2011), he had worked on strengthening his right leg, improving his mobility and overall rehabilitating his right knee. Respondent Galloway testified that he was and is fully capable of performing all of the 14 Critical Tasks required of CHP officers.

Dr. Mikulics' report was received into evidence and he testified at the hearing. Dr. Mikulics testified that Respondent Galloway had full range of motion in his right knee and that his examination was essentially normal. Dr. Mikulics expressed his opinion that Respondent Galloway could fully perform all of the 14 Critical Tasks required of CHP officers.

Respondent Galloway called his treating orthopedic physician, James McSweeney, M.D., to testify on his behalf. Dr. McSweeney is a board certified orthopedic surgeon.

Dr. McSweeney had performed surgeries on Respondent Galloway's right knee in 2005 and 2006, before he was approved for IDR. Dr. McSweeney did not treat Respondent Galloway between 2006 and 2011, when Respondent Galloway lived in Montana. However, when Respondent Galloway returned to the San Diego area in 2011, as part of his effort to be reinstated to the CHP, Dr. McSweeney again became Respondent Galloway's treating orthopedic surgeon. Dr. McSweeney examined Respondent Galloway in March 2011 and in July 2014, and performed a cartilage shaving surgery on Respondent Galloway's right knee to remove torn cartilage. Based on the results of the March 2011 examination, Respondent Galloway believed that Dr. McSweeney would testify in support of his request to be reinstated to his former position with CHP. In his March 2011 report, Dr. McSweeney noted that the strength in Respondent Galloway's right knee had improved, that the knee was nontender, and that the range of motion was close to normal. Dr. McSweeney expressed an opinion that Respondent Galloway "may be able to perform critical tasks."

Dr. McSweeney requested that Respondent Galloway be further evaluated by participating in a functional capacity evaluation, which included performing numerous physical tasks such as pulling, pushing, lifting, carrying, etc. Based on the results of the functional capacity evaluation, Dr. McSweeney stated in an October, 2011 report that Respondent Galloway had sufficiently rehabilitated himself to the extent that he should have "the opportunity" to return to work as a CHP officer.

However, Dr. McSweeney changed his mind regarding Respondent Galloway's ability to perform all of the 14 Critical Tasks required of CHP officers. When Dr. McSweeney performed the July, 2014 cartilage shaving procedure on Respondent Galloway's right knee, he described the right knee cartilage as being "completely destroyed." On the basis of this finding, Dr. McSweeney testified that, in his opinion, Respondent Galloway could not perform all of the 14 Critical Tasks required of CHP officers.

After reviewing and considering all of the evidence and testimony, the ALJ found that the weight of competent medical evidence regarding the condition of Respondent Galloway's right knee led to the conclusion that Respondent Galloway remains substantially incapacitated from performing the usual and customary duties of a CHP officer. Accordingly, the ALJ concluded that the CHP appeal of CalPERS' determination to reinstate Respondent Galloway should be granted.

Staff recommends 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.

September 17, 2015

Rory J. Coffey

RORY J. COFFEY