

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Matthew Eisenman (Respondent) was employed by the California Highway Patrol (CHP) as a State Traffic Officer. By virtue of his employment, Respondent was a State safety member of CalPERS. In June 2008, Respondent submitted an application for Industrial Disability Retirement on the basis of a claimed psychological (post-traumatic stress disorder (PTSD)) condition. CalPERS staff reviewed relevant psychological reports and Respondent was evaluated by a CalPERS retained Psychiatrist, who prepared a report finding that Respondent was substantially incapacitated from performing the usual and customary duties of a State Traffic Officer. Respondent was approved for Industrial Disability Retirement in November 2008.

In April 2010, Respondent submitted a Reinstatement from Disability/Industrial Disability Retirement Application, seeking reinstatement to his former position as a State Traffic Officer. Staff reviewed relevant psychological reports and a written description of the usual and customary duties of a CHP Officer. Respondent was evaluated by Benjamin Kaufman, M.D., a Board-Certified Psychiatrist. Dr. Kaufman reviewed available psychological reports and a written job description. Dr. Kaufman prepared a written report which contained his observations, findings, and conclusions. Dr. Kaufman's opinion was that Respondent was no longer substantially incapacitated on the basis of PTSD and could be reinstated to his former position with CHP. Staff determined that Respondent was no longer substantially incapacitated from performing the duties of a State Traffic Officer and advised both Respondent and CHP of the determination.

Upon being notified of CalPERS' decision, CHP filed an "informal appeal" and then proceeded to unlawfully condition Respondent's return to work upon a successful psychological screening normally required of candidates for peace officer positions under Government Code section 1031. Respondent submitted to the psychological screening, which was conducted by the State Personnel Board Psychological Screening Program unit (PSP). The Unit concluded that Respondent was not suitable to serve as a peace officer due to the disability that led to his retirement. Respondent then appealed to the State Personnel Board. The State Personnel Board (SPB) not only invited briefing from the CHP and Respondent on the issues in the case, but also from other interested parties, including CalPERS. CalPERS submitted an amicus brief advocating that CHP does not have the ability to reject CalPERS' medical evaluation on reinstatement and do its own internal medical evaluations before returning a formerly disabled employee back to work. After considering the exhaustive briefing, the SPB held that Respondent had a mandatory reinstatement right to his former position upon receiving a final determination from CalPERS under Government Code section 21192 that he is no longer incapacitated from substantially performing the usual duties of his job. The SPB further held that there is no existing authority that would permit CHP to condition or supplant Respondent's return to his former position by requiring that he undergo a further psychological screening under the guise of maintaining continued fitness standards of Government Code section 1031.

After this comprehensive loss at the SPB, CHP appealed CalPERS' determination. The matter was the subject of 6 days of hearing (November 13 and 14, 2014, and April 7, 8, and 9, and May 15, 2015) and the parties filed Post-Hearing Briefs. The matter was submitted for decision on August 17, 2015.

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 pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process. Respondent was represented by counsel during the hearing and for purposes of preparing and submitting a Post-Hearing Brief.

CHP based its appeal on the provisions of Government Code section 1031(f). In separate litigation (*Resendez*), the California Court of Appeal, in a Decision dated October 13, 2015, affirmed CalPERS' sole authority to conduct evaluations of individuals for purposes of reinstatement, and declared that a State employer agency, such as CHP: A) cannot conduct its own evaluations of former employees, approved for disability retirement, who seek reinstatement; B) have a mandatory duty to reinstate the employee if the CalPERS' determination is affirmed, following an administrative appeal, and C) cannot condition the reinstatement of the former employee on the basis of the employee successfully satisfying criteria set forth in Government Code section 1031(f).

The Proposed Decision refers to Section 1031(f). For the most part, the Administrative Law Judge's (ALJ) legal analysis does not include reference to the Section's provisions. However, in Legal Conclusion No. 4, the ALJ states, in relevant part, "...his mental condition continues to preclude work in law enforcement at this time. (Gov. Code, sec. 1031.)" (Emphasis added.)

Additionally, the evidence produced by CHP in support of its appeal, such as a Pre-Employment Psychological Screening Report, personality test (MMPI-2) results, a Psychological History Questionnaire and the testimony of Joanne Danti, Ph.D., were obtained only because CHP informed Respondent that he was required to submit to CHP's requests, a position invalidated by the *Resendez* decision. As the ALJ noted, "As part of the reinstatement process, CHP arranged a psychological screening. Respondent was asked to complete a Psychological History Questionnaire (Questionnaire) and undergo evaluation by a State Personnel Board (SPB) psychologist." (Factual Finding No. 35; Emphasis added.)

As a result, much of the evidence presented by CHP and considered by the ALJ was secured improperly and contrary to the statutory process described by Government Code sections 21192 and 21193. Sections 21192 and 21193 set forth the reinstatement process, including that the Board alone has the authority to conduct evaluations.

At the hearing, Respondent testified that he believes and feels that he is psychologically strong enough and prepared to successfully handle the inevitable stressors that are part of the day-to-day environment of a State Traffic Officer, if he were to be reinstated to his former position. He testified that his treatment for PTSD symptoms has made him psychologically stronger and better able to identify and respond in a healthy manner to incidents that might occur in the future, if he were to be reinstated to his former position.

The CalPERS Independent Medical Examiner (IME), Dr. Kaufman, testified at length. Dr. Kaufman's opinion was that Respondent's PTSD symptoms had completely resolved and that Respondent was psychologically capable of performing the usual and customary duties of a State Traffic Officer.

Respondent's treating Psychologist, James Park, Ph.D., testified, describing the course of treatment provided to Respondent and the treatment's results. In Dr. Park's opinion, Respondent completely recovered from his previous PTSD symptoms and does not present any increased risk of re-experiencing PTSD symptoms if he were reinstated to his former position.

The ALJ made a careful and thorough review of the evidence offered by CHP, including documentary evidence and the testimony of expert witnesses that CalPERS regards as improperly secured. Nonetheless, the ALJ's overall review of the evidence, assessment of the weight to give to different pieces of evidence, and analysis of how all of the evidence relates to CalPERS' standard of substantial incapacity, adequately supports the Proposed Decision.

Accordingly, without repeating the ALJ's Factual Findings, there is sufficient support in non-objectionable evidence presented at the hearing for the ALJ to conclude, as she did in Legal Conclusion No. 4, that:

Respondent has been disabled or incapacitated from the performance of his usual duties since 2006, and retired for industrial disability since 2008. On this record, respondent continues to be substantially disabled and impaired for return to duty as a CHP officer. He continued to experience documented symptoms of PTSD even after initiating reinstatement in December 2009, and he remains in psychotherapy. Respondent's treatment records and numerous evaluations document public rage reactions, lack of emotional regulation, cynicism, defensiveness, and a tendency to be overly-self favorable... For the reasons stated above, respondent is substantially disabled or incapacitated for the performance of his usual duties as a State Traffic Officer because of an ongoing psychological condition.

The Administrative Procedure Act (APA) does not give the Board the authority to remand a matter back to the Office of Administrative Hearings (OAH), with a request that the matter be re-heard, on the basis of amended evidence (i.e., evidence secured on the basis of 1031(f) excluded), by a different ALJ than the original ALJ who prepared the Proposed Decision. In this matter, the Board can adopt the Proposed Decision or reject the Proposed Decision and decide the matter itself, on the record, in a Full Board Hearing. Staff is recommending that the Board adopt the Proposed Decision.

The Proposed Decision is phrased as "denying" Respondent's Application for Reinstatement from Industrial Disability Retirement. A more accurate Order would be to state that the appeal by CHP is granted, overturning the determination of CalPERS that Respondent was no longer substantially incapacitated from performing the usual and customary duties of his position as a CHP Traffic Officer. The ALJ concluded that Respondent CHP's appeal should be granted.

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

November 18, 2015



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