ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Arturo Trejo (Respondent) was employed as a Correctional Officer by the California Department of Corrections and Rehabilitation, California State Prison Centinela (CDCR). By virtue of his employment, Respondent was a state safety member of CalPERS. On August 30, 2010, Respondent submitted an application for Industrial Disability Retirement on the basis of a claimed orthopedic (low back) condition. Respondent was approved for Industrial Disability Retirement effective September 8, 2010.

Pursuant to Government Code section 21192, CalPERS' staff sought to have Respondent reevaluated for the purpose of determining whether he remained substantially incapacitated from performing the usual and customary duties of a Correctional Officer. Patrick O'Meara, M.D., a board-certified Orthopedic Surgeon, reviewed medical reports, a written job description and performed an Independent Medical Examination (IME) of Respondent. In his written report, Dr. O'Meara noted his observations, findings, and conclusions regarding Respondent. Dr. O'Meara offered an opinion that Respondent was not substantially incapacitated because of his low back condition, and could perform the usual and customary duties of a Correctional Officer. CalPERS' staff determined that Respondent was no longer substantially incapacitated and, therefore, was no longer eligible for Industrial Disability Retirement and should be reinstated to his former position. CalPERS' staff provided written notice of its determination to both Respondent and to CDCR. Respondent appealed the determination, and a hearing was held on September 20, 2016, at the Office of Administrative Hearings.

Throughout the appeal process and during the hearing Respondent was represented by counsel.

Copies of relevant medical records were submitted by the parties and reviewed and considered by the Administrative Law Judge (ALJ). The ALJ noted that, in 2010, at the time that Respondent submitted his application for Industrial Disability Retirement, Soheil Aval, M.D., a board-certified Orthopedic Surgeon, prepared a report following his examination of Respondent and review of medical records. In his report, Dr. Aval noted that diagnostic imaging (MRI report) disclosed a 5 mm disc bulge at L4 – L5 and a 2 mm disc bulge with annular tearing a L5 – S1 in Respondent's low back. This finding would be of significance to Respondent's treating physician, Vrijesh H. Tantuwaya, M.D., and to the ALJ.

Dr. O'Meara's report was reviewed by the ALJ, considered, and received into evidence. At the hearing, Dr. O'Meara testified consistently with the contents of his report. Dr. O'Meara testified that his examination of Respondent was unremarkable, that he did not observe objective findings that were consistent with or would support Respondent's claims of constant moderate to severe low back pain. A MRI study

performed in August 2014, disclosed age appropriate degenerative disc disease in Respondent's low back, but no evidence of a herniated disc or nerve root impingement. Dr. O'Meara testified that Respondent was not substantially incapacitated, and that he could perform the usual and customary duties of a Correctional Officer.

Dr. Tantuwaya testified at the hearing. He is board-certified in Neurological Surgery and has been Respondent's treating physician for the past 2½ years. Dr. Tantuwaya agreed that the most recent (2014) MRI study of Respondent's low back showed no evidence of a herniated disc. However, Dr. Tantuwaya testified that the earlier or previous MRI studies (2008 and 2010), demonstrated a right L4 – L5 disc herniation with compression of the exiting or traversing right L5 nerve root. Dr. Tantuwaya testified that Respondent was a proper candidate for surgical intervention and that, had Respondent had surgery, the complaints of low back pain, with pain radiating down his right leg, could possibly have been alleviated or removed. Respondent was not provided with such surgery. Dr. Tantuwaya testified that Respondent has suffered permanent and now irreparable damage to his L5 nerve because of the pressure or impingement that was present, without successful intervention by reason of conservative treatment, from approximately 2008 until an unknown date. Dr. Tantuwaya also testified that Respondent's complaints of pain and weakness are consistent with the anatomical pattern of an L5 – S1 radiculopathy. Dr. Tantuwaya testified that Respondent remains substantially incapacitated from performing the usual and customary duties of a Correctional Officer for CDCR.

After considering all of the evidence and testimony, the ALJ found that, "A preponderance of the credible medical opinion and other evidence established that [Respondent] currently suffers from a low back disability that precludes him from performing the usual and customary duties of a Correctional Officer." (See Factual Finding No. 27.)

The ALJ concluded that Respondent'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.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The Proposed Decision grants Respondent's appeal and so Respondent supports adoption of the Proposed Decision. CDCR did not participate in the hearing and cannot file a Petition for Writ of Mandate in Superior Court.

December 21, 2016

RORY J. COFFEY
Senior Staff Attorney