

**ATTACHMENT C**  
**RESPONDENTS ARGUMENT**

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CALPERS Board Unit



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December 9, 2016

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Re: In the Matter of Application for Industrial Disability Retirement of **ELIZABETH HOFFMAN**, Respondent, and **DEPARTMENT OF CORRECTIONS, WASCO STATE PRISON**, Respondent.

**RESPONDENT HOFFMAN'S WRITTEN ARGUMENT AGAINST THE BOARD'S ADOPTION OF THE PROPOSED DECISION**

**Introduction**

On November 2, 2016 CalPERS sent a letter along with the Proposed Decision of Tiffany L. King, Administrative Law Judge, which was rendered on October 28, 2016. The letter provided Respondent Elizabeth Hoffman, and her counsel, an opportunity to submit written argument of no more than six pages by December 9, 2016. Since this written argument is less than six pages, and is being faxed on December 9, 2016, to the CalPERS fax number provided, it is proper and timely. Further timeliness is ensured by emailing this document to [Kristen.Kassis@calpers.ca.gov](mailto:Kristen.Kassis@calpers.ca.gov), an email address provided by CalPERS Senior Staff Attorney Kevin Kreutz for ease of filing by December 9, 2016.

**The Proposed Decision Should Not Be Adopted Because It Improperly Relies On The Opinion Of Dr. Rush**

A trier of fact may disregard expert testimony and draw its own conclusions from the evidence only when the evidence conflicts or the expert's testimony is rebutted. (*Lauderdale Associates v. Department of Health Services* (1998) 67 Cal.App.4<sup>th</sup> 117, 126.) Here, CalPERS should disregard the "expert" opinion of Dr. Rush as biased and pre-determined. Further, for the reasons listed below, Dr. Rush's underlying evaluation leading to his opinion was woefully inadequate. As the evaluation was inadequate, ALJ King's reliance on Dr. Rush's opinion formed from this evaluation should not be adopted.

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Dr. Rush, an expert retained by CalPERS, testified at Respondent's hearing. He testified that he has conducted approximately fifty (50) evaluations for CalPERS over the last five (5) years. Yet, on cross-examination, Dr. Rush was unable to say how many medical opinions he has rendered where it was determined the applicant was incapacitated. After Dr. Rush was unable to identify a specific number of opinions where he found the applicant incapacitated, he was offered an opportunity to provide a rough estimate or a percentage. Nonetheless, Dr. Rush was unable to provide either. Dr. Rush's faulty memory in this regard is both troubling and circumspect, especially considering the amount of evaluations he has done in the recent past. Either Dr. Rush knows the number of evaluations where he has found the applicant incapacitated and does not wish to disclose, due to the biased total in CalPERS favor; or, Dr. Rush truly does not know the number of evaluations, which bears on his cognitive abilities in both remembering facts present in this matter, as well as necessary in determining incapacity in all matters where he is retained.

Dr. Rush's faulty examination of Respondent in this matter, performed approximately seven years after the underlying incident, was further confirmed in his continued cross-examination. Dr. Rush could not recall how much time he spent on Respondent's medical history, family history, description of the event, or his physical examination itself. There was no record in his report of talking to Respondent about her specific job duties even though this is an item specifically requested by CalPERS when retained. (Hearing Exhibit 6, p. 3.)

Further, Dr. Rush did not perform any tests to confirm West Nile Virus in Respondent, nor did he make a request to CalPERS to perform tests to confirm West Nile Virus, even though CalPERS allowed him to make such requests. (Hearing Exhibit 6, p. 4.) Dr. Rush stated that antibodies from the West Nile Virus last for years and tests would most likely show antibodies still present in Respondent if she had it. This revelation alone, notwithstanding the other inadequacies in his evaluation, is a perfect example of the pre-determined outcome Dr. Rush had in this matter. Dr. Rush provided no detailed explanation why Respondent could not perform her job duties. He merely wrote that the Respondent "may or may not have had West Nile virus in 2007. Most of the doctors think that she did have it. If she did It apparently has resolved and she should be fully recovered by now." As stated above, a test could have been requested and ordered by Dr. Rush to confirm West Nile Virus, a virus whose antibodies would most likely still be in Respondent per Dr. Rush's own opinion. Yet, despite neither ordering nor requesting such test, Dr. Rush opined that Respondent "may or may not have had West Nile virus" and if she did it either "has resolved" and she "should be fully recovered." The disservice Dr. Rush provided to Respondent and CalPERS in his "evaluation" cannot go understated or overlooked.

The medical evidence presented at hearing in Respondent's favor far outweighed Dr. Rush's faulty opinion. Respondent introduced an AME report, dated January 4, 2011, prepared by Dr. Meth in her worker's compensation case. Dr. Meth provided the following diagnostic impressions: (1) history of West Nile virus; (2) headaches secondary to the West Nile virus; (3) GERD; and (4) hypertension. Dr. Meth opined that Respondent's headaches appeared to be related to her West Nile virus infection, that it was medically probable responded developed elevated blood pressure due to the headaches from the West Nile virus, and that it was medically probable Respondent's heartburn was caused by her use of aspirin to relieve her headaches from the West Nile virus. Also, presented at hearing was a January 20, 2011 State Compensation Insurance Fund (SCIF) acceptance of Respondent's worker's compensation claim in which SCIF rated Respondent as 81-percent permanently disabled. These determinations, disregarded and

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given no weight by ALJ King in her opinion, provide evidence of incapacity which this Board should consider. Such evidence becomes even more significant if the appropriate decision is made to disregard the opinion of Dr. Rush.

**Conclusion**

For the reasons set forth above, Respondent respectfully requests the Board not adopt the Proposed Decision but that it enter a new and different Decision which finds Ms. Hoffman incapacitated from her customary duties as an Electrician II and award her disability retirement. In the alternative, Respondent respectfully requests the Board not adopt the Proposed Decision, disregard the opinion of Dr. Rush, and provide Respondent with a new, unbiased Independent Medical Examination. Lastly, Respondent Hoffman prefers against designation of this decision as precedential.

Very truly yours,

Goyette & Associates, Inc.  
A Professional Law Corporation



Brett F. Sherman  
BFS:am