ATTACHMENT B

STAFF'S ARGUMENT
STAFF’S ARGUMENT TO ADOPT THE PROPOSED DECISION

Thomas C. Durden (Respondent) worked as a Heavy Equipment Operator for the Department of Forestry and Fire Protection (Cal Fire). By virtue of his employment, Respondent is a state safety member of CalPERS subject to Government Code section 21151.

Respondent applied for industrial disability retirement on March 4, 2011. CalPERS approved the application on June 7, 2011, based on Respondent’s internal (pulmonary) condition. Respondent was placed on industrial disability retirement effective July 1, 2011.

On November 12, 2015, Respondent submitted an application for reinstatement from industrial disability retirement to his former position of Heavy Equipment Operator with Cal Fire.

As part of its review of Respondent’s medical condition, CalPERS referred Respondent to Thomas S. Allems, M.D., an Internist, to perform an independent medical examination. Dr. Allems interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Allems opined that Respondent was still substantially incapacitated from performing his usual and customary duties as a Heavy Equipment Operator for Cal Fire due to chronic asthma.

CalPERS reviewed medical reports concerning Respondent’s pulmonary condition including Dr. Allems' report. After reviewing the medical reports and other information, CalPERS determined that Respondent was still substantially incapacitated from performing his duties as a Heavy Equipment Operator with Cal Fire.

CalPERS informed Respondent and Cal Fire of its determination to deny Respondent’s request for reinstatement by letter dated June 30, 2016.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on June 29, 2017. Respondent represented himself at the hearing. Respondent Cal Fire did not appear at the hearing.

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 presented his own testimony. He did not call any medical experts to testify nor did he introduce any medical reports or other documentary evidence.
At the hearing, Dr. Allems described his findings upon physical examination of Respondent. He testified about his evaluation and the reasons for his conclusion that Respondent was incapacitated from the performance of his duties as a Heavy Equipment Operator for Cal Fire. Dr. Allems testified that Respondent continued to have asthma and that he could face life-threatening flares if he performed his job duties fighting wildland or forest fires. Dr. Allems concluded that Respondent was unable to perform the duties of a Heavy Equipment Operator. Dr. Allems testified that Respondent's asthma rendered him substantially incapacitated from the performance of such duties.

The ALJ found that the only competent medical evidence presented concerning Respondent’s condition was provided by CalPERS. CalPERS established that Respondent is still substantially incapacitated from performing the usual and customary duties of a Heavy Equipment Operator for Cal Fire. After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to “make technical or other minor changes in the proposed decision.” In order to avoid ambiguity, staff recommends that the Board modify the Proposed Decision by changing the caption of the Proposed Decision from “In the Matter of the Statement of Issues (Application for Reinstatement From Industrial Disability Retirement) of: THOMAS C. DURDEN, Respondent, and DEPARTMENT OF FORESTRY AND FIRE PROTECTION (CAL FIRE), Respondent” to, “In the Matter of the Application for Reinstatement from Industrial Disability Retirement of THOMAS C. DURDEN, Respondent, and DEPARTMENT OF FORESTRY AND FIRE PROTECTION, Respondent.”

The law and the facts support the Proposed Decision. Staff argues that the Board adopt the Proposed Decision, as modified.

September 20, 2017

AUSTA WAKILY
Senior Staff Attorney