ATTACHMENT B

STAFF'S ARGUMENT
STAFF’S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Respondent Department of Consumer Affairs (Respondent DCA) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge’s (ALJ) Proposed Decision dated June 7, 2017. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

The hearing on this case was completed May 8 and May 24, 2017. Both Respondent DCA and Respondent Hanson were represented by counsel at all phases of the hearing. The Proposed Decision was in favor of CalPERS and Respondent Hanson (denial of Respondent’s DCA’s employer originated application for disability retirement). The Board voted to adopt the Proposed Decision on August 16, 2017. Respondent DCA submitted this Petition for Reconsideration on September 1, 2017.

Respondent Aaron Hanson (Respondent Hanson) was employed by Respondent DCA as an Associate Governmental Program Analyst (AGPA) since 2012. On January 22, 2016, Respondent DCA filed an application for disability retirement on Respondent Hanson’s behalf (psychological, stress). Respondent Hanson has consistently maintained he is not disabled. CalPERS reviewed medical records and sent Respondent Hanson for an IME examination. On September 26, 2016, CalPERS denied Respondent DCA’s application for disability retirement.

At the hearing, CalPERS presented testimony from the Independent Medical Examination (IME) conducted by Psychiatrist Laura Davies. Dr. Davies testified that Respondent experienced anxiety, and exhibited bizarre behavior at work. However, Dr. Davies testified that none of this was evidence of a psychiatric condition, nor indicative of being substantially incapacitated to perform his usual job duties. Dr. Davies believes that Respondent can perform his job duties, and that he is not disabled. The ALJ found that Dr. Davies’ opinion was persuasive, her IME report and testimony provided clear and supported medical opinion that he does not have a condition that prevents him from performing his job. The ALJ also opined that Dr. Davies’ exam was closest in time to DCA’s filing of a disability retirement application on Respondent Hanson’s behalf.

Respondent DCA presented the testimony of Jessica Ferranti, M.D., who performed a Fitness for Duty exam to determine whether Respondent was fit for duty as an AGPA. Dr. Ferranti did not opine whether Respondent was disabled. Her evaluation was limited solely to the date of her examination, she did not review any of Respondent’s medical records, she was not asked about disability, she did not know the CalPERS standard for disability, and she thought his condition might respond well to medication. The ALJ found that Dr. Ferranti’s opinion was not based on the CalPERS standard, she was not familiar with the CalPERS standard, nor had she ever conducted an IME exam. The crux of the problem with Dr. Ferranti’s opinion is that Dr. Ferranti found Respondent Hanson was not “fit for duty” which is not equivalent to “respondent was substantially incapacitated from performing his usual job duties.” Further, the ALJ found that, “fitness for duty evaluations do not apply to CalPERS’ disability retirement standards.” (PD p.7, para. 20)
Respondent DCA also presented the testimony of Beth Scott, who supervised Respondent indirectly, and was aware of his behavioral and work-related issues. Ms. Scott described Respondent’s performance issues, including his being unwilling to take criticism, and being argumentative, accusatory and inappropriate in his communications. Ms. Scott testified about emails and memos in Respondent’s file, describing concerns with his performance and directives to correct his behavior and lack of professionalism. The ALJ found that DCA presented substantial evidence that Respondent was ineffective in his job, made people feel uncomfortable and unsafe, and displayed problematic and unprofessional behaviors. The ALJ also found that this evidence does not support a finding of disability. It could show a failure of ongoing discipline. Government Code section 21156 (a)(2) specifically provides that an employer may not use disability retirement as a substitute for the disciplinary process.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent DCA’s appeal. The ALJ found that the burden was on Respondent DCA to present competent medical evidence to show that Respondent was substantially incapacitated to perform his usual duties as an AGFA due to a psychological condition. The evidence established that although Respondent was separated from employment due to Dr. Ferranti’s opinion that he was unfit for duty, the claim of a psychological condition that rendered Respondent substantially incapacitated from performing his usual job duties was not supported by the evidence. Dr. Ferranti’s conclusion was not based on CalPERS’ standards for disability retirement, which is the only standard that applies.

The ALJ concluded that Respondent is not eligible for disability retirement. Respondent DCA filed a petition for reconsideration based on disagreement with the ALJ’s findings, and disagreement with the ALJ’s legal analysis of the CalPERS disability standard and disagreement with the analysis of competent medical evidence. Respondent DCA’s attorneys capably and fully presented DCA’s case, presented witnesses and documentary evidence at hearing, and cross examined Dr. Davies.

With respect to Respondent DCA’s disagreement with the ALJ’s findings of fact and legal analysis, it is clear from the Proposed Decision that evidence was taken, and numerous exhibits were submitted. Evidence was taken on the underlying facts, possible medical conditions, and Respondent’s claimed disability. The ALJ simply found against Respondent DCA. Respondent has not raised any new evidence or changed circumstances to warrant reconsideration. Nevertheless, CalPERS addresses Respondent DCA’s arguments below.

Respondent DCA argues that the CalPERS standard for disability was incorrectly stated by the ALJ as “permanently and substantially incapacitated from performing his duties” in order to deny DCA’s appeal (emphasis added). Respondent DCA takes issue with the use of the word “and” and claims the use of such word instead of "or" creates a more difficult standard item than the law intends. However, the Proposed Decision shows that the ALJ correctly cited to Government Code section 21156 to hold, “[a]n
employee qualifies for disability retirement if it is proved that, at the time of the application for disability retirement he was incapacitated physically or mentally for the performance of . . . his duties in the state service." The ALJ cited correctly to Government Code section 20026 which provides that "disability" and "incapacity for performance of duty" as a basis of retirement, mean "disability of permanent or extended and uncertain duration, as determined by the board... on the basis of competent medical opinion" (emphasis added). The ALJ cited correctly to Government Code section 21156 (a)(2) to find that an employer "shall not use disability retirement as a substitute for the disciplinary process." The ALJ cited correctly to case law to find the term "incapacity for performance of duty" to mean "the substantial inability of the applicant to perform his usual duties." (Mansperger v. PERS (1970) 6 Cal.App.3d 873, 876; italics in original). Thus, contrary to Respondent DCA’s assertions, the ALJ cited to and correctly applied the CalPERS standard for disability.

Respondent DCA also argues that the Fitness for Duty exam performed by Dr. Ferranti was competent medical evidence to show Respondent Hanson was disabled. Two doctors testified at hearing. Only Dr. Davies testified as to whether Respondent Hanson was disabled using the CalPERS standard. The ALJ correctly noted that DCA never asked Dr. Ferranti to opine whether Respondent Hanson was disabled using the CalPERS standard. Dr. Ferranti opined as to Respondent Hanson’s fitness for duty at the time of the examination, but she freely admitted her exam was quite limited: she could not estimate the duration of any condition Respondent Hanson might have; she never reviewed any of his existing medical records; she thought his condition might improve with medication and that his behavior was within his power to change and control; and she could not estimate the duration of any condition Respondent Hanson might have. Dr. Ferranti thought that Respondent Hanson was not fit for duty as an AGPA at the time of her examination, but could not testify as to his mental status at any other time or determine whether that fitness was permanent or temporary, and suggested he needed to be re-evaluated in six months (which Respondent DCA never did). Moreover, Dr. Ferranti’s opinion was limited to the date of her examination – Dr. Ferranti would not, and could not, opine as to Respondent Hanson’s medical state on the date the application for disability retirement was filed.

For all of the reasons stated above, staff argues the Board deny the Petition for Reconsideration and uphold its decision. No new evidence has been presented by Respondent DCA that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the August 16, 2017, meeting was well reasoned and based on the credible evidence presented at hearing.


[Signature]
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