ATTACHMENT B

STAFF'S ARGUMENT
STAFF’S ARGUMENT TO GRANT RESPONDENT CSUSB’S PETITION FOR RECONSIDERATION, AND TO DENY RESPONDENT HENDEE’S PETITION FOR RECONSIDERATION

Both Respondent California State University San Bernardino (CSUSB) and Respondent Justin Z. Hendee (Respondent Hendee) petition the Board of Administration to reconsider its adoption of the Administrative Law Judge’s (ALJ) Proposed Decision (PD) dated September 27, 2017. For reasons discussed below, the Board should grant CSUSB’s Petition for Reconsideration and assign it to an administrative law judge for the taking of further evidence regarding: 1) Respondent Hendee’s separation from employment while on probation; and 2) the effect the separation may have on Respondent Hendee’s immediate reinstatement to his former position. The Board should deny Respondent Hendee’s Petition.

In 2011, Respondent Hendee applied for, and was granted, industrial disability retirement based on orthopedic conditions. In 2014, CalPERS notified Respondent Hendee that CalPERS conducts re-examinations of persons on disability retirement, and that he would be re-evaluated for purposes of determining whether he remains substantially incapacitated and is entitled to continue to receive industrial disability retirement. After re-evaluation, CalPERS determined that Respondent Hendee was no longer substantially incapacitated from performing the duties of his position. Respondent Hendee appealed CalPERS’ determination, and a hearing was held on July 10, 2017.

After the hearing, the ALJ upheld CalPERS’ determination and denied Respondent Hendee’s appeal. In addition to ruling that Respondent Hendee was no longer substantially incapacitated from performing his usual and customary job duties as a Police Officer, the ALJ ordered CSUSB to immediately reinstate Respondent Hendee to his former position. Neither CSUSB nor Respondent Hendee submitted argument to the Board prior to considering this matter at the November 15, 2017 Board meeting.

I. CSUSB’s Petition Should Be Granted

CSUSB specifically limits its Petition for Reconsideration to the sentence in the PD directing that “CSUSB shall reinstate respondent to his former position immediately.” (See PD at p. 11.) CSUSB requests that this reinstatement language be stricken from the PD. CSUSB is not challenging the re-evaluation determination by the ALJ.

Although CSUSB neglected to advance this argument when the Board first considered the PD in November and the Board could deny the petition on that ground alone, CSUSB’s argument is legally correct: the ALJ did not have authority to mandate Mr. Hendee’s reinstatement. Thus, the Board should take this opportunity to require the ALJ to correct his error rather than forcing CSUSB to file a writ petition in the Superior Court which it would almost certainly win.
Although CSUSB sensibly (albeit belatedly) requests the Board to simply strike the offending sentence from the PD and adopt it, that is not an option under the Administrative Procedures Act. Under Government Code section 11521, “Reconsideration,” the Board is limited to two options, neither of which includes the striking of language from the PD. Staff thus suggests instead that the Board grant CSUSB’s Petition and remand the case to an administrative law judge for the taking of further evidence on the issue implicated by the questionable mandate in the PD, namely, the sentence requiring CSUSB to immediately reinstate Respondent Hendee to his former position.

That was never an issue in the case and hence was not litigated. The Accusation for this matter, which outlines the issues to be decided at hearing, limited the issue to whether Respondent Hendee is disabled or incapacitated from performance of his usual job duties. And, the very top of Page 2 of the PD outlines the issue, which reads, “is Mr. Hendee . . . still permanently disabled or substantially incapacitated from performing the usual and customary duties of a police officer?” Because the issue to be decided was limited to Respondent Hendee’s permanent disability or substantial incapacity, limited evidence was heard regarding Respondent Hendee’s separation while on probation.

Since the scope of the hearing did not include the issue of mandatory reinstatement, the ALJ did not have the opportunity to examine the facts underlying Respondent’s separation while on probation at the July 10, 2017 hearing. Plus, there was no evidence taken regarding the implications of that separation. Accordingly, staff recommends that the Board grant CSUSB’s Petition and remand the case for hearing regarding: 1) Respondent Hendee’s separation from employment while on probation; and 2) the effect that the separation may have on Respondent Hendee’s immediate reinstatement to his former position.

II. Respondent Hendee’s Petition Should be Denied

In his separate Petition for Reconsideration, Respondent Hendee argues that the Board should reverse its adoption of the Proposed Decision denying his re-evaluation appeal.

Yet, Mr. Hendee has presented no new evidence that would alter the ALJ’s analysis regarding his ability to perform his usual and customary duties as a Police Officer. The ALJ weighed the medical evidence presented by the parties and concluded that CalPERS’ expert’s testimony was entitled to more weight than that of Respondent Hendee’s experts. The Proposed Decision that was adopted by the Board at the November 15, 2017 meeting was well reasoned and based on the credible evidence presented at hearing. Staff thus argues that the Board should deny Respondent Hendee’s Petition.

December 20, 2017

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