ATTACHMENT B

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

Reina C. Vicory (Respondent) was employed by Respondent California Medical Facility, California Department of Corrections & Rehabilitation (Respondent CDCR) as a Registered Nurse. By virtue of her employment, Respondent was a state safety member of CalPERS. On or about November 1, 2011, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (back) condition. Respondent’s application was approved by CalPERS, and she retired effective September 21, 2011.

In 2016, CalPERS’ staff notified Respondent that CalPERS conducts reexaminations of persons on disability retirement and that she would be reevaluated for purposes of determining whether she remains substantially incapacitated and therefore is entitled to continue to receive industrial disability retirement.

In order to remain eligible for disability retirement, competent medical evidence must demonstrate that the individual remains substantially incapacitated from performing the usual and customary duties of her former position. The injury or condition which is the basis for the disability must be permanent or of an extended and uncertain duration.

As part of CalPERS’ review of Respondent’s medical condition, Respondent was sent for an Independent Medical Examination (IME) to Daniel D'Amico, M.D., a board-certified Orthopedic Surgeon. Dr. D'Amico interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints and reviewed medical records. Dr. D'Amico also performed a comprehensive IME. Dr. D'Amico opined that Respondent is able to perform her usual and customary job duties.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for industrial disability retirement and should therefore be reinstated to her former position as a Registered Nurse.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on June 25 and 26, 2018. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing.

At the hearing, Dr. D'Amico testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. D'Amico’s medical opinion is that Respondent can perform the duties of her position and is therefore no longer substantially incapacitated. Dr. D'Amico testified that Respondent’s complaints of pain are not supported by any objective findings.
Respondent testified on her own behalf. Respondent also called physicians to testify. Respondent presented the testimony of Dr. Andrew Burt, M.D. and Robert Froh, D.C. Dr. Burt is not a board-certified Orthopedic Surgeon and has not performed surgery since 1985. Dr. Burt performs medical evaluations for the worker’s compensation system. Dr. Burt is not Respondent’s treating physician and only saw Respondent for the purpose of performing a medical evaluation of her. Respondent also submitted medical records from her treating physicians to support her appeal.

Respondent testified that she is currently under the care of a chiropractor and suffers from severe back pain. Respondent testified that she is unable to lift more than 35 pounds and would be unable to perform the job duties of the position.

At the hearing, Respondent also testified that she disagreed with the results of Dr. D’Amico’s examination and report.

The ALJ found that the only competent medical evidence presented by Dr. D’Amico established that Respondent is no longer substantially incapacitated from performing her duties as a Registered Nurse for Respondent CDCR. The ALJ held that Dr. D’Amico’s opinion was “supported by his physical examination of respondent, the lack of findings on the MRIs and x-rays.”

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent’s appeal. The ALJ found that Respondent is no longer substantially incapacitated from performing her job duties. The ALJ did not find Dr. Burt’s testimony to be reliable because Dr. Burt found Respondent to be disabled without addressing or applying CalPERS’ standard for disability. The ALJ found Dr. D’Amico’s opinion more persuasive and held that CalPERS offered sufficient evidence to meet its burden of proof.

For all of the above reasons, staff argues that the Proposed Decision denying Reina C. Vicory’s appeal and upholding CalPERS’ determination to reinstate Respondent from industrial disability retirement be adopted by the Board.

September 26, 2018

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PREET KAUR
Senior Attorney