ATTACHMENT B

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

Rachelle Barone (Respondent) applied for industrial disability retirement based on an orthopedic (right shoulder) condition. By virtue of her employment as a Correctional Officer for Respondent California Medical Facility, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

Respondent filed an application for service pending industrial disability retirement on October 27, 2016, and has been receiving benefits since that time.

As part of CalPERS’ review of Respondent’s medical condition, Robert K. Henrichsen, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Henrichsen interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Henrichsen opined that Respondent was not substantially incapacitated from performing the usual and customary duties of a Correctional Officer for Respondent CDCR.

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

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of her position.

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 22, 2018. Respondent represented herself at hearing. Respondent CDCR did not appear at the hearing. The ALJ found that CalPERS had provided proper and adequate notice of the hearing to both Respondent and Respondent CDCR. The ALJ ruled that the matter would proceed as a default against Respondent CDCR.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her 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.

A copy of the CDCR Essential Functions for a Correctional Officer was offered and received into evidence. Respondent testified that the Essential Functions document correctly described the usual and customary duties that she would perform as a
Correctional Officer. Dr. Henrichsen referred to the CDCR Essential Functions in evaluating Respondent.

Copies of medical reports were offered and received into evidence. The medical records disclosed that Respondent injured her right shoulder in 2009 before she began working for Respondent CDCR. Respondent had arthroscopic surgery on her right shoulder, with good results, as she was obviously able to pass Respondent CDCR’s pre-employment physical examination and successfully complete Respondent CDCR’s academy training.

On March 9, 2015, Respondent claimed to have injured her right shoulder at work with Respondent CDCR. An examination one month later found no swelling, good range of motion, but Respondent complained of tenderness. Respondent began a course of physical therapy.

In May 2015, an MRI study of Respondent’s right shoulder showed a tiny undersurface tear of the supraspinatus and infraspinatus tendon, bicep tendons intact, normal muscle structure above the rotator cuff and the Acromioclavicular (AC) joint was clear of any inflammatory fluid.

In July 2015, Respondent had subacromial decompression surgery on her right shoulder. Post-surgery it was noted that the decompression procedure was good, with no evidence of bony impingement and a pristine rotator cuff attachment.

In January 2016, Respondent’s treating physician found full range of motion in her right shoulder but noted that Respondent reported pain when reaching overhead. A follow-up MRI in March 2016 showed no full-thickness rotator cuff tear, minimal tendinosis, intact bicep tendon, and some AC joint arthritis.

Respondent was evaluated as part of a claim for Workers’ Compensation benefits. The evaluating doctor, Thomas S. Pattison, M.D., concluded as follows in a written report:

[Respondent] presents with an injury that seemingly was not all that severe and would typically heal within a month or two, as the injury occurred with a lifting-type mechanism as opposed to a fall. Two MRIs and the surgery all seemed quite reassuring but, unfortunately, the pain persisted. The surgery was notable for no indication of an adhesive capsulitis as there was full range of motion under anesthesia.

(See Factual Finding No. 16.)

At the hearing, Dr. Henrichsen testified in a manner consistent with his examination of Respondent and the IME report. Dr. Henrichsen’s examination of Respondent showed normal/full range of motion of her cervical spine. With regard to her right shoulder, he noted some restricted ranges of motion, but all appropriate clinical exam tests were negative. There was normal muscle strength and ligamental stability in her shoulder.

(See Factual Finding No. 18.)
Dr. Henrichsen’s medical opinion is that Respondent is not substantially incapacitated from performing the usual and customary duties of a Correctional Officer. Specifically, Dr. Henrichsen testified that Respondent could properly “use,” (meaning “swing”) a baton. He believed that Respondent might experience some discomfort if required to do so, but that such discomfort would be temporary.

Respondent testified on her own behalf. She stated that she believed that she would not be able to perform all of the Correctional Officer duties because of pain. Respondent did not call any physicians or other medical professionals to testify. Respondent submitted medical records from Dr. Pattison.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that Respondent had not presented competent medical evidence to support her claim of being disabled. The ALJ noted the distinction between the evaluation performed by Dr. Henrichsen, the CalPERS IME, who correctly applied the CalPERS standard for eligibility for disability retirement and the evaluation performed by Dr. Pattison. As the ALJ noted:

Instead, Dr. Pattison evaluated respondent under the worker’s compensation standard; where subjective complaints are considered in making a percentage finding of permanent and stationary for the ultimate purpose of monetizing the damage to the injured employee and establishing eligibility for job displacement services. (See Factual Finding No. 23.)

The ALJ concluded that Respondent is not eligible for industrial disability retirement.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

September 26, 2018

RORY J. COFFEY
Senior Attorney