ATTACHMENT B

STAFF’S ARGUMENT
STAFF’S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Gene Joseph Lombardi (Respondent) applied for industrial disability retirement based on an orthopedic (back) condition. By virtue of his employment as a School Police Officer II for Respondent Oakland Unified School District (Respondent District), Respondent was a Local Safety member of CalPERS.

Respondent filed an application for industrial disability retirement on May 23, 2017.

As part of CalPERS’ review of Respondent’s medical condition, Howard Sturtz, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Sturtz interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Sturtz opined that Respondent is not substantially incapacitated from performing his usual and customary duties.

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 report, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of his position.

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 October 25, 2018. Respondent was represented by counsel at the hearing. Respondent District did not appear at the hearing. The ALJ found that CalPERS had provided proper and sufficient notice to Respondent District of the date, time, and location of the hearing and that the hearing could proceed as a default against Respondent District.

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.

The ALJ received into evidence a copy of the written job description for the position of School Police Officer II with Respondent District. In addition, Respondent testified and described his typical duties. Respondent would patrol school campuses and other properties owned by Respondent District. He was required to frequently enter and exit a patrol vehicle. Respondent performed law enforcement and crime prevention functions, including detaining and arresting individuals. A School Police Officer II must be able to physically restrain an individual.
At the hearing, Dr. Sturtz testified in a manner consistent with his examination of Respondent and the IME report. Dr. Sturtz testified that Respondent has Grade I lumbosacral spondylolisthesis, which involves a fracture of a vertebra and slippage of the L5 vertebrae forward over the S1 vertebrae. Dr. Sturtz testified that this diagnosis does not equate with disability. Dr. Sturtz’ medical opinion is that Respondent could perform the usual and customary duties of a School Police Officer II.

Respondent testified on his own behalf. He began his career in law enforcement in 2001, working as a Deputy Sheriff for Alameda County. He became a School Police Officer II for Respondent District in 2009. Respondent injured his low back in 2015. In January 2016, an MRI study revealed bilateral pars interarticularis defects at L5 with Grade I spondylolisthesis at L5-S1. Respondent’s treating physicians placed work restrictions on Respondent, prohibiting him from doing any work that could involve physical altercations. Respondent testified that, without being able to predict the event, he will move his low back, such as bending at the waist, and he will experience sharp muscle pain. Respondent described incidents where this would happen, and he would collapse to his knees or struggle to regain balance.

Respondent called James Stark, M.D., to testify on his behalf. Dr. Stark is board-certified in Physiatry. Dr. Stark made the same diagnosis as made by Dr. Sturtz. However, Dr. Stark testified that Grade I spondylolisthesis is a “spinal instability.” Dr. Stark regarded Respondent’s described symptoms as presenting a classic pattern of recurrent episodes of sharp, disabling low back pain. Dr. Stark offered his opinion that Respondent could not perform many of the usual and customary duties of a School Police Officer II, including physically restraining individuals.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent’s appeal. The ALJ found Dr. Stark’s testimony and opinion regarding Respondent to be more persuasive than that offered by Dr. Sturtz. The ALJ found that Respondent had met his burden of demonstrating, on the basis of competent medical evidence, that he is substantially incapacitated from performing the usual and customary duties of a School Police Officer II.

The ALJ concluded that Respondent is eligible for industrial disability retirement.

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 words State Safety member” be changed to “Local Safety member” on page two, paragraph one.

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

December 19, 2018

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