ATTACHMENT B

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

Respondent Marcus Tincher (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge’s (ALJ) Proposed Decision dated October 2, 2018. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Marcus Tincher (Respondent) was employed by Respondent Pelican Bay State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer. On August 22, 2012, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (right knee) condition. Respondent’s application was approved by CalPERS on November 16, 2012.

In 2017, CalPERS conducted a reexamination of Respondent. As part of CalPERS’ review of Respondent’s medical condition, Respondent was sent for an Independent Medical Examination (IME) to Harry A. Khasigian, M.D., a board-certified Orthopedic Surgeon. Dr. Khasigian interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Khasigian also performed a comprehensive IME. Dr. Khasigian opined that Respondent was not substantially incapacitated from performing the usual and customary duties of a Correctional Officer.

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

Respondent appealed this determination. A hearing was held on September 26, 2018.

Dr. Khasigian testified that in his examination of Respondent and based upon his review of medical records and diagnostic studies, he found no objective signs of continued disability. Respondent did not have any limp, and his stance, station and gait were normal. His right knee was not swollen nor tender. Respondent’s range of motion in the right knee was full, smooth (without noticeable catching), and without crepitus (grinding sound). All tests for ligament stability were normal. An MRI in July 2017, and x-rays taken on September 20, 2017, showed that there was “mild medial joint space narrowing” and “no joint effusion” in Respondent’s right knee. These findings are consistent with a fully functioning knee joint. There was no muscle atrophy in Respondent’s right leg, indicating normal use by Respondent. Dr. Khasigian testified that the injury to Respondent’s right knee (a mild medial meniscus tear) is a common condition, the subject of routine surgical repair, and a condition that normally heals completely, following surgery, in a matter of months. Dr. Khasigian testified that it would be highly usual for Respondent to continue to experience symptoms eight years after the initial injury.
Respondent testified on his own behalf, that he does not think that he can perform the usual and customary duties of a Correctional Officer. He experiences pain in his right knee and feels that his right knee is not stable. Respondent did not call any physicians or other medical professionals to testify on his behalf. Respondent submitted medical records from his treating physician, Bruce Perry, M.D., to support his appeal but as the ALJ noted, Dr. Perry’s findings were similar to those of Dr. Khasigian:

Respondent submitted a recent progress report created by his orthopedic doctor, Dr. Bruce Perry. Dr. Perry noted that Respondent had full range of motion in his knee. He noted no tenderness or swelling, and all tests for stability were normal. Respondent’s gait was also normal. (Factual Finding No. 12; Emphasis added.)

The ALJ found that the competent medical evidence presented by Dr. Khasigian established that Respondent is no longer substantially incapacitated from performing his duties as a Correctional Officer for Respondent CDCR.

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 failed to present sufficient competent medical evidence to refute the determination made by CalPERS that Respondent is no longer substantially incapacitated from performing the usual and customary duties of a Correctional Officer.

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. In fact, no new information was presented at all. The Proposed Decision that was adopted by the Board at the November 15, 2018, meeting was well reasoned and based on the credible evidence presented at hearing. Staff argues the Board deny the Petition and uphold its decision.

December 19, 2018

RORY J. COFFEY
Senior Attorney