ATTACHMENT B

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

Tracy A. Folau (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge’s (ALJ) Proposed Decision dated December 6, 2018, as modified. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent was employed by Respondent California Department of Corrections and Rehabilitation, California Prison Industry Authority (Respondent CDCR) as a Sales Representative. By virtue of her employment, Respondent was a state industrial member of CalPERS. On or about July 10, 2014, Respondent submitted an application for disability retirement on the basis of psychological (depression, anxiety and post-traumatic stress disorder (PTSD)) conditions. Respondent’s application was approved by CalPERS and she retired effective September 4, 2014.

On August 23, 2017, CalPERS staff notified Respondent that CalPERS conducts a reexamination of persons on disability retirement, and that she would be reevaluated for purposes of determining whether she remains substantially incapacitated and is entitled to continue to receive a 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 Matthew F. Carroll, M.D., a board-certified Forensic Psychiatrist. Dr. Carroll interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. Dr. Carroll reviewed the job duties and essential functions of a Sales Representative for the California Prison Industry Authority to determine whether Respondent remained substantially incapacitated from performing the usual and customary duties of Respondent’s former position. Dr. Carroll also performed a comprehensive IME. Dr. Carroll found that there was no evidence that Respondent suffers from post-traumatic stress disorder (PTSD), in part, because there was no evidence of a documented traumatic event. Dr. Carroll did note that Respondent has a history of being depressed and reported her having symptoms of a major depressive disorder; however, Dr. Carroll opined that Respondent would be able to perform the essential functions of her job as a Sales Representative if she so desired.

CalPERS requested that Dr. Carroll review additional medical records supplied by Respondent that related to her recent medical treatment. Dr. Carroll reviewed all of those medical records, and issued a supplemental report indicating that in his medical
opinion Respondent is not substantially incapacitated from performing her duties as a Sales Representative.

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

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 October 25, 2018, and November 6, 2018. Respondent represented herself at the hearing. Respondent CDCR did not appear at the hearing.

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.

At the hearing, Dr. Carroll testified in a manner consistent with his examination of Respondent and the reports prepared after the IME. Dr. Carroll’s medical opinion is that Respondent can perform the duties of her position and is therefore no longer substantially incapacitated.

Dr. Carroll testified that for an individual to suffer from PTSD, there needs to be a documented traumatic event. With respect to Respondent, Dr. Carroll testified that there was no documented event. Dr. Carroll acknowledged that Respondent made numerous allegations of impropriety against her former employer, Donovan State Prison; however, there was no documented traumatic event. For example, Dr. Carroll testified that there was no evidence that anyone from Donovan State Prison threatened Respondent and actually followed her around, as she alleged. For this reason, Dr. Carroll testified there is no objective basis for finding Respondent suffered from PTSD.

CalPERS also presented evidence at the hearing that Respondent no longer worked for Donovan State Prison, the location where the alleged harassment took place. Instead, Respondent worked for the California Prison Industry Authority, a branch of the California Department of Corrections and Rehabilitation. As a Sales Representative, she no longer was required to work at Donovan State Prison on a daily basis; however, she was expected to visit there every 4-6 weeks.

Respondent testified on her own behalf. Respondent testified that she worked as a Sales Representative for the California Prison Industry Authority at the time she filed for disability retirement. Respondent submitted evidence that her job duties required her to visit Donovan State Prison every 4-6 weeks.
Respondent also submitted evidence regarding a complaint she submitted to the California Bureau of State Audits and the Office of Inspector General in connection with her employment at Donovan State Prison. Respondent submitted evidence regarding a Whistleblower Retaliation Complaint she filed alleging discrimination/retaliation while an employee of Donovan State Prison. Respondent submitted evidence that as a result of her complaints, she was transferred to work for the California Prison Industry Authority as part of a settlement agreement with Donovan State Prison.

Respondent testified that she will go back to work for California Prison Industry Authority if she has to, and she contacted them about returning to work.

Respondent did not call any physicians or other medical professionals to testify. Respondent did not submit any medical records to support her appeal. At the hearing, Respondent testified that she disagreed with the results of Dr. Carroll’s examination and report; however, Respondent presented no medical evidence to support her position that she remains substantially incapacitated.

Respondent did submit a letter from a former Associate Warden at Donovan State Prison. The letter did not address Respondent’s medical condition or her ability to perform the duties of a Sales Representative.

The ALJ found that CalPERS had the burden of establishing circumstances had changed since CalPERS approved Respondent’s disability retirement application, that Respondent was capable of returning to work, and that she should be reinstated to her former employment as a Sales Representative with the California Prison Industry Authority. The ALJ determined that CalPERS met its burden and proved that Respondent is no longer substantially incapacitated from performing her usual duties as a Sales Representative.

The ALJ found that Dr. Carroll’s report and testimony was credible and persuasive that Respondent is no longer substantially incapacitated from performing her duties as a Sales Representative for Respondent the California Prison Industry Authority. The ALJ determined that Respondent failed to provide sufficient evidence to rebut Dr. Carroll’s well-founded opinions.

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 the usual and customary duties of a Sales Representative for the California Prison Industry Authority.

On March 26, 2019, Respondent informed CalPERS that she was submitting a Petition for Reconsideration. However, Respondent provided no additional evidence and/or argument in connection with her Petition. CalPERS contacted Respondent to request that she provide any additional evidence and/or argument that she intends to offer in connection with her submission.
No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision, as modified, that was adopted by the Board at the February 21, 2019, meeting was well reasoned and based on the credible evidence presented at hearing.

For all of the above reasons, staff argues the Petition should be denied and the Board’s decision should be upheld.

April 17, 2019

JOHN SHIPLEY
Senior Attorney