ATTACHMENT B

STAFF'S ARGUMENT

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STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Joseph A. Bonofiglio (Respondent) was employed by Respondent Department of Developmental Services Fairview State Hospital (Respondent DDS) as an Adult Education Teacher. By virtue of his employment, Respondent was a state miscellaneous member of CalPERS. On or about February 9, 2016, Respondent submitted an application for disability retirement on the basis of orthopedic (neck and back) conditions. Respondent's application was approved by CalPERS and he retired effective September 1, 2016.

In December 2017, CalPERS staff notified Respondent that CalPERS conducts reexaminations of persons on disability retirement, and that he would be reevaluated for purposes of determining whether he remains substantially incapacitated and is entitled to continue to receive disability retirement benefits.

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 his former position. The injury or condition which is the basis of the claimed disability must be permanent or of an extended duration which is expected to last at least 12 consecutive months or will result in death.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) to Juan Antonio Realyvasquez, M.D., a board-certified Orthopedic Surgeon. Dr. Realyvasquez interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Realyvasquez also performed a comprehensive IME. Dr. Realyvasquez opined that Respondent was no longer substantially incapacitated to perform his usual and customary duties as an Adult Education Teacher.

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

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 May 14, 2019. Respondent represented himself at the hearing. Respondent DDS did not appear at the hearing.

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.

At the hearing, the evidence established that CalPERS initially found Respondent to be substantially incapacitated based upon the medical opinion of Dr. Max Matos, M.D., one of Respondent's treating physicians. Dr. Matos found that disc herniation and radiculitis in Respondent's cervical spine, and disc herniation in his lumbar spine, combined to cause Respondent to be substantially incapacitated for a period of approximately six months to one year.

At the hearing, Dr. Realyvasquez testified that he examined Respondent in May 2018 to confirm whether Respondent's temporary disability, as noted by Dr. Matos, remained, or whether he was no longer substantially incapacitated and thus should be returned to work. At the time of the evaluation, Respondent presented with complaints of pain in his low back and neck following an altercation with a special education student at work in 2014. On physical examination, Dr. Realyvasquez testified that he found mild tenderness along Respondent's entire cervical spine with limited range of motion, and some tenderness in the lumbar spine. Dr. Realyvasquez also found no muscle spasm in the lumbar spine when Respondent stood on one foot, that Respondent had a normal straight leg raise test, and that his gait was normal. Dr. Realyvasquez diagnosed Respondent as having cervicalgia, degenerative joint disease without radiculopathy and chronic cervical spine sprain/strain. Notwithstanding these conditions, Dr. Realyvasquez testified that he believed Respondent could perform his usual and customary duties as an Adult Education Teacher.

Respondent called five witnesses to testify on his behalf. The first, a friend who worked with Respondent as a blackjack dealer, testified that Respondent could not complete a New Year's Eve job in 2018-2019, allegedly due to back pain, and stopped taking blackjack dealer jobs after that. The second witness, Respondent's former high school teacher, testified that he spends less time socially with Respondent than before the 2014 incident, due to Respondent's back pain, and Respondent's need to cancel or leave an event early. The third, Respondent's mother, testified that Respondent was physically active before the 2014 incident and has been less active since. A coworker from Respondent's former employer testified that Respondent has not been as social as before the 2014 incident, often needing to stand at restaurants because of back pain. The fifth witness, a coworker from the school where Respondent worked, testified that the Adult Education Teacher duty statements failed to state that Respondent would have to effectively deal with potentially aggressive and violent behavior from special education students.

Respondent testified at the hearing regarding physical limitations because of his injury, as well as treatment, including medication and therapies he has tried that did not improve his condition. Respondent explained that he was trying to improve his condition

and attempt certain physical activities, but that the extreme pain he experienced after required he abandon those activities.

Respondent also cross-examined Dr. Realyvasquez at length, focusing on the following areas of inquiry, which the ALJ addressed in her Proposed Decision: (1) the scope of Respondent's job duties; (2) whether Respondent needed a second opinion; and (3) the interpretation of certain MRI reports. Respondent also submitted medical records from his treating physicians to support his appeal, which were admitted as administrative hearsay.

After considering all the evidence introduced as well as arguments by the parties at the hearing, the ALJ upheld CalPERS' determination and denied Respondent's appeal. The ALJ found that CalPERS bore the burden to prove that Respondent was no longer substantially incapacitated. Assuming CalPERS met its burden, Respondent then was required to prove, by the presentation of competent medical opinion, that he remained substantially incapacitated and thus should continue to receive disability benefits.

The ALJ found that Dr. Realyvasquez's report and testimony were competent medical evidence sufficient to support a finding that CalPERS met its burden of proof. Although the doctor made certain errors in his report, they were not material to his opinions, but related to ancillary issues such as Respondent's marital history and alleged prior knee surgeries. Though Respondent argued that Dr. Realyvasquez did not understand Respondent's usual and customary job duties, the ALJ disagreed, finding the doctor reviewed and understood the job duty statements admitted into evidence, which were prepared, in part, by Respondent. The ALJ found that it was irrelevant whether, as questioned by Respondent, Dr. Realyvasquez felt Respondent needed to undergo additional MRIs. The evidence did not establish that Dr. Realyvasquez felt he needed to review additional MRIs to render a competent medical opinion, or that Respondent needed a second medical opinion in order for the doctor to arrive at a conclusion on the issue before him during the medical evaluation of Respondent.

In summary, the ALJ found that the only competent medical evidence at the hearing was presented by Dr. Realyvasquez, and it established that Respondent is no longer substantially incapacitated from performing his duties as an Adult Education Teacher for Respondent DDS. The ALJ also found that Respondent failed to present any competent medical opinion to controvert the evidence offered by CalPERS.

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

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Senior Attorney