ATTACHMENT B

STAFF'S ARGUMENT

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STAFF'S ARGUMENT TO ADOPT THE MODIFIED PROPOSED DECISION

Maximillian J. Sebolino (Respondent) applied for industrial disability retirement based on claimed orthopedic (neck) and psychological (PTSD) conditions. By virtue of his employment as a Medical Technical Assistant – Psychiatric (MTA – Psych) for Respondent Salinas Valley State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, Donald C. Pompan, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Pompan interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, reviewed relevant medical records and conducted a clinical examination of Respondent. Dr. Pompan also reviewed images of Respondent secured as a result of surveillance. Dr. Pompan opined that Respondent was not substantially incapacitated from performing his usual and customary duties.

Alberto G. Lopez, M.D., a board-certified Psychiatrist, also performed an Independent Medical Examination (IME). Dr. Lopez interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, reviewed his medical records and conducted a mental status examination. Dr. Lopez reviewed the surveillance images of Respondent. Dr. Lopez opined that Respondent was 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 duration which is expected to last at least 12 consecutive months or will result in death.

After reviewing all medical documentation and the IME reports, 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 April 10, 2019. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing.

The ALJ received into evidence and considered the contents of written job descriptions regarding Respondent's usual and customary duties as an MTA – Psych for Respondent CDCR. Respondent also described his usual and customary duties.

Respondent provided general behavioral psychiatric nursing care to inmate-patients at the Salinas Valley State Prison. His duties included observing patient-inmates, preparing reports, escorting patient-inmates to scheduled appointments, dispensing medications, assisting in cell searches and, if necessary, physically subduing an inmate-patient.

On April 6, 2015, Respondent was involved in a physical altercation with an inmate-patient. Respondent was struck twice, once in the face and then on his forehead. The ALJ summarized the medical evidence regarding the severity of the strikes experienced by Respondent as follows:

> Respondent was neither rendered unconscious nor deemed to be in urgent, emergency medical care by reason of the two blows inflicted by the prison inmate.
> …
> On the day of initial treatment with the Work Well Medical Group, the single objective sign of any physical injury to respondent was noted as 'contusion of the face.'

Respondent sought medical treatment and remained off work until October 6, 2015. When Respondent returned to work, there were no specific work restrictions recommended by his treating physician. Rather, Respondent's doctor indicated that Respondent should work three days a week, which he did between October 2015 and January 2016. The hearing, Respondent admitted that, during this period, he was able to and did perform the full range of all of the usual and customary duties of an MTA-Psych. The ALJ summarized the evidence as follows:

> No competent, corroborating evidence exists to show that during the period of October 2015 to January 6, 2016, respondent was engaged in activities other than the performance of the usual duties of a medical technical assistant. Even though he chose to work three days per week, no evidence indicates that respondent was unable to perform the substantial range of duties, functions, and responsibilities of a medical technical assistant-psychiatric.

The ALJ received into evidence and considered the contents of various medical reports from physicians and other health care professionals who had provided care to Respondent. In relevant part, the ALJ summarized two entries, one regarding Respondent's cervical spine and the other his psychological condition.

> A cervical spine x-ray on August 27, 2015, led Michael Bass, M.D. to note '*normal cervical spine.*' Because of respondent's continuing complaints, a Magnetic Resonance Imaging (MRI) scan of the cervical spine, as interpreted by Dr. Bass, revealed 'slight kyphotic deformity centered at the C3-4 disc level. There is degenerative disc with some posterior annular bulging…. Slight bulging of the desiccated C4-5 disc.

> No HNP [Herniation of the nucleus pulposus] or [no] stenosis [narrowing of anatomical space]. *Normal cervical spine otherwise*.'
> (Emphasis added.)
>
> On August 7, 2016, psychologist Dr. Corona determined respondent's mental condition to reflect 'adjustment disorder, anxiety, depression, acute stress disorder, *in full remission.*'
> (Emphasis added.)

Approximately three weeks before the hearing, counsel for Respondent hired a psychologist who maintains a practice in Durham, North Carolina. LeKisha Alesii, Ph.D., spoke with Respondent via a webcam connection for approximately one hour. Dr. Alesii did not meet Respondent face-to-face until the morning of the hearing.

Beginning on page 10 of the Proposed Decision, and carrying over onto page 11, the ALJ states the multiple reasons why he found that "Dr. Alesii was not persuasive…." Included as reasons for finding Respondent's psychological witness to be "not persuasive," the ALJ found that:

- A webcam interview of Respondent was less reliable than a face-to-face interview;
- Dr. Alesii's argument that the CalPERS IME (Dr. Lopez) evaluated Respondent on a "good day," lacked any factual basis and was merely speculation;
- Dr. Alesii's reliance on psychologic test (MMPI-2) results undermined her ultimate opinion since the test results were regarded as "invalid" because of Respondent's false or inexact answers.

In contrast, the ALJ found the report prepared by the CalPERS psychiatric IME, Dr. Lopez, to be "thorough, reasonable and logical." The ALJ also found or described Dr. Lopez's report as being "credible, persuasive and compelling." The ALJ found that Dr. Lopez's opinion was "well-reasoned" and expanded upon by his testimony at the hearing. The ALJ found that Respondent gave false answers in response to psychological testing. Contrary to the established criteria for a valid diagnosis of PTSD, the ALJ found that Respondent maintained an active and normal social life with his large extended family, that Respondent was pursuing additional education, and was not taking any prescribed medications nor receiving any psychiatric treatment for his claimed symptoms.

The ALJ provided the following summary of Dr. Lopez's evaluation of Respondent:

> The independent evaluating psychiatrist did not focus blindly on [R]espondent's self-reported symptoms (which even at the April 2019 hearing respondent's account came across as being well-rehearsed and robotic); but, rather Dr. Lopez gathered and assessed evidence regarding [R]espondent's demonstrated abilities or inability to 'function.'

Regarding Respondent's ability to function, the ALJ found that Respondent was not experiencing symptoms of depression, that Respondent may experience anxiety, but only occasionally, that Respondent did not experience nightmares, had good sleep, a normal appetite and normal sexual relations with his spouse.
Dr. Lopez testified that Respondent was not substantially incapacitated from performing his usual and customary duties because of any psychological condition. The ALJ also found that "Dr. Alesii's observations regarding Dr. Lopez were not persuasive or reliable."

The clinical examination of Respondent by the orthopedic IME, Dr. Pompan, resulted in no objective findings to support Respondent's complaints of chronic neck pain and muscle tightness. Respondent was able to forward flex his neck in a normal manner. He exhibited "near full backward extension" and was able to turn or rotate his head, left and right, without observable limitation, although with complaints of pain. Reflex testing was normal, as was sensation in his upper extremities.

Dr. Pompan's review and opinion regarding results of x-ray and MRI studies regarding Respondent's cervical spine were consistent with the opinions of other physicians who had treated or examined Respondent, as expressed in their reports, which Dr. Pompan reviewed. According to Dr. Pompan, there is no evidence to suggest that Respondent has a herniated disc in his cervical spine and, similarly, there is no evidence to show that there is any nerve root compression or compromise. The ALJ summarized Dr. Pompan's findings, as stated in his report, that Respondent's "subjective complaints do not correlate with what is objectively seen on his magnetic resonance imaging scan or in regard to the neurological findings on his physical examination."

Respondent exhibited exaggerated movements of his neck during his evaluation by Dr. Lopez, during his examination by Dr. Pompan and throughout the hearing. In the Proposed Decision, the ALJ included the assessments of Dr. Lopez, Dr. Pompan and the ALJ to their respective observations of these movements, especially as they compared to the images of Respondent captured in a surveillance video.

> Dr. Lopez noted the [R]espondent was seen freely making use of his upper extremities, and that he exhibited no repetitive wringing of the neck, and [R]espondent used the orthopedic-oriented cane in only one video scene when he was merely carrying the plastic device.
> (Dr. Lopez)
>
> "…in my many years of evaluating patients with neck pain, [Dr. Pompan had] not seen anyone who has to constantly [move his] neck…' At the hearing of this matter, Dr. Pompan emphasized that persons having cervical spine pathology do not wring or gyrate the neck as such patients tend not to move the head and neck at all, but rather such neck-pathology sufferers turn the upper body as a unit.
> (Dr. Pompan)

> The sub-rosa video recording of Respondent from October 10, 2017, to October 20, 2017, having been reviewed twice by the under-signed ALJ, establishes that [R]espondent has no form of incapacitating disorder or malady affecting his cervical spine or other body part. (NOTE: The ALJ then lists 12 specific observations supporting his ruling, as noted on pages 18-20 of the Proposed Decision.)

The ALJ made specific findings regarding Respondent's lack of credibility. While the Proposed Decision contains more observations and comments on Respondent's presentation at the hearing, the following is a summary of the ALJ's assessment of Respondent:

> By his demeanor while testifying; by the dubious character of substantial portions of his testimony on significant issues in this matter; by existence of his significant interest and motive to exaggerate matters; and, by statements previously made by him to treating doctors and evaluating physicians that were inconsistent with testimony at the hearing, respondent demonstrated that he was neither a credible nor persuasive witness at the hearing. …
> …
> By his demeanor at the hearing, [R]espondent showed that he was neither truthful nor straightforward.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ concluded that Respondent is not eligible for industrial disability retirement.

Pursuant to Government Code section 11517 (c)(2)(C) which authorizes the Board to "make technical or other minor changes in the proposed decision," hereby modifies the Proposed Decision, by changing "existed" to "exited" on paragraph 2, page 18 and by changing "January 6, 2017" to "November 6, 2017" on paragraph 2, page 18 of the Proposed Decision, as modified and hereby adopts as its own Decision the Proposed Decision, as modified dated July 16, 2019.

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

September 18, 2019

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RORY J. COFFEY
Senior Attorney