

ATTACHMENT C

RESPONDENT'S ARGUMENT

LIEBERT CASSIDY WHITMORE

A PROFESSIONAL LAW CORPORATION
 135 Main Street, 7th Floor
 San Francisco, California 94105
 Tel: 415.512.3000 • Fax: 415.856.0306
 www.lcwlegal.com

NOV - 5 2019

FAX COVER SHEET

DATE: November 5, 2019

CLIENT-MATTER NUMBER: WE100/034

To:

NAME:	FAX NO.:	PHONE NO.:
Board of Administration of the California Public Employees' Retirement System c/o Ms. Cheree Swedensky	(916) 795-3972	(916) 795-3675

FROM	Richard C. Bolanos	PHONE	415.512.3020
RE:	<i>Respondent West Valley-Mission Community College District's Argument Against Proposed Decision CalPERS Case No.: 2018-0507 OAH Case No.: 2018080407</i>		

NUMBER OF PAGES WITH COVER PAGE:	3
Original(s):	
<input type="checkbox"/> Will not follow <input type="checkbox"/> Will follow by U.S. Mail <input checked="" type="checkbox"/> Will follow by overnight mail	

Message:**Dear Ms. Swedensky:**

We have sent the original via Priority Express (overnight), of the previous version of the Respondent West Valley-Mission Community College District's Argument Against Proposed Decision addressed to the Board Members addressed to you. Please submit this version of the Respondent's Argument to the Board.

Thank you for your kind attention and consideration.

Fannie F. Siu
Legal Secretary

**IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE
 FANNIE F. SIU AT 415.512.3056 IMMEDIATELY.**

The information contained in this facsimile message is information protected by attorney-client and/or the attorney-work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

9062010.1 WE100-034

November 5, 2019

VIA FACSIMILE & OVERNIGHT DELIVERY
(916) 795-3972

Board of Administration of the California Public
Employees' Retirement System
c/o Ms. Cheree Swedensky
Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

**Re: *Respondent West Valley-Mission Community College District's Argument
Against Proposed Decision***
CalPERS Case No.: 2018-0507
OAH Case No.: 2018080407
Client-Matter: WE100/034

Dear Board Members:

Respondent West Valley-Mission Community College District ("District") submits the following written argument against the Proposed Decision in the above referenced matter.

The following points are submitted in addition to arguments presented in the District's Closing Brief and should read with the District's record evidence submitted as part of the administrative hearing.

The evidence shows that in June 2016, Applicant injured his right elbow during a training exercise and developed lateral epicondylitis or a tear in his elbow tendon. After a year of treatment, his condition only moderately improved. In September 2017, his treating physician determined his condition was permanent and imposed permanent job restrictions of no lifting, pulling or pushing more than 60 lbs. with his right arm and no combative duties. In light of these medical restrictions, Applicant and the District jointly submitted an application for his disability retirement in accordance with State law. On April 13, 2018, CalPERS denied the application because it had determined that Applicant was not permanently disabled from the performance of his duties as a police officer with the District at the time the application was filed. The District's appeal was heard by Administrative Law Judge Regina Brown on April 29, 2019. Judge Brown's Proposed Decision was issued on August 15, 2019, in which she denied the District's appeal. As shown below, the Proposed Decision's Factual Findings actually confirm that Applicant is substantially incapacitated from performing his job duties of police officer.

Ms. Cheree Swedensky

Re: *Respondent West Valley-Mission Community College District's Argument Against Proposed Decision*

CalPERS Case No.: 2018-0507

OAH Case No.: 2018080407

November 5, 2019

Page 2

The Proposed Decision's Factual Findings establish that CalPERS independent medical examiner orthopedic surgeon William R. Stearns, M.D. diagnosed Applicant with right elbow lateral epicondylitis and right elbow mild osteoarthritis. Dr. Stearns further found that due to those two conditions Applicant has functional limitations of a maximum of 60 pounds of lifting, pushing and pulling capacity with his right arm. (Proposed Decision, Factual Finding 14, p. 6.) Dr. Stearns further found that by April 2018, the chronic lateral epicondylitis had resolved but that the arthritis in his right elbow "accounted for his pain, swelling, atrophy, and the effects on his range of motion and flexing strength because arthritis does not heal." (Proposed Decision, Factual Finding 19, p. 7.) The record further establishes that the functional limitations found by Dr. Stearns preclude Applicant from performing the duties of police officer for the District. (Proposed Decision, Factual Findings 23, 30, 31 and 32, pp. 8-12.)

The Proposed Decision denying the District's application conflicts with the factual findings summarized above. While Judge Brown finds that Applicant's lateral epicondylitis was "asymptomatic and had resolved", she further finds that "any pain and symptoms that Applicant continues to experience are consistent with the arthritis in his right elbow." (Proposed Decision, p. 12.) As noted above, CalPERS' own medical expert testified that the arthritis in Applicant's right elbow precludes him from lifting, pushing and pulling more than 60 lbs. with his right arm and that the arthritis will not heal. The District's unrefuted evidence further establishes that those functional limitations permanently preclude Applicant from performing the duties of police officer for the District. These findings alone establish that Applicant is entitled to a disability retirement as a matter of law.

For the reasons summarized above, and as further argued in the District's Closing Brief, the Proposed Decision is factually and legally unsupported and must be rejected by the Board as a matter of law.

Very truly yours,

LIEBERT CASSIDY WHITMORE



Richard C. Bolanos
Counsel for Respondent
West Valley-Mission Community
College District

RCB:ffs

cc: Mr. Ed Maduli
Chief Chris Rolén