

ATTACHMENT A

RESPONDENT'S PETITION FOR RECONSIDERATION

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March 23, 2020

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
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MAR 25 2020

Re: PETITION FOR RECONSIDERATION

Dear Chief Executive Officer,

This is a PETITION FOR CONSIDERATION on behalf of Won Baek. We are requesting that the Chief Executive Office grant a stay of the effective date of the Decision. There are several and important reasons why the Board at its next meeting should consider allowing Mr. Baek to apply for Industrial Disability Retirement.

NO DUE PROCESS DURING HIS APPEAL WITH STATE PERSONNEL BOARD

As testified under oath, the wrongdoings alleged in NOAA were fabricated in retaliation for his reporting a correctional officer's violation of the prison rules. During NFL football season, a correctional officer brought a television to watch NFL playoffs inside the kitchen where Mr. Baek was stationed at and allowed inmates to watch the games with him. Mr. Baek told the correctional officer that watching football games with inmates was interfering with his work and the work that needed to be performed by the inmates. After that conversation with the correctional officer, the allegations indicated in NOAA were reported by the correctional officer and inmates who were watching the games with the correctional officer. Mr. Baek testified that there were inappropriate languages used during his dealings with the inmates, but this was normal and not anything more than what others would use in a similar position with CDCR. Mr. Baek requested a timely appeal of the adverse action and retained an attorney through his union to handle the appeals hearing. The day before the hearing Mr. Baek spoke to the attorney

and his attorney no longer wanted to handle his case and wanted an immediately withdrawal. Mr. Baek went to the hearing by himself without any representation. When he appeared at the hearing, the SPB judge wanted to go forward with the hearing even

though Mr. Baek's attorney had withdrawn from his case one day before the hearing. Even without the attorney Mr. Baek was going to go forward with the appeal, but SPB failed to provide an interpreter for the appeal and Mr. Baek was unable to proceed with the hearing. Mr. Baek pleaded with the SPB for a continuance, but continuance was denied. SPB states in the record that Mr. Baek withdrew his appeal, but the truth of the matter is he was forced to withdraw because there was no way to proceed without an interpreter and SPB would not continue the appeal to a later date. It is unfathomable how much Mr. Baek was deprived of his due process in appealing the NOAA. The decision by SPB not to continue the appeal to allow Mr. Baek to find a new attorney or at least to continue the matter for Mr. Baek to find an interpreter to present his case undermined the notion of fairness and due process afforded in the administrative law and the Constitution.

This Board has the heard and is informed of why Mr. Baek was terminated and has an opportunity to make a right decision to correct the past wrong done to Mr. Baek. The incorrect decision by SPB should not be relied upon to adopt the proposed order in favor of denying Mr. Baek's right to apply for Industrial Disability Retirement. In the interest of justice and fairness, Mr. Baek should be allowed to apply for Industrial Disability Retirement and this matter should be decided on the merits of his health condition at the time he was forced to leave his employment with CDCR.

WRONG LEGAL STANDARD ADOPTED BY ADJ

In the proposed order, the ADJ states that Mr. Baek did not establish by "undisputed evidence" that he was eligible for a CalPERS disability retirement. However, later in his proposed order the ADJ changes the legal standard to "unequivocal" medical evidence even though no such legal standard was used in *Smith*. In weighing and applying the proffered medical evidences and testimonies, the ADJ used "unequivocal" standard rather than "undisputed evidence" to adjudicate this matter.

Mr. Won gave an undisputed evidence about his condition after re-injuring his neck and right upper extremities in mid-September of 2016. Mr. Won testified that he was incapable of performing his duties. Mr. Baek's testimony was corroborated by his co-worker Jefferey West, who by offer-of-proof and stipulation by CalPERS' attorney admitted into evidence that Mr. Baek was not able to perform his duties as a supervising cook. Mr. Baek had a first-hand eyewitness who testified to the physical condition of Mr. Baek before his alleged misconducts as indicated in the NOAA.

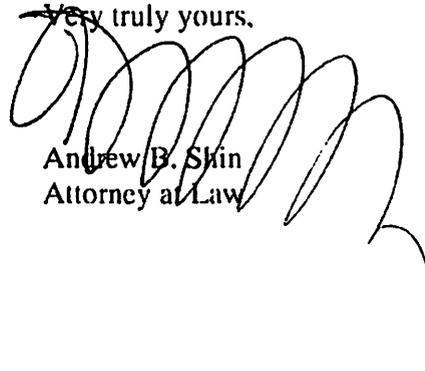
Furthermore, Mr. Baek presented medical records of existing injury to his neck and right shoulder from November 4, 2013 work injury and additional medical records after re-injuring the same area in mid-September of 2016. The testimony of Mr. Baek and Jeffrey West along with medical evidences presented were undisputed evidences to prove that Mr. Baek was physically incapacitated after mid-September of 2016 before the alleged incidents of misconduct. By applying incorrect legal standard of "unequivocal"

medical evidence, the ADJ incorrectly rule on the equitable exception outlined in the *Smith* decision.

CONCLUSION

It is our contention that Mr. Baek should not have been terminated or dismissed from his employment with CDCR in the first instance. Mr. Baek was pushed into a corner and basically coerced into accepting his dismissal by SPB without a fair and impartial hearing. Mr. Baek had no chance nor the opportunity to clear his name or to defend his case which would have afforded him an ample opportunity to apply for disability retirement with CalPERS. This board has an opportunity to undo the wrong that has been committed by the correctional officer, his previous attorney and SPB. The only way to correct the past wrong at this point is to allow Mr. Baek to proceed with his disability retirement application with CalPERS and to have his disability be adjudicated by medical evidences rather than unfair decision handed down by SBP. We look forward to your fair and impartial decision.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'Andrew B. Skin', is written over the typed name and title.

Andrew B. Skin
Attorney at Law

ABS/slf
Encl.