ATTACHMENT B

STAFF’S ARGUMENT
STAFF’S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Kimberly O’Donnell (Respondent) applied for disability retirement based on a psychological (PTSD) condition. By virtue of her employment as a Public Safety Dispatcher for Respondent City of Ventura (Respondent City), Respondent was a local miscellaneous member of CalPERS.

Respondent filed an application for service pending disability retirement on May 8, 2019 and has been receiving benefits since that time.

As part of CalPERS’ review of Respondent’s medical condition, Lawrence H. Warick, M.D., Ph.D., a board-certified Psychiatrist and Neurologist, performed an Independent Medical Examination (IME.) Dr. Warick interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints and reviewed her medical records. Dr. Warick opined that Respondent was not substantially incapacitated from performing her job 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 of the medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of her position.

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 March 6, 2020. Respondent was represented by counsel at the hearing. Respondent City did not appear at the hearing.

CalPERS presented the testimony of Dr. Warick in support of its determination. Dr. Warick is certified by the American Board of Psychiatry and Neurology. He operates a private practice in psychiatry, and he is an Associate Professor of Clinical Psychiatry at the UCLA School of Medicine. Dr. Warick has seen hundreds of PTSD patients in his practice.

At the hearing, Dr. Warick testified in a manner consistent with his examination of Respondent and the IME Report. Dr. Warick testified that during the mental status examination, Respondent was friendly, cooperative, articulate, coherent, alert and showed no signs of clinical depression and no evidence of overt anxiety such as shaking or fidgeting. She was not distracted or preoccupied, and she did not display psychotic symptoms.
Dr. Warick did not observe any physical or mental traits of PTSD during Respondent's mental status exam, and he confirmed his clinical observations with the objective MCMI-IV testing which showed no evidence of PTSD.

Dr. Warick also noted that Respondent was not being treated for PTSD which generally requires three or four different drugs. Instead Respondent was being treated for mild adjustment disorder with a low dose of Zoloft. Dr. Warick testified that there is no evidence that Respondent was substantially incapacitated from performing her job duties based on her psychological condition.

Respondent testified at the hearing about her claimed PTSD condition and the events of July 28, 2017, when a Police Officer/co-worker, with whom she was acquainted, attempted to commit suicide.

Respondent was working with several other dispatchers when the Police Officer/co-worker sent a suicide e-mail to the entire department. Respondent testified that she was the first one to read the e-mail. Thereafter, the phone rang with personnel calling from the Police Officers' Locker Room on the floor below the Dispatch Station. Respondent was told they had "an accidental discharge" of a firearm, and they requested medics be dispatched. Respondent testified that she knew the accident involved her co-worker.

Respondent testified that emergency vehicles arrived at the location, and she was later informed that the emergency call had involved her co-worker and that he was still alive after attempting to shoot himself.

On the day of the incident, Respondent and the other Dispatchers were relieved of their duties early, and the City immediately arranged a peer support group.

Respondent testified that she returned to work performing her regular duties following the incident. Respondent testified that several days after the incident, she suffered from anxiety, shaking, nausea, irritability, nightmares, sleeplessness, startling and panic from loud noises, fear of large crowds and anxiety when seeing a man resembling her co-worker.

Respondent eventually informed the City she could not perform her job, and the City referred her to a doctor who "took her off work." Respondent's last day of work was September 30, 2017.

Respondent testified that she cannot return to work because her work is stressful, and the City of Ventura is a trigger for her PTSD symptoms.

Respondent applied for service pending disability retirement on May 8, 2019, and moved to Boise, Idaho in June 2019. Respondent has been working as a Driver's License Clerk at a County Office in Idaho since October 2019.

Respondent also presented the testimony of her treating physician, Lucille C. Thomas, M.D. Dr. Thomas operates a practice specializing in family and addiction medicine. She
is certified by the American Board of Family Medicine and has subspecialty certification in Addiction Medicine. Her Addiction Medicine certification includes the ability to provide mental health treatment, and she has provided psychiatric treatment to patients who have suffered from adjustment disorders and PTSD.

Respondent began treatment with Dr. Thomas on January 31, 2018. At the first appointment, Respondent reported that she suffered from escalating stress and anxiety stemming from the incident in 2017. Dr. Thomas diagnosed Respondent as having adjustment disorder with anxiety. Dr. Thomas later added PTSD to her diagnosis after being informed by Respondent about a Qualified Medical Examination in Respondent's employment litigation.

Dr. Thomas opined that Respondent still suffers from PTSD because it is "highly unlikely for PTSD to go away." Dr. Thomas predicted that if Respondent was exposed to triggering events, her symptoms would return. Dr. Thomas opined that Respondent cannot substantially perform her job duties as a Public Safety Dispatcher. Dr. Thomas asserted that Respondent's inability to work for the City is "an actual restriction" and "not a prophylactic restriction" because Respondent "cannot work [at the City] with her current condition."

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ concluded that the evidence did not establish that at the time of her application for disability retirement, Respondent was substantially incapacitated from the performance of her usual and customary duties as a Public Safety Dispatcher. In support of her conclusion, the ALJ noted that,

"Regardless of Respondent's diagnosis, all of Respondent's doctors and evaluators noted that, with therapy and medication, her symptoms decreased significantly over time. By 2019 [when Respondent filed her application] Dr. Thomas noted that Respondent reported "feeling great" and sleeping better; Dr. Zarrin noted that Respondent's symptoms had improved such that they no longer met the severity of a major depressive disorder; and Dr. Warick noted during Respondent's mental status examination that she showed no signs of clinical depression and no evidence of overt anxiety."

The ALJ explained that "incapacitated for the performance of duty" means the "substantial inability of the applicant to perform his usual duties" as opposed to mere discomfort or difficulty. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) The ALJ also noted that the increased risk of further injury is not enough to establish substantial incapacity.

Although Respondent asserts that the July 2017 trauma renders her incapable of handling the stressful duties of a Public Safety Dispatcher, her assertion was not borne out by the evidence. The ALJ noted that all of Respondent's doctors and evaluators found that, with therapy and medication, Respondent’s symptoms decreased.
significantly. Dr. Thomas failed to sufficiently account for this in reaching her opinion that Respondent cannot return to work.

Further, the ALJ noted that Dr. Thomas arrived at her opinion based on Respondent's trepidation about returning to work, but she did not sufficiently establish that Respondent's aversion to the discomfort of returning to the stress of her job prevented her from performing her usual duties as a Public Safety Dispatcher. The ALJ further explained that the potential for exacerbation or escalation of Respondent's psychiatric symptoms when placed in her former position is a prospective possibility and is insufficient to support a finding of Respondent's inability to perform her usual and customary duties. (Hosford, supra 77 Cal.App.3d 854, 862-863.)

The ALJ therefore concluded that Respondent is not eligible for disability retirement.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to “make technical or other minor changes in the “Proposed Decision.” In order to avoid ambiguity, staff recommends replacing the outdated language quoted by the ALJ in Government Code section 20026 on page 29, paragraph two, by changing the phrasing from “Disability’ and ‘incapacity for performance of duty’ as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board … on the basis of competent medical opinion” to “‘Disability’ and ‘incapacity for performance of duty’ as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board … on the basis of competent medical opinion”; and by removing the word, “industrial” on page 30, paragraph five.

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

July 15, 2020

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Austa Wakily
Senior Attorney