

ATTACHMENT C

RESPONDENT'S ARGUMENT

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Fax Transmission

To: Cheree Swedensky, Assistant to the Board

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RE: Respondents Argument

Pages: 5

Comments:

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Ms. Swedensky,

Please find Respondents Argument in the matter of Nick Megazzi attached. OAH and CalPERS case numbers are included on the front page of the pleading.

Thank you, again,

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8 **BEFORE THE BOARD OF ADMINISTRATION**
9 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
10

11 NICHOLAS E. MEGAZZI, an individual,
12 CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, a
California State Agency,

13 Respondent,

14 v.

15 CALIFORNIA PUBLIC EMPLOYEES'
16 RETIREMENT SYSTEM, a California State
Agency,

17 Petitioner.
18

Case No. Agency Case No. 2019-0719 / OAH No.
2019110607

**RESPONDENT'S ARGUMENT IN SUPPORT
OF PROPOSED DECISION BY
ADMINISTRATIVE LAW JUDGE THOMAS
J. HELLER**

[Publication Requested]

19 Megazzi urges this CalPERS review board to (1) adopt the proposed decision of Administrative
20 Law Judge Thomas J. Heller and (2) publish the opinion for the benefit of all.

21 CalPERS Counsel Helen Louie advocated aggressively and tenaciously for CalPERS, but the
22 evidence presented was simply insufficient to meet CalPERS burden because Megazzi has a well-
23 documented range of motion limitation known in common parlance as a "frozen shoulder." While many
24 cases of frozen shoulder heal quickly resulting in recovery, testimony from Dr. Richard Scheinberg,
25 Megazzi's testifying orthopedic surgeon revealed that it is extremely rare for someone with Megazzi's
26 history to recover.

27 A special note should be made about Dr. Richard Sheinberg. Rather than hire an expert witness
28

1 based on advocacy, Megazzi chose to retain Dr. Richard Scheinberg, who had already independently
2 examined Megazzi and determined that he was permanent and stable in his disability for the purposes of
3 Worker’s Compensation analysis. Dr. Scheinberg re-examined Megazzi after being retained and made
4 findings consistent with his earlier determination and the determination of other doctors including
5 CalPERS own expert witness indicating that Megazzi had very restricted range of motion – probably, but
6 not necessarily, from adhesive capsulitis, which may have worsened an injury sustained at a correctional
7 institution. CalPERS expert argued that the tests he and others performed to measure range of motion
8 should be disregarded as “subjective” and offered various indirect ways of trying to guess at Megazzi’s
9 condition such as evaluating callouses on his hands. But, while the effort was intellectually entertaining,
10 it was costly and not in the service of discovery the truth.

11 Megazzi was determined to be disabled in 2015 and 2017 and nothing significant in terms of
12 changes exists in his condition today. The nature of his disability is such that he is not able to move one
13 of his arms outside of a very limited range of motion -- making his physical state such that he is
14 incapable of fulfilling job requirements and anticipated physical activity expected from a correctional
15 officer. Not only would denial of benefits and reinstatement of Megazzi be a kind of tragedy of injustice
16 for Megazzi, it is easy to imagine how such a scenario could lead to tragedy for others if someone like
17 Megazzi really did show up for work and attempt to perform as a correctional officer. Megazzi would
18 not be able to defend himself or others.

19 Again, CalPERS pursued this dispute doggedly and tenaciously, but you can only argue against
20 reality for so long before reality reminds you that words can’t beat truth. CalPERS dedicated resources
21 to providing social media evidence and investigative surveillance, but both were entirely irrelevant to the
22 particulars of Megazzi's injury. The social media showed Megazzi at places and around other people
23 who were doing things that Megazzi would struggle with if he had a limited range of motion, but it did
24 not actually show Megazzi attempting to do any of those things. Taking a trip out to sea with co-workers
25 and standing with them in a photo is not the same thing as casting a fishing line. Standing next to a golf
26 cart is not the same thing as golfing. That means that a review of years of active social media accounts
27 showed no instance of Megazzi actually using his arm outside of his limited range of motion. The
28 surveillance also did not show Megazzi using his arm outside his limited range of motion during the three

1 days he was followed. Megazzi testified very persuasively about his actual activities as opposed to the
2 activities implied by the very indirect social media evidence. But, he also testified to his physical state
3 with direct honesty and without being impeached. At the conclusion of the case, Megazzi's counsel
4 asked rhetorically if there was any reason to disbelieve his client's testimony because there was no such
5 reason in the record.

6 Megazzi suspects that there are, in fact, many cases of people in the CalPERS system who are
7 receiving disability retirement benefits who should not qualify for those benefits. So, it is frustrating that
8 so much time and effort has been spent on his case when he has suffered from the same disability for
9 years with documentation showing only insignificant variation to his limitation on range of motion. But,
10 most importantly, Mr. Megazzi is not a wealthy man and continuing the dispute after extensive discovery
11 and two days of hearing seems more combative than inline with CalPERS mission.

12 **PUBLICATION**

13 Meggazi believes that publication of the proposed decision would serve both CalPERS and other
14 disabled retirees in his position.

15 The body of published opinions available on the CalPERS website provides a satisfactory body of
16 law, but the proposed decision provides additional insight into appropriate evidence and analysis of
17 evidence. We also believe that Judge Heller's plain English discussion of the case provides a good taste
18 of the process and expectations for future parties.

19 In particular, one thing that confused Megazzi and his counsel about CalPERS position is that
20 Megazzi's condition had not substantially changed from the date his disability status was first
21 acknowledged by CalPERS. CalPERS seemed to be taking the position that because the medical tests
22 documenting range of motion are subjective in nature they are no more than fancy complaints of pain
23 and, thus, not eligible as a grounds for disability. In Megazzi's mind, the question was, "What's different
24 now?" After all, CalPERS approved his disability based on the same range of motion tests.

25 Administrative Law Judge Thomas Heller asks the same question:

26 "26. In addition, CalPERS did not prove what is different now about
27 Megazzi's shoulder condition from when CalPERS accepted his disability
28 retirement application in early 2015 and again found him to be disabled
upon reevaluation in late 2017. Dr. Kaufmann's report includes some

1 discussion of Megazzi's condition over time, but Dr. Kaufman did not
2 testify about how Megazzi's condition is different now versus early 2015 or
3 late 2017... Thus, there is scant medical evidence of what CalPERS
4 considered a qualifying disability then to compare with the evidence
5 Megazzi's condition now.”

6 This understanding of what is expected in terms of evidence is good guidance for petitioners
7 appealing CalPERS' decision to terminate their benefits. It's hard to expect the court to reach a different
8 conclusion in retrospect, but it would be easy to overlook the need to present this evidence without
9 guidance in advance from an opinion such as the proposed decision.

10 Dated: 8/24/2021

Law Office of Brandon Martin, Inc.

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12 *Brandon Martin*

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