

ATTACHMENT C

RESPONDENT'S ARGUMENT

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June 22, 2022

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FROM: Thomas J. Wicke
 RE: In the Matter of the Application for Industrial Disability Retirement of Atziri Villagomez
 FILE NO.: Agency Case No. 2021-0138; OAH No. 2021060149
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8 **BOARD OF ADMINISTRATION**
 9 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

11 In the Matter of the Application for
 12 Industrial Disability Retirement of

13 ATZIRI VILLAGOMEZ ,
 14 Respondent,
 15 and

16 CALIFORNIA INSTITUTION
 17 FOR WOMEN, CALIFORNIA
 18 DEPARTMENT OF
 19 CORRECTIONS AND
 20 REHABILITATION,

21 Respondent.

**RESPONDENT, ATZIRI
 VILLAGOMEZ'S ARGUMENT**

Agency Case No. 2021-0138

OAH No. 2021060149

21 I.

22 INTRODUCTION

23 Ms. Atziri Villagomez (hereinafter "Ms. Villagomez") applied for industrial
 24 disability retirement in January, 2018. After an initial denial, the matter was heard on April
 25 29, 2022 by Administrative Law Judge Kimberly Belvedere. On May 27, 2022 Judge
 26 Belvedere submitted her Proposed Decision denying Ms. Villagomez her request for an
 27 industrial disability retirement.

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1 Ms. Villagomez suffered an industrial left knee injury requiring surgery while
2 working as a Corrections Officer.

3 II.

4 CONDUCT OF HEARING

5 As with most cases today, this matter was heard through videoconferencing.
6 However, the videoconferencing was not operating correctly nor effectively throughout the
7 hearing.

8 Judge Belvedere was unable to connect visually with the parties. Therefore Judge
9 Belvedere did not have the opportunity to view the testimony of Ms. Villagomez, nor the
10 two medical experts presented in this case.

11 During the hearing there were several occasions when the testimony was interrupted
12 as a result of the freezing of the connection or even disconnection requiring rebooting.

13 Pension rights are fundamental and vested rights under the California Constitution
14 requiring the full protection of due process. Strumsky v. San Diego County Employees'
15 Retirement Association (1974) 11 Cal. 3d. 28.

16 Ms. Villagomez requests this matter be reheard on the basis of Judge Belvedere's
17 inability to observe and fully determine the credibility or demeanor of the witnesses.

18
19 III.

20 THE MEDICAL EVIDENCE REQUIRES

21 A FINDING OF PERMANENT INCAPACITY

22 At the closure of the evidentiary portion of this matter, the parties discussed with
23 Judge Belvedere the submission of written briefs for her review. Judge Belvedere did not
24 allow the parties to submit written briefs, but instead required oral arguments.

25 While oral argument is time efficient, it is not substantively effective.

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1 A. Video Evidence:

2 Video surveillance of Ms. Villagomez was improperly evaluated by Judge
3 Belvedere when at page 15 of the Proposed Decision, she states:

4 "In sum, there is nothing in any of the video surveillance that
5 would indicate respondent is in pain."

6 Ms. Villagomez testified that she is in constant pain associated from her left knee
7 injury and surgery. Pain is subjective and would not be depicted by a lay person viewing a
8 video. No medical evidence presented to Judge Belvedere indicates Ms. Villagomez was
9 not in pain. There was an implication that she was not in pain, but without her visually
10 observing Ms. Villagomez it would be difficult to ascertain.

11 Dr. Neil Ghodadra, a Board Certified Orthopedist who reviewed the videotapes
12 upon close review found physical movements consistent with left knee pain. As an expert,
13 Dr. Ghodadra's observations were dismissed.

14 As with most surveillance videos, they depict minutes of Ms. Villagomez's daily
15 activities. It is not an accurate picture of her daily living activities. More importantly, Ms.
16 Villagomez worked as a Corrections Officer for the California Institution for Women,
17 California Department of Corrections and Rehabilitation (CDCR).

18 Nothing in the surveillance tapes indicate physical activities that would be required
19 of Ms. Villagomez during her law enforcement duties within a custody facility. The fact
20 Ms. Villagomez visits a store, walks for exercise in her neighborhood, does not indicate
21 that she is capable of performing the duties of a law enforcement person in a custody
22 facility.

23 B. Medical Evidence:

24 Judge Belvedere describes the physical aspects of Ms. Villagomez's job through the
25 documents, as well as her testimony, see pages 6-8 of Proposed Decision.

26 At page 34, Judge Belvedere states:

27 "For purposes of CalPERS disability, a person must be
28 physically incapable, to a substantial degree, of performing
their job duties."

1 The legal standard by which to determine the threshold element of "permanent
2 incapacity" in a disability retirement case is clearly set forth in Mansperger v. Public
3 Employees' Retirement System (1970) 6 Cal. App. 3d. 873.

4 In Mansperger, the California Court of Appeal carved out the legal standard by
5 which to prove "permanent incapacity", pursuant to Government Code Sections 20026 and
6 21156: To be "incapacitated for the performance of duty" ... means the *substantial* inability
7 of the applicant to perform his **usual duties**." Id., p. 876 [Italics in original; emphasis
8 added]. That which constitutes "substantial" as well as "usual" is a question of fact; and,
9 the Mansperger Court conducted a thorough factual analysis to determine the penultimate
10 legal issue in any and all disability retirement claims – "permanent incapacity." Critically,
11 "usual duties" were defined as **normal or common, as opposed to remote occurrences**.
12 Id., p. 877.

13 The daily physical requirements of a Corrections Officer, a sworn peace officer,
14 mandates inmate searching (requiring squatting), cell searches (requiring lifting/squatting
15 to view mattresses), responding to emergencies (requiring running) as examples. All of the
16 physical requirements involve the left knee. Further, the videotapes do not depict any of
17 these activities.

18 Judge Belvedere does not connect the evidence of Ms. Villagomez's testimony to
19 her specific job duties. Instead Judge Belvedere discounts the pain level which Ms.
20 Villagomez experiences on a daily basis.

21 In justifying her position, Judge Belvedere relies upon the testimony of Dr. Yu. The
22 retained expert for CalPERS'. Dr. Yu is the only medical expert who does not place any
23 restrictions upon Ms. Villagomez.

24 The other treating and examining physicians all restrict Ms. Villagomez's activities
25 that would preclude her from performing her job duties: Dr. Holland, Ms. Villagomez's
26 surgeon; Dr. Chun, a Qualified Medical Examiner in the workers' compensation matter;
27 Dr. Michael Marger, a Healthpoint physician; Dr. Neil Katz, a more recent treating
28 physician; and Dr. Neil Ghodadra, a Board Certified Orthopedist who testified at the

1 hearing. Each doctor sets forth specific work restrictions inconsistent with the performance
2 of her job duties as a Corrections Officer.

3 Dr. Neil Ghodadra testified in his expert medical opinion that Ms. Villagomez is
4 permanently incapacitated for the performance of her job duties as a Corrections Officer.
5 At page 26, Judge Belvedere indicates that Dr. Ghodadra's restrictions are "prophylactic"
6 in nature. However, upon redirect examination Dr. Ghodadra found the restrictions to be
7 "actual" restrictions.

8 In summarizing Ms. Villagomez's medical expert, Dr. Neil Ghodadra, Referee did
9 not list his complete qualifications including the fact Dr. Ghodadra has served the Los
10 Angeles County Employees Retirement Association (LACERA) for several years and has
11 consistently performed multiple orthopedic evaluations per month for LACERA. Nor does
12 Judge Belvedere recite a fact as testified by Dr. Ghodadra that he performs knee surgeries
13 on a regular basis, having performed approximately 50 knee surgeries in 2022 alone. To
14 the contrary, Dr. Yu retired in 2017 and presently is not engaged in surgery.

15 At page 32, Judge Belvedere states:

16 "In sum, while the video is not dispositive of whether
17 Respondent has a substantially disabling condition, it certainly
18 did not depict a person who was experiencing such debilitating
19 pain that she could not perform normal life activities."

19 The issue before Judge Belvedere was whether Ms. Villagomez was permanently
20 incapacitated from performing the duties of a Corrections Officer in a custody facility. The
21 issue was not whether Ms. Villagomez is capable of performing "normal daily activities".
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IV.

CONCLUSION

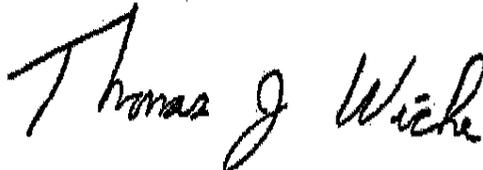
As with most disability retirement hearings, a difference of opinion occurs between the medical experts. To determine reliable evidence upon which a Proposed Decision would be based, the presentation of evidence must require not only an audio format, but a visual format.

Respectfully, Ms. Villagomez asks that this matter be referred back to the Office of Administrative Hearings for a further hearing.

DATED: June 22, 2022

Respectfully submitted,

LEWIS, MARENSTEIN, WICKE,
SHERWIN & LEE, LLP

By: 

THOMAS J. WICKE
Attorneys for Respondent
ATZIRI VILLAGOMEZ

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At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 20750 Ventura Boulevard, Suite 400, Woodland Hills, CA 91364-2338.

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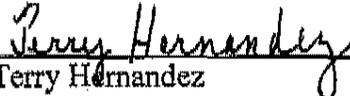
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Executed on June 22, 2022, at Woodland Hills, California.


Terry Hernandez