

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED**

Thanh Ly (Respondent) was employed by Marin County Schools - San Rafael City High School District (Respondent District) as a Food Service Assistant II. By virtue of his employment, Respondent was a school miscellaneous member of CalPERS. On May 23, 2018, Respondent submitted an application for disability retirement on the basis of an orthopedic (low back) condition. Respondent's application was approved by CalPERS, and he retired effective May 1, 2018.

In October 2020, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that he would be reevaluated for purposes of determining whether he remains substantially incapacitated and is entitled to continue to receive a disability retirement.

To remain eligible for disability retirement, competent medical evidence must demonstrate that the individual remains substantially incapacitated from performing the usual and customary duties of his former 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.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) to Harry A. Khasigian, M.D., a board-certified Orthopedic Surgeon. Dr. Khasigian interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, reviewed medical records, and performed a comprehensive physical examination. Dr. Khasigian opined that Respondent is able to perform all of his job duties.

After reviewing all medical documentation and the IME report, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for disability retirement, and should therefore be reinstated to his former position as a Food Service Assistant II.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). Two days of hearing were held on August 24, 2022, and January 4, 2023. Respondent was represented by counsel at the hearing. Respondent District did not appear at the hearing. The ALJ found that the matter could proceed as a default against Respondent District, pursuant to Government Code section 11520, subdivision (a).

At the hearing, Dr. Khasigian testified in a manner consistent with his examination of Respondent and the reports prepared after the IME. Dr. Khasigian opined that Respondent can perform the duties of his position and is therefore no longer substantially incapacitated. Dr. Khasigian opined that Respondent's subjective

symptoms were not substantiated by examination findings and noted several inconsistencies during his examination, which he believed were related to “non-physiological behavior.” Dr. Khasigian found that the lack of changes in Respondent’s findings, behavior, and pain over the past five years was “not consistent with a physiologic injury.” He also noted that Respondent had not received any medical care for his claimed orthopedic condition in the past year. When presented additional medical records pertaining to Respondent, Dr. Khasigian reiterated his opinion that Respondent’s records show significant inconsistencies but no substantial incapacity. Dr. Khasigian opined that Respondent did not have any objective evidence of a medical condition that rendered him substantially incapacitated from performing the usual and customary duties of a Food Service Assistant II.

Respondent presented the testimony and report of Andrew Burt, M.D. Dr. Burt is not a board-certified Orthopedic Surgeon and has not performed surgery since 1985. Dr. Burt testified that he believes Respondent to be more disabled now than he was in 2018 and believes Respondent’s account that his condition is progressively worsening. Dr. Burt testified that physical findings can vary day to day, which, to him, explained why Respondent’s gait was normal the day before his examination of Respondent -- at the examination with Respondent’s treating physician -- and abnormal the next day when Respondent completed his IME.

Respondent also submitted medical records from his treating physicians and the 2018 IME report of Victoria Barber, M.D. to support his appeal, which were admitted as administrative hearsay. Hearsay evidence may be used to supplement or explain other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code § 11513.)

Respondent testified on his own behalf regarding his job duties as a Food Service Assistant II and claimed that he cannot do his job. Respondent testified that his back condition is worse now than it was in 2018.

The ALJ found Dr. Khasigian’s opinion to be more persuasive than that of Dr. Burt and assigned greater weight to Dr. Khasigian’s opinion because “[h]e supported his opinion with a thorough review of [R]espondent’s medical records and a detailed physical examination” and “more persuasively explained the factual bases for his conclusions and opinions.” Further, Dr. Khasigian’s findings aligned with Respondent’s treating physician’s findings the day before Respondent’s examination with Dr. Burt. The ALJ also noted that “Dr. Khasigian is a board-certified orthopedic surgeon who still maintains an active, full-time orthopedic surgery practice.” The ALJ found that “[t]he evidence in Dr. Khasigian’s reports and testimony shows that [R]espondent’s subjective complaints are not matched by objective findings that verify his substantial incapacity to perform the usual duties of his position.”

After considering all the evidence introduced as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that “CalPERS established by competent and persuasive medical evidence that [R]espondent is no longer

substantially incapacitated from the performance of his usual job duties as a Food Service Assistant II due to orthopedic (low back) condition.”

Pursuant to Government Code section 11517, subdivision (c)(2)(C), the Board is authorized to “make technical or other minor changes in the Proposed Decision.” To avoid ambiguity, staff recommends changing “industrial disability retirement (IDR)” to “disability retirement (DR)” in paragraph 1, under the Factual Findings section, on page 2 of the Proposed Decision; changing “IDR” to “DR” in paragraphs 2 and 4, under the Factual Findings section, on pages 2 and 3 of the Proposed Decision; and changing “SRL” to “SLR” in paragraph 23, under the Factual Findings section, on page 9 of the Proposed Decision.

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

June 20, 2023

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Attorney