

ATTACHMENT B

STAFF'S ARGUMENT

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

Ronny F. Cespedes (Respondent) was employed by Respondent City of Montclair (City) as a Police Sergeant. By virtue of his employment, Respondent was a local safety member of CalPERS.

On March 10, 2014, the City served Respondent with a Notice of Intent to Discipline with a recommendation to terminate him from his position as a Police Sergeant. The recommendation was based on an Administrative Investigation, which set forth the causes for dismissal pursuant to the violations of the Montclair Police Department Policy Manual, and the Memorandum of Understanding between the City of Montclair and the Montclair Police Officers Association.

On June 3, 2014, the City served Respondent with a Notice of Termination with an effective termination date of June 3, 2014, and provided him with appeal rights.

Respondent appealed the termination before the City Manager on July 24, 2014. By letter dated September 29, 2014, the City denied Respondent's appeal of his termination from employment. Respondent requested the matter be submitted to advisory arbitration on October 1, 2014. A hearing before an Arbitrator was conducted over several days in 2015 and 2016. On May 10, 2017, the Arbitrator sustained the penalty of discharge as outlined in the Arbitrator's Advisory Opinion and Award (Arbitrator's Decision).

Respondent filed a Petition for Writ of Administrative Mandamus (Petition) in the Superior Court of California, County of San Bernardino, on August 4, 2017, seeking judicial review of the Arbitrator's Decision. On June 27, 2019, the trial court issued a ruling denying the Petition for failure to exhaust all available administrative remedies prior to seeking judicial review and for failure to show futility as a basis for excuse. Respondent appealed the trial court's judgment (Judgment).

On September 27, 2021, the California Court of Appeal issued a ruling that affirmed the Judgment, found Respondent's excuse for failing to exhaust all available administrative remedies had been forfeited, and that the trial court's findings were supported by substantial evidence.

Meanwhile, Respondent signed an application for industrial disability retirement on January 11, 2016, which was received by CalPERS on January 11, 2016. Respondent claimed disability on the basis of an orthopedic condition.

CalPERS reviewed evidence provided by the City that established Respondent's employment was terminated for cause due to his conduct, and not because of a disability or to prevent him from being able to apply for disability retirement benefits. For these reasons, CalPERS determined that Respondent was ineligible for industrial

disability retirement pursuant to *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*) and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*).

The *Haywood* court found that when an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination of the employment relationship renders the employee ineligible for disability retirement. The ineligibility arises from the fact that the discharge is a complete severance of the employer-employee relationship. A disability retirement is only a “temporary separation” from public service, and a complete severance would create a legal anomaly – a “temporary separation” that can never be reversed. Therefore, the courts have found disability retirement and a “discharge for cause” to be legally incompatible.

The *Smith* court explained that to be preemptive of an otherwise valid claim, the right to a disability retirement must have matured before the employee was terminated. To be mature, there must have been an unconditional right to immediate payment at the time of termination unless, under principles of equity, the claim was delayed through no fault of the terminated employee, or there was undisputed evidence of qualification for a disability retirement.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). The matter was continued several times to allow for Respondent’s appeal of his termination to be concluded. Ultimately, a hearing was held on March 14, 2022, after the Court of Appeal issued its decision denying Respondent’s claim that he was improperly terminated. Respondent did not appear at the hearing. Respondent City also did not appear at the hearing; however, CalPERS called the City’s Director of Administrative Services and Human Resources as a witness and he stipulated that the City did not oppose CalPERS’ determination.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent’s questions and clarified how to obtain further information on the process.

At the hearing, CalPERS presented evidence that established Respondent was terminated from his position with the City, appealed his termination, and ultimately was terminated for cause. CalPERS presented evidence regarding the conduct that resulted in Respondent’s termination. CalPERS also presented evidence regarding Respondent’s appeal of his termination and that the California Court of Appeal upheld the City’s decision to terminate his employment.

CalPERS called the City’s Director of Administrative Services and Human Resources (Director) as a witness. The City’s Director testified regarding the termination of Respondent’s employment, stating that Respondent was terminated for cause due to his conduct, and not because he was disabled or to prevent him for applying for disability retirement benefits.

CalPERS argued that because Respondent's termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, Respondent was ineligible to apply for industrial disability retirement benefits. Because neither party appeared at hearing, CalPERS' arguments were unopposed.

After considering all of the evidence introduced, as well as CalPERS' arguments, the ALJ denied Respondent's appeal. The ALJ found that CalPERS has the burden of proof to establish Respondent does not have the right to apply for industrial disability retirement benefits, and that CalPERS met its burden.

The ALJ found that Respondent was terminated for cause "due to his conduct, as determined by an exhaustive administrative investigation." The ALJ found that the Director "credibly testified that respondent Cespedes was terminated for cause, and not terminated as a result of a disabling condition nor to prevent him from being able to apply for disability benefits." The ALJ also noted that Respondent's termination was upheld in a Skelly hearing, an Arbitrator's Decision, a Judgment by the Superior Court and a ruling by the Court of Appeals.

In the Proposed Decision, the ALJ concludes that Respondent's appeal of CalPERS' determination that he is not eligible to apply for industrial disability retirement should be denied.

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 that the word "industrial" be added in front of the words "disability retirement" on page 14; the last line of paragraph 11.

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

June 15, 2022

John Shipley
Senior Attorney