

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Abiodun J. Ogunkunle (Respondent) was employed by Department of State Hospitals, Patton (Respondent DSH) as a psychiatric technician. By virtue of his employment, Respondent was a state safety member of CalPERS.

On March 6, 2019, Respondent DSH served Respondent with a Notice of Adverse Action (NOAA) dismissing him effective March 25, 2019. The NOAA listed various causes for his dismissal, including numerous sexually inappropriate statements and unwanted sexual advances. Respondent appealed his dismissal. During pendency of the appeal, Respondent and Respondent DSH executed a Stipulation for Settlement. As a condition of settlement, Respondent voluntarily resigned from his position effective March 25, 2019, and he agreed to withdraw his appeal. He also agreed never to apply for employment with Respondent DSH in the future. The Stipulated Settlement was approved by the State Personnel Board on June 3, 2019.

On November 29, 2021, Respondent submitted an application for industrial disability retirement (IDR). Respondent listed his retirement date as March 25, 2019, and he claimed disability on the basis of orthopedic and psychological conditions.

CalPERS reviewed Respondent's IDR application and requested information from Respondent DSH. Respondent DSH provided information and documents surrounding Respondent's dismissal, appeal and Stipulated Settlement. CalPERS determined that Respondent was ineligible for IDR pursuant to *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); *Martinez v. Public Employees Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*); CalPERS Precedential Decision 13-01 *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot (Vandergoot)*; and CalPERS Precedential Decision 16-01 *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip MacFarland (MacFarland)*.

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.

The *Martinez* court affirmed the holdings in *Haywood* and *Smith* and refused to overturn more than twenty years of legal precedent. The *Martinez* court also affirmed the *Vandergoot* Precedential Decision as a logical extension of the *Haywood* and *Smith* cases. Both *Martinez* and *Vandergoot* involved employees who agreed to resign following a settlement of a Notice of Adverse Action (NOAA) terminating their employment. The employees in *Martinez* and *Vandergoot* waived any right to reinstatement as part of a settlement agreement. In *Vandergoot*, the Board held that “a necessary requisite for disability retirement is the potential reinstatement of the employment relationship” with the employer if it is ultimately determined by CalPERS that the employee is no longer disabled. The Board concluded that an employee’s resignation was tantamount to a dismissal when the employee resigned pursuant to a settlement agreement entered to resolve a dismissal action and agreed to waive all rights to return to his former employer.

In *MacFarland*, the court found that the character of the disciplinary action does not change because the member submitted a resignation prior to the effective date of the NOAA. The Board held that a resignation preceding the effective date of the Notice of Adverse Action bars a member from applying for IDR on the basis of *Haywood* or *Smith*.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on January 5, 2023. Respondent represented himself at the hearing. Respondent DSH did not appear at the hearing.

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.

CalPERS called Jennifer Gorsuch, Personnel Officer at DSH-Patton to testify at the hearing. Ms. Gorsuch explained that Respondent was permanently separated from Respondent DSH employment and that he had no automatic reinstatement rights. Ms. Gorsuch also testified that Respondent’s separation was not the ultimate result of a disabling medical condition and that Respondent DSH did not terminate Respondent to preempt an application for disability retirement. Ms. Gorsuch authenticated the termination documents, which were admitted as direct evidence.

Respondent testified on his own behalf that although he had voluntarily agreed to resign and withdraw his appeal effective March 25, 2019, he nonetheless had a matured right to disability retirement because he was out on total temporary disability and receiving treatment for his condition when he received the Notice of Adverse Action. He claimed he was never informed of his right to apply for disability retirement and believes his employer terminated him with the intent of precluding him from receiving disability retirement.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that by signing the Stipulated Settlement, Respondent agreed to be permanently separated from employment at Respondent DSH and that he waived all rights to appeal. His permanent separation with

no right to reinstatement prevents him from applying for IDR absent an exception, which the ALJ did not find. Respondent did not have a matured right to a disability retirement when he was dismissed. He did not even submit his application until more than two years after his dismissal, and the records he introduced were from his workers' compensation case which are not binding on CalPERS. The ALJ concluded that CalPERS properly canceled Respondent's IDR application because his eligibility for IDR is precluded by law.

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

March 15, 2023

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