

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION ON REMAND

Jason J. Bemowski (Respondent) was employed by City of Chino (Respondent City) as a Police Officer beginning December 24, 2001. By virtue of his employment, Respondent was a local safety member of CalPERS.

Beginning in January 2019, the Roseville Police Department initiated a criminal investigation of Respondent based on allegations that on December 23, 2018, he engaged a minor to perform acts of prostitution.

Following the investigation, Respondent City served Respondent with a Notice of Relief from Duty stating in relevant part:

You are immediately relieved from duty as a City employee and pending the results of an investigation for acts, or failures to act, which may be grounds for disciplinary action. The relieving of an employee from duty is not a disciplinary action. You will be on a Leave of Absence with pay, for purposes of salary, benefits and service time, until further notice.

On March 7, 2019, Respondent was arrested and booked for violations of Penal Code sections 261.5(a) unlawful sexual intercourse with a minor; and 647(b) prostitution.

On March 11, 2019, Respondent City advised Respondent he was the subject of a personnel complaint and investigation. The memorandum stated in part: “[T]he investigation being conducted concerning allegations that you have engaged in conduct that, if found true, could violate sections of the Chino Police Department Operations Manual. . . .”

On March 11, 2019, Respondent filed a workers’ compensation claim against Respondent City, claiming orthopedic injuries since October 2002.

On April 3, 2019, Respondent filed an application for Industrial Disability Retirement (IDR), claiming disability due to an orthopedic condition.

On September 17, 2019, Respondent City issued a Notice of Intent to Discipline, advising Respondent the City intended to terminate his employment based on violations of the Chino Police Department manual, alleged commission of criminal sex acts with a minor, and inappropriate communications with other Chino Police Department personnel.

On October 1, 2019, Respondent City issued a Notice of Discipline informing Respondent that the City would terminate his employment effective October 1, 2019. In an affidavit, Respondent City confirmed that Respondent was permanently separated from the City, based entirely on the Notice of Intent and its supporting facts. Respondent City stated that it “did not terminate [Respondent Bemowski] as a result of any alleged disabling medical condition, or to prevent or preempt [him] from filing a claim for disability retirement.”

On December 4, 2019, CalPERS notified Respondent and Respondent City of its determination to cancel Respondent's April 3, 2019 IDR application. 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*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); 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.

In *Vandergoot*, the Board agreed 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 held that an employee's resignation was tantamount to a dismissal when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and agreed to waive all rights to return to his former employer.

In *MacFarland*, the character of the disciplinary action does not change because a resignation was submitted prior to the effective date of the Notice of Adverse Action. The Board held that a resignation preceding the effective date of the Notice of Adverse Action bars a member from applying for industrial disability retirement 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). An initial hearing was held on July 26, 2021; and a Proposed Decision was issued on August 26, 2021. The Board considered the proposed decision, and on January 7, 2022, remanded the matter back to the ALJ for the taking of additional evidence on the following issues: (1) whether Respondent's inability to reinstate into his former job precludes CalPERS from awarding an IDR regardless of the date that he submitted his IDR application; and (2) whether it is appropriate to apply judicial precedent decided under the Judges' Retirement Law (JRL) to eligibility determinations under the Public Employees'

Retirement Law (PERL) without citation to proper legal authority. The remanded matter was held on October 25, 2022. Respondent was represented by counsel at both hearings. Respondent City did not appear at the initial hearing but was present and represented by counsel at the remand hearing.

At the initial hearing, Respondent testified that he suffered injuries to his shoulders in 2002 during training. Then in 2015, his left shoulder was dislocated during a foot chase. He also claimed back injuries. He presented a treating physician's report showing shoulder injuries and low back pain. Respondent emphasized that administrative leave is not disciplinary action. During his leave, he received pay and benefits, and paid contributions.

At the remand hearing, Respondent submitted five paystubs showing that he made contributions to CalPERS during those pay periods. He admitted that he was convicted of a felony and could no longer serve as a police officer. He conceded that he did not participate in any administrative interview, but claimed he was under medical care and could not undergo an interview.

At the remand hearing, a City Lieutenant testified that the City issued the March 11, 2019 memorandum advising Respondent he was the subject of a complaint and investigation. Respondent City attempted numerous times to schedule an administrative interview with Respondent to no avail. Respondent City's memorandum gave four alternate dates for an interview, and Respondent City offered to schedule an interview either at the City or in Respondent's home, but Respondent never appeared. Finally, Respondent's attorney informed Respondent City that Respondent did not intend to participate in an interview. Respondent City granted an extension of time to conduct the interview, but Respondent again refused to participate.

After Respondent's repeated refusals to participate in interviews, Respondent City issued the Notice of Intent to Discipline on September 17, 2019, advising Respondent he would be terminated on October 1, 2019. Respondent appealed his termination, and the matter went to arbitration. The arbitrator upheld the termination, including the following finding: "On March 2, 2021, [Respondent Bemowski] pleaded No Contest and was convicted of the violation of Penal Code section 261.5 (C)-F [Felony], Unlawful Sexual Intercourse with Minor: more than 3 Years ([Respondent Bemowski] was more than 3 years older than the minor)." The Lieutenant testified that the City could not issue the Notice of Intent until September due to Respondent's delay tactics and refusal to participate in an administrative interview. The Lieutenant also testified that Respondent was terminated based on misconduct, and that as a convicted felon, he is prohibited by law from service as a police officer.

Extinguishment of Reinstatement Rights Renders Respondent Ineligible for IDR

After considering all of the evidence introduced at both the initial and remand hearings, as well as arguments by the parties, the ALJ denied Respondent's appeal.

The ALJ found that Respondent bears the burden of proof because he is seeking IDR retirement benefits. The ALJ held that extinguishment of Respondent's right to reinstatement renders him ineligible for IDR, regardless of the date that he submitted his IDR application. Citing case law, the ALJ found the "central holding in both *Haywood*

and *Smith* is that termination of a member's employment for cause renders the member ineligible for disability retirement." The ALJ continued with review of CalPERS Precedential Decisions *Vandergoot* and *MacFarland* which "extend the holdings in *Haywood* and *Smith* to situations where the employee resigns or retires before the effective date of the termination for cause." Reading the cases together as a whole, the ALJ found, "the linchpin of eligibility for disability retirement is whether the member has the potential for reinstatement. If the member is unable to be reinstated by the employer to their position once the member is no longer disabled, then the member cannot be eligible for IDR." Citing *Haywood*, the ALJ continued, "[a] firing for cause constitute[s] a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement – the potential reinstatement of [the employment relationship] if it ultimately is determined that he no longer is disabled." The ALJ acknowledged there were some exceptions to the *Haywood/Smith* line of cases, but found that none of the exceptions applies to the facts of this case.

Applicability of Judicial Precedent under the Judges' Retirement Law (JRL)

The ALJ next reviewed judicial precedent under JRL regarding a suspended judge with pending criminal charges who was allowed to apply for disability retirement (*Willens v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 451 (*Willens*)). The ALJ distinguished *Willens* on several grounds. First, the disability retirement of Judge Willens was governed by the JRL, whereas Respondent's IDR is governed by the PERL. Second, the ALJ cited language in *Smith* stating that the holding in *Willens* "turns on [the] peculiarities of the office of judge." For example, the California Constitution allows an indicted judge to retain their office and salary until the criminal conviction is final, but there is no similar protection for police officers. Third, the ALJ found Judge Willens produced substantial evidence that his disabilities predated his IDR application by years. Therefore, he fell into an exception outlined in *Smith* (he had a mature claim due to substantial medical evidence of his eligibility for disability retirement). In this case, there was insufficient evidence of Respondent's injuries such that his eligibility for IDR would have been a foregone conclusion. Finally, unlike Judge Willens, Respondent's criminal charges are not pending but had resulted in a felony conviction. The ALJ found that *Willens* is inapplicable to the facts in this case, and that Respondent's appeal must be denied.

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

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