

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Gary Thompson (Respondent) was employed by Respondent City and County of San Francisco (CCSF) as a Juvenile Probation Counselor for its juvenile probation department. By virtue of his employment, Respondent was a local safety member of CalPERS.

Respondent was arrested for allegedly stealing a laptop while going through a security checkpoint at San Francisco International Airport on May 5, 2010. CCSF notified Respondent on May 12, 2010, that it intended to place him on unpaid administrative leave pending completion of an investigation of the facts that gave rise to his arrest.

On August 24, 2010, Respondent was convicted of violating Penal Code section 485, appropriating lost property, and placed on one year of court probation. Respondent was notified on January 14, 2011, that CCSF proposed to terminate his employment and that he would have an opportunity to respond to the charges before a final decision was issued.

CCSF sent Respondent a notice of proposed termination on February 22, 2011, and on June 13, 2011, issued a final notice of termination of employment with an immediate effective date. The reasons for termination were (1) commission of an act constituting moral turpitude; (2) failure to notify the probation department of his arrest; and, (3) exhibiting conduct unbecoming of a Juvenile Probation Counselor.

Respondent submitted a service pending industrial disability retirement application (2011 Application) on February 22, 2011. Respondent requested an effective retirement date of June 10, 2011 and has been receiving service retirement benefits since that date.

Because Respondent was a local safety member, CCSF had an obligation to make a determination whether Respondent was substantially incapacitated and entitled to receive industrial disability retirement benefits. By letters dated March 6, 2011, May 18, 2011 and July 27, 2011, CalPERS requested CCSF make a determination regarding Respondent's industrial disability retirement status. CCSF informed CalPERS that it was not able to make a determination because Respondent failed to provide the medical records it requested. When Respondent contacted CalPERS regarding the status of his application, he was informed that CCSF makes the determination. Due to Respondent's failure to provide CCSF with medical records and CCSF's inability to make a determination, CalPERS eventually closed the industrial disability retirement portion of the 2011 Application.

Almost eight years later, Respondent once again submitted an industrial retirement application (2019 Application) on February 25, 2019. Respondent claimed disability on the basis of a heart condition.

CalPERS contacted CCSF regarding the 2019 Application and requested information regarding Respondent's separation with CCSF. At that time, CalPERS was provided with documentation establishing that Respondent's employment was terminated as a result of the actions that took place in May 2010, and the effective date of the termination was the same date Respondent submitted the 2011 Application.

Because Respondent's employment with CCSF was terminated for cause, 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*); *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*); *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot*, (*Vandergoot*) dated February 19, 2013, and made precedential by the CalPERS Board of Administration on October 16, 2013; and *In the Matter of Accepting the Application for Industrial Disability Retirement of Philip D. MacFarland* (2016), CalPERS' Precedential Decision No. 16-01 (*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.

The *Martinez* court recently affirmed the continued validity of *Haywood* and *Smith* and confirmed the soundness of the Board's decision in *Vandergoot*. The *Martinez* court found that a resignation effected a "permanent separation," and resignation in these circumstances is tantamount to a dismissal for the purposes of applying the *Haywood*

criteria for determining eligibility to apply for disability benefits. The *Martinez* court found the Board's decision and reasoning in *Vandergoot* "is eminently logical."

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.) A hearing was held on February 18, 2021. Respondent represented himself at the hearing. CCSF 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.

At the hearing, CalPERS presented evidence that established Respondent was terminated from his position with CCSF, appealed his termination, and ultimately was terminated for cause effective June 13, 2011. CalPERS also presented evidence that the conduct that resulted in Respondent's termination took place on May 5, 2010. CalPERS argued that Respondent's termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. In addition, CalPERS argued that because the acts that gave rise to his termination occurred before Respondent claims he became disabled, Respondent was ineligible to apply for industrial disability retirement benefits. Last, CalPERS argued that Respondent was not eligible to apply for industrial disability retirement benefits even though he service-retired on the same date his termination became effective. CalPERS argued that under *Martinez* and *MacFarland*, service-retiring in the face of termination rendered him ineligible to apply for and/or to receive industrial disability retirement benefits.

Respondent testified on his own behalf. Respondent testified that he had a heart attack on September 20, 2010, and that he believed it resulted from CCSF's investigation into his arrest and subsequent disciplinary investigation. Respondent contended that he retired because of his heart condition, and it was not related to the actions that resulted in his arrest. Respondent submitted documentation related to a Workers' Compensation claim he filed in an effort to establish he suffered a work-related injury. Last, Respondent argued that he did not agree to retire in lieu of termination; therefore, he did not believe he was ineligible to receive industrial disability retirement benefits.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent has the burden of proof to establish the right to receive industrial disability retirement benefits. The ALJ

found that Respondent did not establish that he was terminated as a result of a disabling medical condition. The ALJ also found that Respondent provided no evidence that he was terminated because of his heart condition.

The ALJ found that Respondent retired in an attempt to avoid termination and that he knew his termination was pending before he submitted his 2011 Application. Pursuant to *MacFarland*, the ALJ found that Respondent's pending final termination date and voluntary resignation extinguished his right to file an application for industrial disability retirement.

In the Proposed Decision, the ALJ concluded that CalPERS correctly determined that Respondent is ineligible to apply for industrial disability retirement and that Respondent's appeal must be denied.

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

June 16, 2021

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Senior Attorney