ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Charlie Martinez ("Respondent") petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated February 11, 2021. For reasons discussed below, staff argues the Board deny the Petition, and uphold its decision.

Respondent was employed by Respondent Valley State Prison for Women, California Department of Corrections and Rehabilitation ("Respondent CDCR") as a Correctional Officer ("CO"). By virtue of his employment, Respondent was a state safety member of CalPERS.

On March 16, 2010, Respondent CDCR randomly selected Respondent to submit to drug and alcohol testing. That same day, Respondent submitted to urinalysis. Thereafter, on March 28, 2010, the testing laboratory reported that Respondent tested positive for tetrahydrocannabinol ("THC") – a marijuana metabolite. Later, on April 5, 2010, the testing lab notified Respondent CDCR of Respondent's urinalysis results. That same day, Respondent CDCR involuntarily transferred Respondent to the mail room.

The positive THC result violated Respondent CDCR's substance abuse policy. On April 19, 2010, Valley State Prison Warden Velda Dobson Davis issued a Notice of Adverse Action ("NOAA") in response to Respondent's test results. The proposed disciplinary action was dismissal from employment. The proposed discipline was to be effective on April 27, 2010. On April 23, 2010, Respondent submitted an application for service retirement to CalPERS, and retired for service effective April 26, 2010, one day before his proposed termination was to become effective.

More than five and one half years later, on December 21, 2016, Respondent signed and submitted an application for industrial disability retirement. Respondent claimed disability on the basis of orthopedic (both feet, right knee) conditions.

Based on the Notice of Adverse Action, 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*); and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland* dated October 7, 2015, and made precedential by the CalPERS Board of Administration on June 22, 2016.

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 *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 ALJ with the Office of Administrative Hearings (OAH). A hearing was held on January 06, 2021. Respondent represented himself at the hearing. Respondent CDCR also appeared 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.

Respondent testified on his own behalf. In sum, Respondent testified that he should have never been required to submit to random drug testing because of his hire date. He also asserted inconsistencies between the "Employee ID Numbers" on the drug testing custody and control form and the drug testing results form.

The ALJ, in response to Respondent's arguments, stated:

> Martinez's arguments challenging the legitimacy of his drug test results or the requirement to submit to drug testing are untimely. Such arguments should have been raised in Martinez's appeal of the [NOAA] to the [State Personnel Board]. Instead of pursuing such an appeal, Martinez elected to retire for service, thereby depriving SPB of jurisdiction over the appeal. Similarly, this court now lacks jurisdiction to revisit the propriety of a final, over-a-decade-old disciplinary decision in the context of Martinez's appeal concerning IDR benefits.

Evidence including drug testing documentation and results, Notice of Adverse Action, the substance abuse testing policy and Respondent's testimony were admitted into evidence. Testimony was also submitted by a representative of Respondent CDCR.

In the Proposed Decision, the ALJ first concludes that Respondent's separation from state service amounted to a dismissal for cause. The ALJ held:

> Martinez was served with the [NOAA] on April 20, 2010. The [NOAA] indicated that he would be dismissed effective April 27, 2010. Even though Martinez retired for service on April 26, 2010, and his personnel records currently reflect a retirement separation, *MacFarland* dictates that the employment relationship was severed on April 20, 2010, when Martinez was served with the [NOAA]. Stated differently, Martinez would have been terminated on April 27, 2010, but for his voluntary retirement for service the previous day. Consequently, for purposes of applying *Haywood* and *Smith*, Martinez was dismissed for cause.

The ALJ then turned to the question of whether a *Haywood* or *Smith* exception applied in Martinez's case. The ALJ concluded:

> There is no evidence that Martinez was dismissed as a result of a disabling medical condition. Indeed, the [NOAA] was issued solely based on Martinez's positive drug test . . . Additionally the evidence does not establish that Martinez's dismissal preempted an otherwise valid claim for disability retirement. More specifically, the evidence does not show that Martinez had a matured right to disability retirement, i.e., an unconditional right to immediate payment, prior to his dismissal.

After considering all of the documentary evidence and testimony of witnesses, the ALJ concluded that Respondent failed to demonstrate that he is eligible to apply for industrial disability retirement. Accordingly, the ALJ denied Respondent's appeal.

In his Petition for Reconsideration, Respondent summarizes the drug testing policy and once again argues that he should not have been required to submit to random drug testing. He asserts that he was neither contractually required to submit to a random drug test, nor did he provide reasonable suspicion subjecting him to a drug test. Assuming *arguendo* that Respondent should not have been subject to a random drug test, Respondent waived his disciplinary due process appeal rights when he knowingly and voluntarily resigned the day before his termination was to become effective. As a public employee, Respondent has a right to a pre-deprivation hearing (commonly referred to as a "*Skelly*" hearing) as well as a post-deprivation hearing before the California State Personnel Board.

Respondent exercised his right to a *Skelly* hearing but resigned before his appeal was heard by the SPB. As the ALJ in this matter appropriately stated, "this court now lacks jurisdiction to revisit the propriety of a final, over-a-decade-old disciplinary decision in the context of Martinez's appeal concerning IDR benefits." The controversy at issue in Respondent's CalPERS appeal is whether he was terminated for cause and whether he has the right to return to work in the event the underlying alleged disability resolves. This is not the appropriate forum to re-litigate whether he should have been served with termination paperwork in the first instance.

In his Petition for Reconsideration, Respondent also alleges due process concerns over the denial of continued employment due to his drug test results. All available evidence indicates that Respondent was afforded due process appeal rights, which he waived when he resigned from employment the day before his termination was to become effective.

Respondent further alleges in his Petition violations of the Memorandum of Understanding (MOU) by Respondent CDCR. The appropriate remedy for a violation of an MOU is to file a grievance with the employer within the timelines prescribed in the MOU.

Finally, Respondent alleges administrative error at the drug testing site leading to an "invalid" drug test. As stated earlier, if Respondent had concerns over the validity of his drug test or the basis for his pending termination, he could have exercised his right to a post-deprivation hearing before the SPB. The validity of Respondent's pending termination is not at issue in the instant case. He waived his rights to appeal his pending termination when he resigned. His attempt to resurrect his concerns over the disciplinary process, a decade later, in the context of a *Haywood* appeal continues to be misguided and misplaced.

The proposed decision that was adopted by the Board at the April 20, 2021 meeting was well-reason and thoroughly addressed all issues Respondent raises, once again, in his Petition for Reconsideration. No new evidence has been presented by Respondent that would alter the analysis of the ALJ. For these reasons, the Petition for Reconsideration should be denied.

June 16, 2021

Dustin Ingraham
Staff Attorney