

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Mark Broom III (Respondent) began working for Respondent Franchise Tax Board (Respondent FTB) in 2006 as an Associate Information Systems Analyst in 2006. In 2014, he was promoted to Information Technology Specialist I. By virtue of his employment, Respondent was a state miscellaneous member of CalPERS.

Respondent was placed on paid administrative time off by Respondent FTB on February 25, 2019, pending an investigation into his alleged violations of departmental policy. Respondent FTB issued its Notice of Adverse Action (NOAA) to Respondent on August 14, 2019. The NOAA notified Respondent that he was being dismissed due to his violation of Respondent FTB's Policy File 4101A – Anti-Harassment. The NOAA alleged complaints from two separate FTB employees, both of whom alleged separate incidents that occurred in February 2019. The NOAA's effective date of dismissal was August 23, 2019.

Respondent attended a pre-termination *Skelly*¹ hearing, by telephone, on August 23, 2019. Respondent FTB upheld Respondent's dismissal following the *Skelly* hearing.

On September 16, 2019, Respondent appealed his termination to the State Personnel Board (SPB). The SPB sent written notice on September 17, 2019 to Respondent and Respondent FTB that a prehearing and settlement conference (PHSC) would take place on November 21, 2019.

Although his attorney appeared, Respondent failed to appear at the November 21, 2019 PHSC. Under the applicable SPB rules and regulations, Respondent's failure to appear was deemed a withdrawal of his appeal. So, on November 21, 2019, the SPB Administrative Law Judge (ALJ) presiding over the appeal issued a proposed decision dismissing Respondent's appeal of his termination. The SPB approved the proposed decision and dismissed Respondent's appeal.

A few months later, on December 5, 2019, Respondent submitted an application for service pending disability retirement, with a requested retirement date of August 25, 2019. In filing the application, Respondent claimed disability on the basis of orthopedic (left shoulder, lower back, left hip) and sleep apnea conditions.

Respondent retired for service effective August 25, 2019 and has been receiving his service retirement allowance since that date.

¹ *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 gives certain employees the opportunity to respond to allegations of misconduct prior to the imposition of discipline. This procedure is generally referred to as a *Skelly* hearing.

Based on the NOAA and other documentation related to Respondent's termination, CalPERS determined that Respondent was ineligible for 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 ALJ with the Office of Administrative Hearings (OAH). A hearing was held on May 24, 2021. Respondent was not represented by counsel at the hearing. Respondent FTB 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.

Respondent testified at the hearing. He does not dispute that Respondent FTB terminated his employment for cause. Respondent contends he is eligible for disability retirement based on his medical conditions. He feels he was eligible for disability retirement long before Respondent FTB's action to terminate his employment. He contends his doctors can prove his disability. Respondent presented no documentary evidence to support his claims. Respondent testified he did not understand the basis for Respondent FTB's dismissal action against him. He testified he suffered mental stress and anxiety as a result of the disciplinary action. Respondent feels that Respondent FTB treated him unfairly.

CalPERS presented the documentary evidence of Respondent's termination, including the NOAA and the SPB documents, through a Government Code section 11514 affidavit. The Government Code section 11514 affidavit, signed by an employee of

Respondent FTB with knowledge of Respondent's termination, confirmed that the termination was neither the ultimate result of a disabling medical condition, nor preemptive of a valid claim for disability retirement.

After considering evidence and testimony from all parties, the ALJ denied Respondent's appeal. There was no dispute that Respondent was terminated from Respondent FTB. In applying Respondent's termination under *Haywood* and *Smith*, the ALJ found that Respondent's termination was not the ultimate result of a disabling medical condition. In addition, the termination was not preemptive of an otherwise valid claim for disability retirement because Respondent did not have a matured right to a disability retirement when he was terminated in August 2019.

For the foregoing reasons, the ALJ denied the appeal and concluded that CalPERS was correct in rejecting Respondent's application for disability retirement.

Staff argues that the Proposed Decision be adopted by the Board.

July 14, 2021

Charles H. Glaberman
Senior Attorney