

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Frank Perdomo (Respondent) was employed by California State Prison, Centinela, California Department of Corrections and Rehabilitation (CDCR) as a Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS.

On January 19, 2021, CDCR served Respondent with a Notice of Adverse Action (NOAA) terminating his employment effective January 26, 2021. The NOAA was based on Respondent's positive drug test for amphetamine and methamphetamine. CDCR gave Respondent an opportunity to provide a prescription to justify the positive drug test, but none was provided.

On January 22, 2021, Respondent resigned from his position as a Correctional Officer. CDCR issued a letter the same day confirming receipt of Respondent's resignation letter, with a determination that the resignation was under "unfavorable circumstances."

On August 18, 2021, Respondent signed an application for Industrial Disability Retirement (IDR) based on orthopedic (left knee and back), concussion and traumatic brain injury, and psychological (post-traumatic stress disorder (PTSD)) conditions. CalPERS received the application on September 7, 2021.

On October 26, 2021, 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)*, Precedential Bd. Dec. No. 13-01; and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland (McFarland)*, Precedential Bd. Dec. No. 16-01.

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 in 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.

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 December 1, 2022. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing, and a default was taken as to Respondent CDCR only.

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, Respondent testified that he suffered an orthopedic injury at work in 2018. He continued to work in pain but had to stop. He filed a workers compensation claim and went to numerous treatments over the course of a year. He eventually returned to work on a trial basis. During the trial period, Respondent began to self-medicate by taking amphetamines and methamphetamines. After he tested positive in August 2020, the member went to rehab and has been sober for two years. Respondent did not present any evidence that his drug use was directly or indirectly due to his claimed orthopedic or PTSD conditions.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that Respondent was terminated for cause and the termination was not the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. The ALJ found that while illicit drug use can be associated with PTSD, the NOAA was based entirely on

Respondent's failure to abide by the law, regulations, and department policy which required that correctional officers not use illegal substances. CDCR expects its correctional officers to be free from illicit drug use, and Respondent failed to abide by this requirement; which failure is a legitimate and justifiable reason for termination. Respondent's termination was not the indirect result of a disability, rather, it was entirely due to illegal use of drugs, which is incompatible with a correctional peace officer position.

The ALJ found that Respondent's termination was not preemptive of a valid claim for disability retirement. Respondent did not have a "matured right" to a disability retirement prior to the positive drug test that led to his separation from CDCR. When CDCR notified Respondent that it would be terminating his employment, Respondent had not applied for a disability retirement, much less received a determination from CalPERS that he was eligible for one. The ALJ found that Respondent did not identify any principle of equity that supports deeming his right to a disability retirement to be matured and surviving his separation from state service.

In the Proposed Decision, the ALJ concludes that Respondent is not eligible for an industrial disability retirement due to the holdings of *Haywood* and its progeny.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes in the proposed decision." To avoid ambiguity, staff recommends changing "at CSP" to "at CDCR" on page 3, paragraph 5 of the Proposed Decision and changing "CSP" to "CDCR" on page 4, paragraphs 5 and 7 of the Proposed Decision.

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

February 14, 2023

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