

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Gena L. Clark-McKnight (Respondent) was employed by the California Division of Juvenile Justice, Northern California Youth Correctional Center, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Clinical Psychologist effective October 3, 2016. By virtue of her employment, Respondent was a state safety member of CalPERS.

Upon Respondent's appointment, she did not possess a valid license to practice psychology. As a condition of continued employment with CDCR, Respondent was required to secure a valid license within four years from the commencement of her appointment with CDCR. One of the minimum qualifications for a Clinical Psychologist is the requirement of a valid California psychologist license issued by the California Board of Psychology. Respondent was required to secure licensure by October 3, 2020. Respondent did not meet the licensure requirement by the required deadline.

By notification from Respondent CDCR dated October 13, 2021, Respondent was served with a Notice of Non-Punitive Action, informing her that her employment was being terminated effective October 27, 2021. The reason for the termination was failure to meet a requirement for continued employment as prescribed in the class specifications for her position. She was also notified that as an employee who was terminated for non-punitive reasons, she did not have a mandatory right to return to her former position.

On September 19, 2022, CalPERS received Respondent's application for industrial disability retirement (IDR). Respondent claimed disability on the basis of bilateral ulnar neuropathy of cubital tunnel syndrome, cervical sprain/strain injury, bilateral carpal tunnel syndrome, myofascial pain syndrome, bilateral elbow epicondylitis, and thoracic sprain/strain injury conditions.

CalPERS reviewed Respondent's IDR application and requested information from Respondent CDCR. Respondent CDCR provided information and documents surrounding Respondent's dismissal. CalPERS determined that Respondent was ineligible for IDR 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*); 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*). While CalPERS cited all five cases, the ALJ focused on the holdings in *Haywood* and *Vandergoot* when writing the Proposed Decision.

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. Civil service employees are precluded from applying for disability retirement if they have been dismissed for cause from their civil service employment, with two exceptions: (1) when the employee establishes that the dismissal was the ultimate result of a disabling condition; or (2) when the employee establishes that the dismissal preempted the employee's otherwise valid claim for 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.

CalPERS notified Respondent that her application for IDR was being denied by letter dated November 4, 2022. Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A remote hearing was held on September 28, 2023. While a Notice of Hearing was properly served, Respondent did not appear at the hearing. Consequently, this matter proceeded as a default against Respondent under Government Code section 11520, subdivision (a). Cristina Castaneda, Staff Services Manager I (SSM I), appeared on behalf of Respondent CDCR, and testified as a witness at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet, answered Respondent's questions and clarified how to obtain further information on the process.

CalPERS called Cristina Castaneda, SSM I at CDCR, to testify at the hearing. Ms. Castaneda explained that Respondent was permanently separated from CDCR and that she had no mandatory reinstatement rights. Ms. Castaneda also testified that Respondent's separation was not the ultimate result of a disabling medical condition and that Respondent CDCR did not terminate Respondent to preempt an application for disability retirement. Ms. Castaneda authenticated the termination documents, which were admitted as direct evidence.

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 failed to establish that she should be allowed to apply for IDR under either of the exceptions in *Haywood*. Her separation from state service was not the ultimate result of a disabling condition, and it did not preempt an otherwise valid claim for disability retirement. Rather, Respondent

was terminated because she failed to obtain a license to practice psychology in California, which is one of the minimum qualifications, and a condition of continued employment, for a Clinical Psychologist. Further, because she was terminated from her position for non-punitive reasons, she did not have a mandatory right to return to her former position. When all the evidence is considered in light of *Haywood* and *Vandergoot*, the ALJ found that Respondent was ineligible to file an application for IDR.

The ALJ concluded that CalPERS met its burden of proof by establishing that Respondent was dismissed for cause unrelated to disability, and that the dismissal did not preempt an otherwise valid disability claim. Moreover, since Respondent failed to appear at hearing to present any evidence, she ultimately failed to establish that any of the exceptions as outlined in *Haywood* apply. Thus, Respondent was properly precluded from applying for IDR. Accordingly, her appeal from CalPERS's denial of her application must be denied.

Pursuant to Government Code section 11517, subdivision (c)(2)(C), the Board is authorized to "make technical or other minor changes in the proposed decision." To avoid ambiguity, staff recommends correcting Government Code section "21154" to "21151" in paragraph 1, under the Factual Findings section, on page 2 of the Proposed Decision.

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

January 16, 2024

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Nhung Dao  
Attorney