

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Robert B. Craig (Respondent) was employed by Department of Transportation, Headquarters Operations (Caltrans) as an Equipment Material Specialist beginning in 2004. By virtue of his employment, Respondent was a state miscellaneous member of CalPERS.

In July 2019, Respondent began an approved leave of absence from work due to a pulmonary condition. Caltrans approved his absence from work for an extended period, but Respondent's absence eventually became unexcused.

On December 24, 2020, Caltrans served Respondent with a "Notice of AWOL Separation," stating he had been absent without leave (AWOL) for at least five consecutive business days. Caltrans intended to invoke the statute regarding a state employee's AWOL separation beginning January 11, 2021. (Gov. Code, § 19996.2 (AWOL statute).) On that date, Caltrans would consider Respondent to have resigned as of his last day of approved leave, August 10, 2020.

On January 8, 2021, CalPERS received Respondent's disability retirement application, with a claimed condition of chronic obstructive pulmonary disease (COPD).

On April 15, 2021, CalPERS informed Respondent that he was ineligible for a disability retirement because his employment at Caltrans ended for reasons that were not related to a disabling medical condition. Based on the Notice of AWOL Separation, 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*); *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*); and two precedential Board Decisions, *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Dec. No. 13-01 (*Vandergoot*) and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip MacFarland* (2016) CalPERS Precedential Dec. No. 16-01 (*MacFarland*).

"Disability" and "incapacity for performance of duty" mean "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion." (Gov. Code § 20026).

Disability is equated with a state employee being incapacitated physically or mentally for the performance of his or her duties. In contrast, a governmental employee loses the right to claim disability benefits if terminated for cause. (*Martinez, supra* at p. 1161.)

A pair of decisions from the Court of Appeals carved out three exceptions to this general rule. First, a terminated-for-cause employee can still qualify for disability retirement

when the conduct which prompted the termination was the result of the employee's disability. Second, a terminated employee may qualify for disability retirement if he or she had a "matured right" to a disability retirement prior to the conduct which prompted the termination. Third, there may be instances where a court "applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause. (*Martinez, supra*, at p. 1161.)

Applying *Haywood and Smith*, the CalPERS Board adopted two precedential decisions. The first states when an employee settles a pending termination for cause and agrees not to seek re-employment, this is "tantamount to a dismissal", thus precluding a disability retirement (*Martinez, supra* at p. 1161, citing *Vandergoot*). The *Martinez* Court held that *Vandergoot* is a reasonable extension of *Haywood and Smith*, and moreover that the *Vandergoot* decision is entitled to "substantial weight" due to "the agency's area of expertise." (*Martinez, supra* at p. 1161-1162.) In the second precedential decision, the Board stated that when an employee submits a retirement application just before a termination for cause becomes effective in order to avoid the termination, the employee is ineligible for a disability retirement unless one of the exceptions carved out in *Haywood* or *Smith* apply (*MacFarland*).

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 September 13, 2022. Respondent represented himself at the hearing. Caltrans 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 on his own behalf that he was already disabled when Caltrans invoked the AWOL statute and separated him from service. He wanted to return to work, but could not due to his pulmonary condition. He filed a workers' compensation case regarding his pulmonary condition, and that case is still pending.

CalPERS introduced evidence including the Notice of AWOL Separation and a Declaration from Caltrans stating that Caltrans' decision to separate Respondent from service was based entirely on his unexcused absences as stated in the Notice of AWOL Separation. The Declaration further stated that Caltrans did not dismiss Respondent due to any alleged medical condition or to prevent him from filing for disability retirement.

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's separation from service was the result of his being AWOL, not due to a disabling condition. The ALJ found that Respondent had failed to report to work without leave on five consecutive

business days, that his separation from service was based entirely on the unexcused absences, and not for any other reason. The ALJ found there was no medical evidence from any medical professional about Respondent's physical condition, and no evidence that Respondent had requested the unexcused absences to be approved beforehand. Further, Respondent did not have a matured right to a disability retirement prior to his unexcused absences leading to his separation from service. Finally, the ALJ found no principle of equity supports Respondent's right to a disability retirement to have matured and to have survived his separation from state service. Based on those findings, the ALJ found that Respondent is not eligible for a disability retirement.

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

January 17, 2023

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