

ATTACHMENT B

Staff Argument

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

Robert Story (Respondent) was employed as an Officer by California Highway Patrol (Respondent CHP). By virtue of his employment, Respondent was a state safety (patrol) member of CalPERS.

On February 13, 2019, Respondent CHP served Respondent with a Notice of Adverse Action (NOAA), notifying him that he was dismissed from his position as an Officer effective March 7, 2019, due to off-duty misconduct, including physical assault and vandalism of private property. Respondent did not appeal the dismissal to the State Personnel Board.

Three years later, on February 14, 2022, CalPERS received Respondent's industrial disability retirement (IDR) application with a requested effective retirement date of March 7, 2019. Respondent claimed disability based on orthopedic (back injuries) and psychological (post-traumatic stress disorder, depression, and suicidal ideations) conditions resulting from an on-duty traffic collision on July 10, 2018.

On July 9, 2022, CalPERS determined that Respondent was precluded from applying for IDR and canceled his IDR application 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 Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on August 1, 2023. Respondent represented himself at the hearing. Respondent CHP did not appear at the hearing, and a default was taken as to Respondent CHP pursuant to Government Code section 11520.

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, answered Respondent's questions and clarified how to obtain further information on the process.

Respondent did not testify or submit evidence at the hearing, nor did he call any witnesses on his behalf.

CalPERS presented documentation regarding Respondent's termination, including the NOAA and testimony from Respondent CHP Office of Internal Affairs.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that CalPERS met its burden of proof to establish that Respondent was dismissed for cause, and that the dismissal did not preempt an otherwise valid disability claim. The burden then shifted to Respondent to show that an exception to *Haywood* applies. Respondent did not establish that: (1) his separation from state service was the ultimate result of a disabling condition, or (2) his separation from state service preempted an otherwise valid claim for disability retirement. The ALJ found that Respondent's termination was due to his misconduct, and Respondent was properly precluded from applying for IDR.

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 changing "Government Code section 20930" to "20390" on page 2, paragraph 1 and page 5, paragraph 3; and by adding the word "industrial" in front of the term "disability retirement" on page 2, in the "ISSUE" section; page 3, paragraphs 3 (continuation), 4, 5 and 6; page 4, paragraphs 7, 8 and 1; page 5, paragraph 4; and page 6 of the Proposed Decision.

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

November 15, 2023

Elizabeth Yelland
Assistant Chief Counsel, Litigation