

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Finn O. McClafferty, Richard B. Ceja and Brian Weir were employed by Respondent City of Beverly Hills (Respondent City) as Police Officers. Marion Weir (now Marion Brewer) is the former wife of Brian Weir who has a financial interest in the outcome of this case because she receives part of Respondent Weir's disability retirement pension. McClafferty, Ceja, and Weir are hereinafter collectively referred to as "Respondent Members." Marion Brewer is hereinafter referred to as "Respondent Brewer." By virtue of their employment, Respondent Members were local safety members of CalPERS.

On May 7, 2012, June 1, 2015, and May 23, 2016, Ceja, McClafferty and Weir, respectively, signed their applications for industrial disability retirement (IDR). Respondent Members claimed orthopedic injuries.

Because Respondent Members were local safety members, CalPERS sent letters to Respondent City requesting it determine whether Respondent Members were substantially incapacitated. If Respondent City found Respondent Members to be disabled, CalPERS requested submission of formal resolutions that set forth Respondent City's determination of disability and industrial causation for each of them.

On July 24, 2015, September 18, 2015 and November 2, 2016, Respondent City provided CalPERS with its determinations of disability resolutions which found that Respondents McClafferty, Ceja, and Weir, respectively, were substantially incapacitated from performing their usual duties.

Thereafter, on August 12, 2015, October 6, 2015 and November 3, 2016, CalPERS notified McClafferty, Ceja and Weir, respectively, of its acceptance of the resolutions finding each of them disabled, and Respondent Members began receiving IDR benefits.

Unbeknownst to CalPERS, when it accepted Respondent Members' IDR Applications, Respondent McClafferty and Respondent City were litigating the legality of the termination of Respondent McClafferty's employment. Although they were not facing any disciplinary actions at the time their IDR applications were approved, Respondents Ceja and Weir were separately litigating retaliation claims they had filed against Respondent City.

Prior to the approval of their IDR applications, Respondent Members and Respondent City entered into settlement agreements to resolve all disputes related to Respondent Members' employment. Pursuant to the terms of these settlement agreements, Respondent Members agreed to immediately apply for IDR benefits (McClafferty and Weir), dismiss civil litigation filed against Respondent City (Ceja and Weir), dismiss appeals relating to disciplinary actions (McClafferty), terminate their employments, and never seek or accept future employment with Respondent City. In exchange, Respondent City agreed to "not interfere" with Respondent Members' IDR applications,

nor pursue the disciplinary action against McClafferty, and pay Weir and Ceja hefty cash settlements.

On March 28, 2018, CalPERS received an anonymous ethics complaint, claiming Respondent Members were “undesirable employees” and that their retirements were “manufactured” by the City as part of a scheme to separate them from employment.

Upon receipt of the ethics complaint, CalPERS contacted Respondent City and requested that it investigate the allegations and provide CalPERS documents necessary for CalPERS to determine whether Respondent Members’ IDR Applications were barred under the operation of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, and its progeny. Respondent City refused to initiate an investigation and refused to disclose any IDR-related personnel information, except selectively disclosing a settlement agreement between Respondent Ceja and Respondent City.

Due to Respondent City’s refusal to cooperate in providing the requested documents, CalPERS referred the matter to the California Department of Justice, Office of the Attorney General (Attorney General’s Office), for further investigation.

In December 2018, the Attorney General’s Office commenced an investigation and obtained Respondent Members’ medical and personnel documents, including settlement agreements. The information and records received through the Attorney General’s Office’s investigation revealed that Respondent City initiated personnel investigations against Respondent Members, resulting in personnel-related legal actions. All three personnel-related legal actions ended with Respondent City placing Respondent Members on paid leave; Respondent Members resigning or retiring from employment; Respondent Members agreeing to never seek re-employment with Respondent City; Respondent Members applying for IDR; Respondent Members receiving an honorable discharge, a retirement badge and an identification certificate making them eligible for a conceal/carry weapon permit (CCW Permit) endorsement; and Respondent City approving Respondent Members’ IDR Applications only *after* the parties executed settlement agreements to terminate Respondent Members’ employments and resolve all personnel disputes and legal actions.

Based on this information, CalPERS determined that Respondent Members were ineligible for IDR pursuant to *Haywood, Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); *In the Matter of Application for Disability Retirement of Vandergoot* (2013) CalPERS Precedential Dec. No. 12–01 (*Vandergoot*), and *Martinez v. Pub. Employees’ Ret. Sys.* (2019) 33 Cal. App. 5th 1156, 1174 & 1776 (*Martinez*).

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.

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 in *Vandergoot* held that “[i]n deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*.” 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.

The *Martinez* court recently affirmed the continued validity of *Haywood* and *Smith* and confirmed the soundness of the Board’s decision in *Vandergoot*. The *Martinez* court found that a resignation in these circumstances is tantamount to a dismissal for the purposes of applying the *Haywood* criteria for determining eligibility to apply for disability benefits. The *Martinez* court found the Board’s decision and reasoning in *Vandergoot* “is eminently logical.”

CalPERS determined that it was a mistake to accept Respondent Members’ IDR Applications. CalPERS determined that Respondent Members, as a result of their resignations and agreements to relinquish their return rights, were ineligible to receive industrial disability retirement benefits.

CalPERS determined that, pursuant to Government Code section 20160, it was obligated to correct its mistakes and cancel Respondents’ IDR Applications, thus resulting in cancellation of their IDR benefits. By letters dated February 21, 2020, May 4, 2020 and May 4, 2020, CalPERS notified Respondents McClafferty, Ceja, and Weir of its determinations, respectively, that their IDRs would be cancelled, and an overpayment resulting from the cancellation of IDR benefits was due to CalPERS from Ceja and Weir. Respondent Members were given appeal rights.

Respondent McClafferty was eligible to apply for service retirement, retroactively to the date of his IDR retirement because he was of service retirement age when he was approved for IDR benefits; therefore, he did not owe CalPERS an overpayment. Respondents Weir and Ceja were advised that due to the cancellation of their IDR benefits, they owed CalPERS an amount equal to the IDR benefits they improperly received.

Respondent Members appealed these determinations and exercised their right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative

Hearings (OAH.) A hearing was held on December 21 through December 23, 2020. Respondent Members were represented by counsel at the hearing. Respondent City was represented by its own counsel at the hearing. Respondent Brewer represented herself.

At the hearing, CalPERS presented evidence establishing Respondent Members separated from employment and relinquished their return rights pursuant to settlement agreements they entered into with Respondent City. Based on this evidence, CalPERS argued that Respondent Members were ineligible for disability retirement under the law.

Respondent Members testified on their own behalves. Respondent Members testified that they were permanently disabled from working as Police Officers for Respondent City. Respondent Members did not dispute the fact they resigned from employment and relinquished their return rights. Instead, Respondent Members argued that either their termination was not final (McClafferty) or Respondent City never commenced disciplinary action against them (Ceja and Weir); therefore, *Haywood* could not be applied to render them ineligible to apply for IDR benefits.

Respondent Members further argued that their right to IDR benefits matured before their separations from employment. In support of their arguments, Respondent Members argued they were substantially incapacitated from the performance of their job duties and that their injuries were analogous to the loss-of-limb scenario outlined by the Court of Appeal in *Smith*.

Respondent Members also argued that CalPERS should not be permitted to cancel their IDR Applications due to equitable consideration. However, Respondent Members Ceja and Weir failed to argue that CalPERS should be limited in its ability to collect overpayments to the three-year statute of limitations found in Government Code Section 20164(b)(1).

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent Members' appeals. The ALJ found that CalPERS' arguments that Respondent Members were not eligible to receive IDR benefits were persuasive and supported by the evidence in this matter. Specifically, the ALJ held that *Haywood* bars Respondent Members from eligibility for IDR because they lacked the necessary requisites required for disability retirement under *Haywood*, *Vandergoot* and *Martinez* – the right to reinstatement to their prior employment in the event they recover from their disabilities.

The ALJ rejected Respondent Members' arguments that they had to have been terminated for *Haywood* to apply. The ALJ held that "*Haywood* makes clear an employee is not eligible for an IDR when his or her employment has been separated and reinstatement rights extinguished." In holding that a termination for cause is not required, the ALJ noted that "[w]hile a termination for cause was the mechanism that created the employment disruption in *Haywood*, subsequent cases have extended this principle to situations other than termination for cause, including resignations with waivers of reinstatement rights." Ultimately, the ALJ found that the settlement agreements entered into between Respondent Members and Respondent City were tantamount to a dismissal for cause, as held by *Vandergoot* and *Martinez*.

In support of his analysis, the ALJ pointed out the following critical inconsistency in the Respondent Members' arguments:

“More intriguing is Respondent Members' failure to answer a key question. If they were retiring from service simply because they were disabled, why would they agree to waive their reinstatement rights?”

The ALJ rejected Respondent Members' arguments that an exception to the *Haywood* rule applies. After a thorough review of the medical evidence presented by Respondent Members, the ALJ held that their separations were not the ultimate result of a disabling condition, nor preemptive of an otherwise valid claim for disability retirement. The ALJ also held that Respondents Ceja and Weir waived the three-year statute of limitations defense relating to the overpayments owed by them because they failed to timely present the affirmative defense.

The ALJ concluded that CalPERS erred in accepting Respondent Members' IDR applications and in providing them with IDR benefits, and it is entitled to correct that error under Government Code section 20160(b).

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 the phrase “...if less than six months from compulsory retirement age...” on page 33, paragraph 8, of the Proposed Decision, be changed to “...if he or she is at least six months less than the age of compulsory retirement”; and the word “not” be inserted after the words “To ensure an employer does” on page 39, paragraph 16, of the Proposed Decision.

June 16, 2021

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