

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO DECLINE TO ADOPT THE PROPOSED DECISION

CalPERS staff requests that the Board decline to adopt the Proposed Decision in favor of conducting a full Board hearing and issuing its own decision.

### Summary

Courts have referred to the pension roll as “a roll of honor - a reward of merit, not a refuge from disgrace.” (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal. App. 4th 1292, 1305 (*Haywood*)). The Legislature enacted disability retirement laws to alleviate the hardship that would befall an employee who becomes medically unable to perform their duties. They were not enacted to be used as a substitute for the disciplinary process, nor be a refuge for employees who are terminated for cause. (*Haywood* at 1304-1305; see also Government Code section 21156(b)(2).) Accordingly, both this Board and the courts have held that terminated employees are not eligible for disability retirement. (*Haywood* at 1307; *Smith v. City of Napa* (2004) 120 Cal. App. 4th 194, 208 (*Smith*)). In fact, courts have found that it would be an absurd construction of California disability retirement law to allow a member who is terminated for cause to receive a lifetime of disability retirement benefits. (*Haywood* at 1305.)

On March 7, 2019, Respondent Jason Bemowski, a police officer with the City of Chino (Chino), was arrested for soliciting a prostitute and having sex with a minor. Four days later, Chino placed Bemowski on leave pending an investigation that ultimately confirmed the charges for which he was arrested, as well as the allegation that he had sexually harassed a subordinate officer. In April 2019, Bemowski filed an application for industrial disability retirement (IDR), even though there was no evidence to suggest, prior to his arrest, that he was physically impaired in any way. On October 1, 2019, Chino terminated Bemowski, who was therefore ineligible to apply for IDR.<sup>1</sup>

Unfortunately, and as detailed below, the assigned Administrative Law Judge's (ALJ's) Proposed Decision misapprehends California law in concluding that Bemowski was eligible for IDR because he had submitted his application before his employer could complete its investigation and terminate him. This reasoning is contrary to California law, and would incentivize employees under investigation to immediately file for IDR before they could be fired. Because Bemowski failed to show that he was terminated *because of* an alleged disability or had a mature disability claim at the time he was terminated, he was not eligible. The timing of his application was irrelevant. (See *Smith* at 205) (“the timeliness of the application is a procedural issue without any significance to the substantive entitlement to a disability retirement.”) The Board should reject the Proposed Decision, correctly apply California law to the facts of this case, and find that Bemowski is not eligible to apply for IDR benefits.

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<sup>1</sup> IDR benefits are particularly beneficial to a CalPERS safety member because it guarantees at least a 50% retirement allowance and 50% of the allowance is exempt from taxation.

## **Factual Background**

On March 7, 2019, Bemowski was arrested and booked by the Roseville Police Department (Roseville PD) and Redlands Police Department following an investigation of human sex trafficking in which Bemowski was found to have actively participated. On March 11, 2019, his employer placed Bemowski on leave pending a full investigation. On April 3, 2019, Bemowski submitted an IDR application to CalPERS. After Chino completed its investigation, which concluded that Bemowski had, in fact, solicited a prostitute, had sex with a minor, and sexually harassed an officer he supervised, Chino terminated Bemowski, effective October 1, 2019. The report detailing Chino's investigation was submitted as evidence at the hearing. The following are some of the relevant events that resulted in the termination of his employment.

On March 1, 2019, Chino received a preliminary report from the Roseville PD outlining evidence that Bemowski had actively solicited and paid for a youthful looking female to come to his house to have sex on December 23, 2018. The evidence established that between December 17, 2018 and December 31, 2018, Bemowski made and received dozens of phone calls to numbers associated with prostitution ads, exchanged hundreds of text messages with phone numbers associated with prostitution ads, and exchanged dozens of text messages with the underage girl with whom he paid to have sex.

On March 5, 2019, detectives from the Roseville PD located the victim of Bemowski's sex crimes. The 16-year old identified Bemowski from a photo lineup, told the detectives that Bemowski had paid for an Uber to take her to and from his house, and had paid her \$550 for "full service with a condom."

When Bemowski reported to work two days later, on March 7, 2019, he was confronted by a superior officer, brought to an office, and informed he was immediately relieved of his duties. As Bemowski was escorted to the lobby's exit doors, he was arrested and transported to Central Jail for booking.

On March 11, 2019, Chino sent Bemowski a memo informing him that he was the subject of a personnel complaint, the basis of which was the conduct that had resulted in his arrest four days earlier. The investigation included interviews of Chino personnel. Evidence from these interviews established that in July and August 2017, Bemowski had sexually harassed one of his supervisees. Bemowski repeatedly sent inappropriate, unsolicited and unwanted sexual text messages to this officer. She felt intimidated by Bemowski's conduct because he was her supervisor, the sergeant of the Professional Standards Unit, and because she was still on probation.

Bemowski repeatedly declined Chino's requests for an interview and failed to appear for his *Skelly* hearing. Chino terminated him on October 1, 2019.

## Legal Framework

For more than two decades, California case law has recognized that a complete severance of the employment relationship, if not preemptive of a vested and matured right to a disability retirement or itself not the ultimate result of a disabling condition, extinguishes the eligibility to apply for disability retirement. (*Haywood* at 1307; see also *Smith* at 208.)

In *Haywood*, the California Court of Appeal ruled that termination for cause “constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement—the potential reinstatement of his employment relationship with the District if it is ultimately determined that he is no longer disabled.” (*Haywood* at 1306.) The Court ruled that where termination “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.” (*Id.* at 1307.) The Court found that 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 Court found disability retirement and a “discharge for cause” to be legally incompatible. The Court rejected the assertion that a member is *eligible* for disability retirement simply because an application was timely submitted. (*Id.* at 1307.)

The Court of Appeal in *Smith* followed *Haywood* and explained that to avoid *Haywood*’s bar on eligibility for a disability retirement, a claim must have already matured at the time of the bad acts that gave rise to the termination. (*Smith* at 205-06.) One way a claim could mature prior to such acts is if CalPERS had already granted it; barring that, the only way a claim could have matured is if the employee had been dismissed *because of* their disability, or where approval of a disability application is a “forgone conclusion” based on “undisputed evidence” such as the loss of a limb. (*Id.* at 207.)

Based on the principles set forth in *Haywood* and *Smith*, the CalPERS Board of Administration held that a resignation under the cloud of disciplinary action that prevents an employee from being reinstated is tantamount to a dismissal for cause and also extinguishes eligibility to apply for disability retirement. (*In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Decision 13-01 (*Vandergoot*).) Just two years ago, the Court of Appeal in *Martinez v. Public Employees’ Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*), affirmed the Board’s reasoning in *Vandergoot*, finding it “eminently logical.” (*Id.* at p. 1176.)

Had the ALJ properly applied this law, she would have rejected Bemowski’s appeal. His employer terminated him for conduct that predated his application for disability retirement. His application had not matured when he was terminated because CalPERS had not already granted it; he was not terminated because of his alleged disability; and there was no evidence of any disabling condition prior to his filing, let alone the required “undisputed evidence.” The only reason the ALJ recommended granting the application was her erroneous conclusion that because Bemowski had applied for IDR while he

was on administrative leave, his application was valid. The Board should correct this error by holding a full Board hearing and issuing its own decision rejecting Bemowski's appeal.

### **The Board Should Reject the Proposed Decision**

The Board should reject the Proposed Decision for the reasons discussed below.

#### **1. The Proposed Decision Fails to Follow California Law**

As discussed above, for over 20 years California's courts and this Board have found that an employee terminated for cause is ineligible to apply for disability retirement benefits. There are two primary reasons for this rule: First, the Legislature created disability retirement benefits to alleviate the hardship for an employee who becomes medically unable to perform their duties, not as a refuge for terminated employees who are ineligible to perform their work. Second, disability retirement is designed to be a *temporary* separation of employment from which an employee may be reinstated if he or she is no longer disabled. A terminated employee cannot be reinstated.

There are two exceptions to this rule. First, it does not apply to employees who are terminated *because of* a disability. Second, the rule does not apply where the employee has a mature claim for disability retirement on the date of the acts that give rise to the termination.

As to the first exception, there is no evidence that Bemowski was terminated because of his disability. The records relating to his termination make clear that he was terminated because he sexually harassed a woman he supervised, solicited a prostitute, and had sex with a 16-year-old girl.

As to the second exception, there is no evidence that Bemowski had a mature claim for disability at the time of the acts that gave rise to his termination. The courts define a mature claim as one in which disability retirement has already been granted or, in the alternative, it is a foregone conclusion based on undisputed evidence that disability retirement will be granted such as the loss of a limb. (*Smith* at 206-207.) Here, neither Chino nor CalPERS had granted Bemowski IDR prior to the conduct that got him fired – his sexual harassment of a subordinate in July and August 2017, and his solicitation of a prostitute and sex acts with a minor in December 2018. Nor was it a foregone conclusion that disability retirement would be granted because there was no evidence that Bemowski was disabled prior to his application. Consequently, California law requires Bemowski's appeal to be denied.

#### **2. The ALJ Improperly Relied on *Willens* in Finding Bemowski Eligible to Apply for IDR**

The ALJ, relying on *Willens v. Commission of Judicial Qualification* (1973) 10 Cal.3d 451 (*Willens*), found that Bemowski was eligible to apply for IDR because he had submitted his application while on administrative leave. The ALJ's reliance on *Willens*

was misplaced for two reasons: that case involved a judge whose benefits were governed by the Judges' Retirement Law (JRL); and the facts the Court relied on in deciding *Willens* was eligible to apply for disability retirement do not exist in this matter.

As *Willens* explains, the JRL evinces no legislative intent to preclude an indicted judge from applying for and receiving a disability retirement. In fact, the law explicitly allows an indicted judge to retain their office and salary until the conviction becomes final. (Cal. Const., art. VI, section 18, subd. (a).) For this reason, the Court found the Legislature did not intend to deprive a judge of a disability retirement "solely because he had been charged, but up to that time, had not been convicted of a criminal offense." (*Willens* at 456.) The PERL contains no similar provision. To the contrary, courts have found that it would be an absurd construction of California disability retirement law to allow a member whose employment is terminated for cause to receive a lifetime of disability retirement benefits. (*Haywood* at 1305.) Simply put, the ALJ's reliance on *Willens* in this case was misplaced because a judge's retirement benefit is governed by a different law. (See *Smith* at 204 (*Willens* "turns on [the] peculiarities of the office of judge.").)

The facts of *Willens* are also distinguishable. As the Court in *Smith* pointed out, *Willens* was entitled to disability retirement *before* his dismissal for cause. (*Smith* at 204 ("There was substantial evidence that the judge had physical and emotional disabilities at the time of his application, dating back to 1969.").) Put another way, *Willens* had a mature claim for disability at the time of his termination, and thus came within one of the exceptions to *Haywood*. Bemowski did not. At best, Bemowski presented evidence that he filed a workers' compensation claim and sought medical treatment *after* he was placed on leave and *after* he knew his job was in jeopardy. Unlike the judge in *Willens*, Bemowski failed to present competent medical evidence that he was substantially incapacitated at any time, let alone before he submitted his application for IDR.

### 3. The Proposed Decision Erroneously Relies on the Date Bemowski Submitted his Application for IDR in Determining his Eligibility

The ALJ found that "the facts of this case do not require a determination of whether the event extinguishing a right to disability retirement is the effective date of the dismissal, the date of the decision to dismiss the employee, or the date of the underlying conduct giving cause for the dismissal." (Proposed Decision, p. 13, footnote 2.) Staff would agree. (*Smith* at 205 ("As we stated in *Haywood*, the timeliness of the application is a procedural issue without any significance to the substantive entitlement to a disability retirement.") But in finding that Bemowski's application must be considered because he filed it after he was placed on leave, the ALJ *did* find the timing determinative. This runs contrary not just to the *Haywood* and *Smith* decisions, but to this Board's subsequent application of the *Haywood* rule as well.

More specifically, the Board has made clear that a member may not avoid the effects of a termination by resigning in lieu of being terminated (*Vandergoot*) or by submitting an

application for IDR before his impending termination becomes effective (*MacFarland*<sup>2</sup>). The Court of Appeal in *Martinez* found the Board's reasoning in *Vandergoot* "eminently logical." The ALJ neglected these decisions in holding that the timing of Bemowski's application – i.e., after he was placed on leave but before the investigation of his malfeasance could be completed – made him eligible for a disability retirement.

Thus, adopting this Proposed Decision would not only run contrary to judicial decisions and two of the Board's precedential decisions, it would also create a dangerous precedent that would incent employees whose jobs are in danger for good cause to rush to "beat the clock" by filing disability retirement applications before their employers can complete the termination process. It could also incent employers to rush through their investigations and HR processes out of an inappropriate desire to complete them and terminate the subject employee before the employee files for IDR. In short, the Proposed Decision undermines the structure of existing California personnel laws and policies in multiple ways.

## **CONCLUSION**

For the reasons explained above, the Board should reject the Proposed Decision and decide the case for itself based upon the record produced before the ALJ and arguments that are presented by the parties before the Board.

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<sup>2</sup> *In the Matter of the Application for Industrial Disability Retirement of Phillip B. MacFarland* (2016) CalPERS Precedential Decision 16-01.