

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent David Clark (Clark) was employed by respondent California Department of Corrections and Rehabilitation, Salinas Valley State Prison (CDCR) as a Physician and Surgeon effective April 1, 1996. By virtue of his employment, Clark became a state safety member of CalPERS.

On April 15, 2002, CDCR served Clark with a Notice of Adverse Action (Notice) terminating his employment based on Clark's interactions with an inmate on June 27, 2000. According to the Notice, the inmate had been injured in a fight with five other inmates. Clark had the inmate placed on a backboard and in a neck brace for four hours, then had the brace removed, and ordered the inmate placed in a wheelchair and returned to his cell since Clark believed the inmate was malingering. He did not order an X-ray to determine whether there was spinal damage, he did not provide standard medical care, and he treated the inmate with disrespect in ignoring his injury. Clark service retired effective May 1, 2002.

On or around December 13, 2005, Clark signed an industrial disability retirement application which CalPERS received on January 4, 2006. He claimed disability based on depression beginning June 29, 2000, following treatment he rendered to an inmate on June 27, 2000. He stated that the California Medical Board suspended his license and required that he surrender his license.

CalPERS reviewed the facts of Clark's termination and learned that he had appealed it and a hearing was held before an Administrative Law Judge (ALJ) of the State Personnel Board (SPB) for six days in 2005 and on the sixth day, Clark and CDCR stipulated that CDCR agreed to withdraw its Notice in exchange for Clark's agreement to resign effective July 29, 2003, and never to apply for or accept employment with CDCR. However, pursuant to a provision in the stipulation, CDCR revoked its agreement several days after signing it, so the hearing before the ALJ resumed. After five more days of hearing, the ALJ issued his Proposed Decision sustaining the termination. The Proposed Decision included facts stating that when the inmate was x-rayed the day after Clark had him returned to his cell, the x-rays showed a spinal cord injury and the inmate was rendered a quadriplegic. The SPB adopted the Proposed Decision (Decision) effective October 22, 2009.

Clark appealed this Decision by filing a Writ Petition in Sacramento Superior Court on January 19, 2009. On May 4, 2011, Clark and CDCR entered into a Stipulation and Release (Stipulation) in which Clark agreed to permanently withdraw his appeal of the Notice, resign from his position with CDCR effective at the beginning of business on April 15, 2002, never apply for or accept employment with CDCR, and waive all reinstatement and employment rights with CDCR.

Based on the Notice, Decision, and the Stipulation, CalPERS determined that Clark was ineligible to apply for industrial disability retirement because he had been terminated for cause and his termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for industrial disability retirement. Clark appealed and a hearing was scheduled to be held before an ALJ of the Office of Administrative Hearings on February 2, 2012.

At the hearing, Clark and CalPERS were represented by attorneys. The parties agreed that the case involved exclusively a matter of law with no factual disputes, and they and the ALJ agreed that the matter would be resolved through written legal arguments.

Clark argued that pursuant to the Stipulation, he resigned from his position at CDCR and was not terminated. He argued that because he resigned, he is eligible to be reinstated into state service, although not with CDCR.

CalPERS argued that *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*) preclude Clark from filing an application for disability retirement. 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.

CalPERS argued that CDCR terminated Clark for the reasons set forth in the Notice and the Decision, and not as the result of a disabling medical condition or to preempt an otherwise valid claim for industrial disability retirement.

In her Proposed Decision, the ALJ concludes that the facts are not in dispute and Clark's termination for cause on April 15, 2002, permanently severed Clark's employment relationship with CDCR. The ALJ states that the character of the disciplinary action does not change because Clark elected to settle his case prior to exhausting his appeal rights. She concludes that CalPERS correctly determined that *Haywood* and *Smith* bar Clark's eligibility to apply for industrial disability retirement.

The ALJ concluded that Respondent's appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

November 15, 2012

A handwritten signature in black ink, appearing to read "Carol A. McConnell", written in a cursive style.

CAROL A. MCCONNELL
Senior Staff Attorney