

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Herculano Garcia (respondent) was employed as a Police Officer for the City of Elk Grove (the City). He was a local safety member of CalPERS.

On May 17, 2011, respondent signed an application for industrial disability retirement on the basis of a "pinched nerve in the upper spine."

CalPERS requested the City determine whether respondent was substantially incapacitated from the performance of his job duties.

In response, the City informed CalPERS that respondent's employment was terminated for cause, effective November 16, 2009. Respondent was terminated due to the following reasons: insubordination; giving false or misleading statements; failure to report to duty as required; and failure to notify his employer whether he was continuing to work in outside employment while on medical leave and light duty.

On February 22, 2012, CalPERS notified respondent that his application for industrial disability retirement was denied on the grounds that he was "dismissed from employment for reasons which were not the result of a disabling condition," and "the dismissal does not appear to be for the purpose of preventing a claim for disability retirement." The notification cited *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 as legal authority for CalPERS' decision.

Respondent filed a timely appeal and requested a hearing. A hearing was completed in Sacramento, California on August 29, 2012. Both CalPERS and the City appeared at the hearing. Respondent did not appear, nor did he supply any evidence.

Under the cases *Haywood v. American River Fire Protection District* (1999) 67 Cal.App.4th 1292, and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, a respondent's application is barred if he/she is dismissed for cause prior to the time an application is made. Accordingly, CalPERS contended that respondent's application was barred by his November 16, 2009, termination.

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 pre-emptive 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. Since under the law, disability retirement is only a "temporary separation" from public service, this complete severance would create a legal anomaly, i.e. 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 pre-emptive, 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 the Proposed Decision, the Administrative Law Judge (ALJ) concluded that good cause exists for CalPERS to reject respondent's application for industrial disability retirement. The ALJ based her ruling on the *Haywood* and *Smith* cases. The ALJ found that respondent was ineligible for disability retirement under *Haywood* due to his termination for cause by the City. The ALJ further found that under *Smith*, respondent's termination was not pre-emptive of an otherwise valid claim for disability retirement.

The ALJ found that respondent was terminated for cause. She held that the evidence is persuasive that he was not terminated as the ultimate result of a disabling medical condition or to prevent him from filing a claim for disability retirement. Moreover, the ALJ found that respondent did not have a matured right to disability retirement at the time he was terminated, and that he had not even applied for disability retirement benefits prior to his termination. Consequently, the ALJ found that respondent is not eligible to apply for disability retirement benefits.

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 motion with the Board under Government Code Section 11520(c), requesting that, for good cause shown, the decision be vacated and a new hearing be granted.

December 12, 2012

for Marquente A. Seaborn

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