

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent John Macari (Macari) was employed by respondent Department of Mental Health, Atascadero State Hospital (Atascadero) as a Psychiatric Technician effective August 31, 2007. He was promoted to Senior Psychiatric Technician on November 18, 2007, and he remained in this position until June 24, 2009. By virtue of his employment, Macari was a local member of CalPERS.

Effective June 24, 2009, Macari was terminated for cause after he got into an altercation with a patient. Macari appealed his termination with the State Personnel Board (SPB). On March 8, 2011, SPB upheld Macari's termination, finding (1) Macari engaged in inexcusable neglect of duty and other failure of good behavior in interactions with the patient on May 26, 2008; and (2) Macari was intentionally dishonest and engaged in other failure of good behavior during the investigatory interview on October 8, 2008.

On July 1, 2011, more than two years after he was terminated for cause, Macari submitted his application for disability retirement with CalPERS. Macari claimed injuries he allegedly incurred during the altercation with the patient on May 26, 2008.

On September 8, 2011, CalPERS notified Macari that his application was rejected based upon his termination for cause.

CalPERS reviewed the facts of the case and the holdings of *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*). CalPERS found no indication in any of the evidence that Atascadero terminated Macari's employment in order to pre-empt him from filing a disability retirement application. Instead, CalPERS found that Macari's termination was based on factual and legal causes unrelated to Macari's claim for disability retirement.

The Administrative Law Judge (ALJ) reviewed the holdings of *Haywood* and *Smith*. In *Haywood*, the Court found that "where an employee is terminated 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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed." (*Haywood, supra*, 67 Cal.App.4th at p. 1307.) The Court explained that "a firing for cause constitutes a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement – the potential reinstatement of [the employee with the employer] if it is ultimately determined that he is no longer disabled.... The disability provisions of the PERS law contemplate a potential return to active service and a terminated employee cannot be returned to active service." (*Id.* at pp. 1306-1307.)

More recently, the Court in *Smith* analyzed the holding in *Haywood*. In *Smith*, the Court held that a termination for cause extinguishes the right to disability retirement, except if an employee were able to prove that the right to disability retirement matured before the

date of the event giving cause to dismiss. (*Smith, supra*, 120 Cal.App.4th at p. 206.) Quoting from *Smith*, the ALJ explained that a right to disability retirement matures as follows:

A vested right matures when there is an unconditional right to immediate payment. [Citations omitted.] In the course of deciding when the limitations period commenced in a mandate action against a pension board, the Supreme Court noted that a duty to grant the disability pension (i.e. the reciprocal obligation to a right to immediate payment) **did not arise at the time of the injury itself but when the pension board determined that the employee was no longer capable of performing his duties.** (*Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-671) In the present case, a CalPERS determination of eligibility did not antedate the unsuccessful certification on the ladder truck. His right to a disability retirement was thus immature, and his dismissal for cause defeated it. (*Id.* The ALJ added the bold.)

Applying the law to the facts, the ALJ found that at the time Macari was terminated, he did not have a mature right to disability retirement. CalPERS had not determined that he was no longer capable of performing his job duties. He did not have an unconditional right to immediate payment of disability retirement benefits. There was no indication that Atascadero terminated Macari's employment to pre-empt him from filing a disability retirement application. Instead, the facts show that Macari's termination was based on factual and legal causes unrelated to Macari's claim of disability. Because Macari did not have a mature right to disability retirement before he was terminated, his termination precluded him from thereafter applying for disability retirement. Consequently, in accordance with *Haywood* and *Smith*, Macari's application for disability retirement must be dismissed.

The ALJ's Proposed Decision is consistent with the law and the facts. For the reasons stated above, staff argues that the Board should 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.

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