

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Scott Shirk (Respondent), employed by respondent Humboldt State University Center (University Center) as a Dining Services Manager, filed an application for disability retirement on the basis of orthopedic (back and neck) and multiple sclerosis conditions. Thereafter, the University Center informed CalPERS that Respondent was ineligible to submit an application for disability retirement because he was dismissed "after a performance improvement process that occurred from August through November 2004, failed to show any positive results."

CalPERS received and reviewed documentation from the University Center concerning Respondent's termination from employment and determined that, because Respondent had been terminated for cause, his application was precluded by operation of law. In making its decision, CalPERS relied on the case of *Haywood v. American River Fire Protection District* (1998), 67 Cal.App.4th 1292 ("*Haywood*"). Under *Haywood*, an application for disability retirement can be barred if, at the time of application, the member has been terminated for cause and the discharge was neither the ultimate result of a disabling medical condition nor intended to prevent an otherwise valid claim for disability retirement. CalPERS gave Respondent appeal rights, he filed an appeal and the matter went to hearing.

Three managers from the University Center were present to testify at the hearing. Respondent was permitted to appear by phone with agreement of the Administrative Law Judge (ALJ), CalPERS' counsel and the University Center.

Ron Rudebock, the University Center Director of Dining, was Respondent's immediate supervisor. He testified that, leading up to the date of his termination, Respondent was often absent, had depleted all of his accumulated vacation and sick leave, and had several work performance issues which negatively impacted dining operations. He cited 16 specific examples of tasks that Respondent had completed late or not at all.

Heidi Chien, the Associate Executive Director of the University Center, testified that she sent memoranda to Respondent on five different occasions about his attendance. On more than one of those occasions, she informed him of the University Center's requirement to provide a medical note from his physician if he was absent due to medical issues or illness. She also requested that Respondent meet with her and Mr. Rudebock to discuss the University Center's medical/catastrophic leave policy and state disability benefits. Respondent failed to attend. On the final occasion that she wrote to Respondent, she informed him that failure to attend a meeting with her would have an impact on his future employment. Although Respondent appeared for the subsequent meeting, he failed to bring any documentation from his physicians to explain his absences. He promised to provide medical information by mail, but failed to do so by the requested date. Ms. Chien testified that she provided Respondent with information regarding his rights under the federal Family and Medical Leave Act (FMLA)

and under the California Family Rights Act (CFRA); however, Respondent did not apply for leave under either.

Ultimately, Ms. Chien testified that, because Respondent did not comply with the requests for medical documentation, the University Center took steps to end Respondent's employment. The University Center requested that Respondent sign a Separation Agreement and resignation in exchange for a lump sum payment equivalent to three months of his annual salary. In exchange for the payment, Respondent agreed to waive any right he might have to reinstatement and/or reemployment and agreed that he would not seek future employment with the University Center. Although the Separation Agreement was worded to accept a "voluntary resignation," Ms. Chien indicated that Respondent and the University Center understood that the University Center was prepared to take adverse action against him and intended to permanently terminate him from his employment for nonperformance. Thus, although he was permitted to resign under the Separation Agreement, this was a dismissal rather than a voluntary resignation.

Joan Tyson, Director of Business Services for the University Center, testified that she met with Respondent to obtain his signature on the Separation Agreement. She advised him that, effective immediately, he was no longer employed. She testified that she did not receive a letter of resignation from the Respondent and that she understood that the University Center was dismissing Respondent from employment.

Respondent testified about the circumstances of his dismissal in agreement with Ms. Chien and Ms. Tyson. He acknowledged that the separation had been mutually agreed upon and that he understood that he was resigning in lieu of being fired. He stated that he understood that his choice was to resign and receive 90 days' pay, or to not receive anything and be fired. However, he argued that, because he had been absent because of medical conditions, his termination was ultimately still the result of a disabling medical condition.

The ALJ disagreed and concluded that Respondent's appeal should be denied because CalPERS had properly rejected Respondent's application on the basis of the *Haywood* doctrine. The ALJ reasoned that Respondent did not contend that he was terminated or asked to resign in order to *deprive* him of an otherwise valid claim for disability retirement. Furthermore, the ALJ pointed out that Respondent's failure to provide his employer with a doctor's note or other medical documentation when requested, meant that Respondent actually had not established that he was unable to work due to his medical condition. Finally, although Respondent argued that his medical condition was not diagnosed until after he had been terminated, the ALJ concluded that, a *possible* medical condition does not prevent application of the principles under the *Haywood* case. *Haywood* requires "unequivocal medical evidence" of such nature that an approval of the application would be assured. The ALJ concluded that Respondent did not present unequivocal medical evidence that demonstrated that CalPERS would have definitely approved his disability retirement application had it been received before termination.

The Proposed Decision is supported by the law and the facts. 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.

March 20, 2013



PATRICIA B. MILES
Senior Staff Attorney