

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

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

Respondent Robert Vandergoot (Respondent) was employed by respondent California Department of Forestry and Fire Protection (CalFIRE) as a Heavy Fire Equipment Operator. By virtue of his employment, Respondent became a state safety member of CalPERS.

On March 5, 2010, CalFIRE served Respondent with a Notice of Adverse Action (NOAA) terminating his employment based on Respondent's actions on August 21, 2009. According to the NOAA, Respondent's strike team was working a large fire near Grass Valley. Respondent was assigned to a 48-hour R&R period at an assigned motel. He was on full pay status despite being on R&R, because he might be called back to fire line duty at any time during the 48 hours. The NOAA states that Respondent was intoxicated on duty. He was arrested and subsequently pled guilty to the criminal charge of disorderly conduct under influence of alcohol. The NOAA further states that Respondent misrepresented himself to police as a Captain with CalFIRE (a rank he did not hold), and later altered time records to use leave credits for the time he was intoxicated, arrested and taken into police custody.

Respondent filed an appeal of the termination with the State Personnel Board (SPB). Prior to the SPB hearing, Respondent and CalFIRE entered into a Stipulated Settlement. CalFIRE agreed to withdraw the NOAA, and the parties agreed Respondent would "resign" from employment "for personal reasons" effective December 9, 2010.

The Stipulated Settlement contained the following provision (Paragraph 3):

Respondent agrees that he will not seek, transfer to, apply for or accept any employment in any capacity with CalFIRE at any time in the future. If respondent returns to employment with CalFIRE in violation of the terms of the Stipulation for Settlement, CalFIRE may dismiss respondent at such time as is convenient to CalFIRE, and respondent waives any right of appeal of said dismissal in any forum.

On April 9, 2010, Respondent signed an industrial disability retirement (IDR) application. He claimed disability based on depression, Hepatitis C, fibrosis, blisters on his skin from sun exposure, hypertension and a spine injury.

CalPERS reviewed the facts and learned that Respondent had been terminated, had appealed his termination to the SPB, and had entered into a Stipulated Settlement in which he agreed to permanently withdraw his appeal of the NOAA, resign from his position with CalFIRE, never apply for or accept employment with CalFIRE, and waive his reinstatement and employment rights.

Based on the NOAA and the Stipulated Settlement, CalPERS determined that Respondent was ineligible to apply for industrial disability retirement due to operation of

the *Haywood* and *Smith* cases, 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. Respondent appealed and a hearing was completed on December 12, 2012.

The cases 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*) preclude Respondent 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.

The Administrative Law Judge (ALJ) found that *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with CalFIRE if it ultimately is determined that Respondent is no longer disabled (*Haywood, supra*, at p. 1296-1297). Such is not possible here, due to operation of the Stipulated Settlement which expressly locks Respondent out from being reinstated. The ALJ found that such a circumstance must be viewed as wholly inconsistent with the policy behind and rationale for disability retirement. Were Respondent to receive a disability retirement allowance, he would have no employer who could require him to undergo a medical examination (Gov. Code section 21192), and it would not be possible for him to be reinstated (Gov. Code section 21193). Since those necessary prerequisites for receiving a disability retirement are not present, the ALJ found that CalPERS properly considered the Stipulated Settlement as tantamount to a dismissal for purposes of applying *Haywood*.

Respondent argued that the NOAA was preemptive of his otherwise valid claim for disability retirement. Under the facts presented here, the ALJ disagreed because Respondent did not have a vested right to industrial disability retirement which had "matured" for purposes of *Haywood* and *Smith*. The ALJ found that Respondent's separation from employment was tantamount to a dismissal for purposes of applying *Haywood* and *Smith*, and that Respondent's separation from employment was not the ultimate result of a disabling medical condition.

The ALJ concluded that the facts are not in dispute, and upheld CalPERS' determination that Respondent is not entitled to file an application for industrial disability retirement. Respondent's termination permanently severed his employment relationship with CalFIRE. The character of the disciplinary action does not change because Respondent elected to settle his case prior to exhausting his appeal rights. CalPERS correctly determined that *Haywood* and *Smith* bar Respondent's eligibility to apply for industrial disability retirement.

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.

April 17, 2013

  
\_\_\_\_\_  
for ELIZABETH YELLAND  
Senior Staff Attorney