

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Debra L. Dougherty (Respondent) was employed by the Department of Corrections and Rehabilitation, at the Mule Creek State Prison as an Office Assistant, on or about December 2, 1993. By virtue of this employment, Respondent became a state industrial member of CalPERS subject to Government Code sections 21150 and 20048.

On or about December 29, 2004, Respondent signed an application for disability retirement. In filing the application, disability was claimed on the basis of an orthopedic (right shoulder) condition. However, pursuant to the applicable decisions of the Court of Appeal, including *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), it was determined a member who has been terminated from their employment and the discharge was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, ceased to be eligible to apply to CalPERS for a disability retirement.

Upon review of Respondent's medical records, CalPERS staff learned that Respondent had been terminated from her employment at Mule Creek State Prison. CalPERS contacted the employer to seek further information regarding her termination. Upon review of the documents submitted by Mule Creek State Prison, CalPERS determined that Respondent was terminated effective November 29, 2004, by automatic resignation for being absent without approved leave from November 30, 2004 through December 13, 2004. CalPERS staff also confirmed that the automatic resignation was upheld upon appeal following an administrative hearing before the Department of Personnel Administration. On February 27, 2006, CalPERS staff notified Respondent that her application for disability retirement was denied on the ground that she had been terminated from employment for cause and that the discharge was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, and she ceased to be eligible to apply to CalPERS for a disability retirement. Respondent was notified of her right to appeal that determination.

Respondent timely appealed the determination and on March 27, 2013, the matter was heard before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings.<sup>1</sup> Respondent was represented by legal counsel. Evidence, including the decision of the Department of Personnel Administration (DPA), Respondent's medical records and the testimony of Respondent, were admitted into evidence. Testimony was also submitted by a representative of Respondent's former employer.

On May 15, 2013, following a one-day hearing, the ALJ issued a Proposed Decision, in which CalPERS staff's determination was sustained. Based on the evidence and testimony presented, the ALJ found that Respondent had a recommendation by her

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<sup>1</sup> In January 2007, counsel for the Respondent requested that the scheduled hearing be taken off calendar, and did not contact CalPERS to re-activate the case until years later.

physician limiting her to lifting no more than 10 pounds. However, she was not taken off work by her physician and her employer was able to permanently accommodate this restriction. Notwithstanding this accommodation, Respondent left her employment on November 24, 2004, and did not return in spite of requests to do so and a warning letter on December 9, 2004, advising her that if she did not resign, report to work or obtain approval for her absence she would be automatically resigned. On December 13, 2004, Respondent was "automatically resigned" from her position. Her appeal of that termination before an ALJ, sitting on behalf of the DPA, was denied. The ALJ in that decision also found that Respondent had failed to provide a valid (including medical) reason for her absence from work. The ALJ found that Respondent's statements that she could not perform her duties immediately preceding her absence were unsubstantiated.

The ALJ found that Respondent did not have a matured right to a "disability pension" at the time she was terminated, and that based on the evidence and testimony at the hearing, there was no persuasive evidence to establish that Respondent's failure to return to work was caused by any medical condition. To the contrary, the ALJ found Respondent chose not to return to work or request leave.

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 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.

June 19, 2013

*for*   
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WESLEY E. KENNEDY  
Senior Staff Attorney