

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

William Welch (Respondent) was employed as a Fire Engine Operator by the Department of Forestry and Fire Protection (Department). By virtue of his employment, Respondent was a state safety member of CalPERS. Respondent was terminated for cause by the Department in 1995. More than 10 years after his termination, Respondent submitted an application for Industrial Disability Retirement on the basis of a claimed vascular (heart) condition. CalPERS staff determined that Respondent was ineligible to file an application for disability retirement. Respondent appealed CalPERS staff's determination and a hearing was held on June 11, 2013.

In *Haywood v. American River Fire Protection District* (1998) 67 Cal. App. 4th 1292, the Court of Appeal held that where an individual was terminated for cause, and the termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the individual was precluded from applying for disability retirement.

Respondent was represented by counsel. At the hearing it was stipulated that A) Respondent was terminated for cause, and B) that his termination was not the result of a disabling medical condition. Accordingly, it was Respondent's burden to prove, on the basis of competent medical evidence, that, at the time of his termination, he had an existing medical condition which would entitle him to disability retirement, and, that his termination prevented him from applying for or securing a disability retirement.

Respondent testified that in 1988 or 1989 he participated in Emergency Medical Technician (EMT) training. He recalled that, as part of the training, he and others in the training group listened to each other's hearts, using a stethoscope. Respondent said that his heartbeat sounded different than the heartbeats of others in the group. Respondent admitted that this did not cause him to seek any medical examination or care. Respondent admitted that he continued to work, without restriction, until he was terminated. Respondent did not call any physician witness to testify on his behalf and there was no evidence submitted that Respondent's "different" heartbeat constituted any sort of disabling medical condition in 1988/1989 or at any time thereafter up to the time of his termination. Additionally, Respondent admitted that he challenged his termination, seeking to remain employed by the Department, and that, if he had been successful in challenging his termination, he was "ready, willing and able" to return to his position with the Department. Respondent admitted that, in 1995, at the time of his termination, he knew that, if he was disabled from performing the usual and customary duties of his job, he could have applied for disability retirement.

After considering all of the evidence and testimony, the Administrative Law Judge (ALJ) found as follows:

“However there is no competent medical evidence that, at the time of his termination, respondent, was either disabled by a heart condition, or eligible to retire for disability, or the Department knew or reasonably should have known that he had a disabling heart condition.”

In another opinion (*Smith v. City of Napa* (2004) 120 Cal. App. 4th 194), the Court of Appeal clarified its previous statements made in *Haywood*. The Court, in *Smith*, stated, in relevant part:

“Thus, if a plaintiff were able to prove that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot preempt the right to receive a disability pension for the duration of the disability. Conversely, ‘the right may be lost upon the occurrence of a condition subsequent such as a lawful termination of employment before it matures...’”

(Emphasis added.)

The ALJ, applying the language from the *Smith* decision quoted above, found as follows:

“As in *Smith*, this is not a case where respondent had an impending ruling on a claim for a CalPERS disability pension that was delayed through no fault of his own....Nor was there “undisputed evidence” that respondent was eligible for a CalPERS disability retirement, “such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb).”...

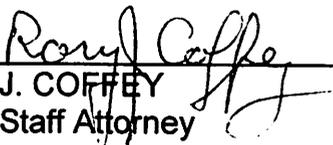
When the above matters are considered as a whole, respondent has not presented competent or unequivocal medical evidence of such a nature that approval of his application for disability retirement was a ‘foregone conclusion.’ Any right to an industrial disability retirement allowance cannot be deemed to have matured in this case.”

The ALJ concluded that, consistent with the *Haywood* and *Smith* decisions, CalPERS staff had been correct in its determination that Respondent was not eligible to submit an application for industrial disability retirement.

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 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.

August 21, 2013



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