

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

## STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

The hearing on this case was completed March 27, 2013. Following the hearing, a Proposed Decision was issued on May 15, 2013. The Decision was in favor of CalPERS (denial of Respondent's eligibility to file a disability retirement application). The Board voted to adopt the Proposed Decision at its meeting on June 19, 2013. Debra L. Dougherty, (Respondent Dougherty) submitted this Petition for Reconsideration dated July 24, 2013.

Respondent Dougherty was employed by Respondent California Department of Corrections and Rehabilitation, Mule Creek State Prison, as an Office Technician and was a miscellaneous member of CalPERS. On December 13, 2004, after several warnings and her failure to provide any medical note regarding her absence from employment, Respondent Dougherty was "automatically resigned" from state service pursuant to Government Code section 19996.2. Respondent Dougherty pursued an administrative appeal from this separation from service. She was represented by legal counsel during that appeal. Following two days of hearing the Administrative Law Judge (ALJ) in that proceeding sustained the resignation and found that Respondent Dougherty had failed to provide any doctor's note indicating that she was excused from work, that she had failed to return to work, and that her employer, Respondent Mule Creek State Prison, could accommodate any restrictions that were presented.

At the hearing in this case, Respondent Dougherty was also represented by legal counsel. She attempted to argue that she had failed to return to work due to physical and mental conditions (e.g., "was sore" and her co-employee's "would all play head games.") She continued to argue, as she had during her hearing following her automatic resignation, that her employer had failed and would fail to accommodate her restrictions. This ALJ found that Respondent Dougherty's employer had accommodated any medical restriction presented, but that Respondent Dougherty was simply not happy with her assignment.

Under these circumstances, the ALJ properly concluded that Respondent Dougherty's eligibility to apply for a disability retirement was subject to the holding in *Haywood v. America River Fire Protection District* (1998) 67 Cal.App. 1292 (*Haywood*) and *Smith v. City Napa* (2004) 120 Cal.App.4<sup>th</sup> 194 (*Smith*). Where a former member has been permanently separated from their employment for reasons that were not the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim of disability retirement, he or she is no longer eligible to apply for a disability retirement. The ALJ found that the evidence was persuasive that Respondent Dougherty's absence from her employment was willful and that she had refused to request leave and that her absence was due to her unwillingness, rather than a medical preclusion, to return to work and that no exception to the holdings in *Haywood* or *Smith* apply.

Respondent's grounds for reconsideration are based on disagreement with the ALJ's findings and legal analysis. CalPERS' staff addresses the arguments below:

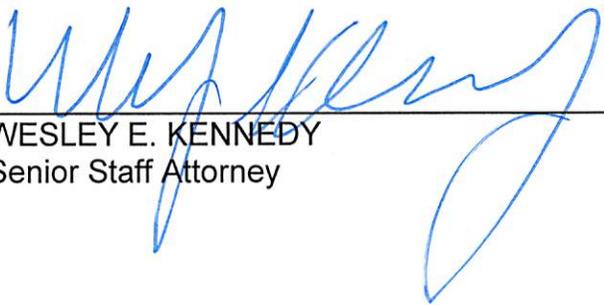
Respondent was properly served with the Statement of Issues and Notice of Hearing and attended the hearing with a legal counsel. At hearing, evidence was taken on the

underlying facts and was received into evidence. The ALJ analyzed the proper California Public Employees' Retirement Law sections relevant to the issues presented. The ALJ simply found against Respondent. Respondent has not raised any new evidence or change in circumstances which would warrant reconsideration.

For all of the reasons stated above, staff argues the Board deny the Petition for Reconsideration and uphold its decision.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Petition for Reconsideration are minimal. Respondent may file a Writ Petition in Superior Court.

August 21, 2013



---

WESLEY E. KENNEDY  
Senior Staff Attorney