

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Robert Icenogle (Respondent Icenogle) was employed as a Correctional Officer by Respondent California Department of Corrections, Sierra Conservation Center (SCC). By virtue of his employment, Respondent Icenogle was a state safety member of CalPERS.

Late in 2003, Respondent Icenogle was arrested and charged with multiple criminal offenses. On December 1, 2003, SCC terminated his employment for being absent without leave (AWOL) pursuant to California Government Code section 19996.2. Respondent Icenogle had been absent and unavailable for more than five consecutive working days because he was being held in the county jail.

On August 13, 2004, Respondent Icenogle filed an application for industrial disability retirement citing a knee injury as his disability.

On December 1, 2004, after an extensive investigation, SCC terminated Respondent Icenogle's employment for cause based on a pending criminal action in Tuolumne Superior Court. Respondent Icenogle did not appeal his termination. On or about January 7, 2005, Respondent Icenogle pled guilty to and was convicted of multiple offenses related to illegal conduct with children.

On March 23, 2006, CalPERS cancelled Respondent Icenogle's initial application for industrial disability retirement because he could not be examined by an independent medical examiner due to the fact he was in prison.

On April 14, 2010, Respondent Icenogle refiled his application for industrial disability retirement. Respondent SCC then explained to CalPERS that Respondent Icenogle was not eligible to submit an application for industrial disability retirement due to his termination on December 1, 2004.

After CalPERS staff reviewed *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*) and the employment documents, they determined that Respondent Icenogle was not eligible to apply for industrial disability retirement. By letter dated November 2, 2010, CalPERS explained to Respondent Icenogle that his application for industrial disability retirement was rejected on the basis of the *Haywood* doctrine.

Respondent Icenogle appealed the determination and hearings were held on June 10, 2013 and July 30, 2013.

In *Haywood* and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*), the applicants were precluded from filing an application for industrial disability retirement.

In *Haywood*, the 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 industrial disability retirement, termination of the employment relationship renders the employee ineligible for industrial disability retirement. The ineligibility arises from the fact that the discharge is a complete severance of the employer-employee relationship. Industrial 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 industrial disability retirement and a "discharge for cause" to be legally incompatible.

In *Smith*, the court explained that to be preemptive of an otherwise valid claim, the right to industrial 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 industrial disability retirement.

Respondent Icenogle represented himself at hearing. At hearing, evidence of his AWOL separation, later termination and convictions was presented. The evidence was not refuted.

Respondent Icenogle argued that he had a valid claim for industrial disability retirement at the time he was terminated from his employment. He argued he was receiving temporary disability, had many surgeries, and his workers' compensation doctors told him that he was permanently disabled.

The Administrative Law Judge (ALJ) found that "SCC's termination of applicant (Respondent Icenogle) was not designed to preempt a valid claim for disability retirement, but was due to applicant's criminal conduct. Applying *Haywood* and *Smith*, the termination did not have the effect of preempting an otherwise valid claim for disability retirement. Applicant's claim for disability retirement had not matured at the time of his separation from service. Applicant did not hold an unconditional right to immediate payment, as there was no finding by CalPERS that there was a right to a disability retirement pension. At the time applicant was separated from employment, CalPERS had not determined whether applicant demonstrated a substantial inability to perform his duties. The opinion of applicant's treating worker's compensation physician did not establish a matured right to disability retirement. Applicant's right to disability retirement was thus immature, and his dismissal for cause defeated it."

The ALJ affirmed CalPERS determination that Respondent Icenogle may not file an application for industrial disability retirement and denied his appeal.

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.

September 18, 2013



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