

ATTACHMENT D
STAFF'S ARGUMENT

**STAFF'S ARGUMENT TO IN SUPPORT OF DESIGNATION OF APRIL 22, 2013
FINAL DECISION AS PRECEDENTIAL**

On April 17, 2013, the Board adopted the Proposed Decision *In the Matter of the Application for Industrial Disability Retirement of: Robert Vandergoot*, Respondent (*In Re: Robert Vandergoot*). The Decision of the Board became effective on June 17, 2013. At the August 21, 2013 meeting, the Board directed the Legal Office to solicit written comments from the public regarding whether the April 17, 2013 Board Decision should be designated precedential and upon receipt of these comments, to return to the Board for further consideration of a precedential designation.

In *In Re: Robert Vandergoot*, the Administrative Law Judge (ALJ) explains in detail the statutory and case authority for his findings regarding denial of respondent's application for Industrial Disability Retirement (IDR) on the basis of *Haywood* and *Smith*¹. *In Re: Robert Vandergoot* also clarifies application of the case law when a member resigns employment pursuant to a Settlement Agreement with his/her employer.

The issues resolved by the ALJ in *In Re: Robert Vandergoot* occur repeatedly in disability retirement litigation before the Office of Administrative Hearings (OAH) pursuant to *Haywood* and *Smith*. Presently, the Board has no precedential decisions regarding denial of disability retirement applications pursuant to the case law found in *Haywood* and *Smith*. As a result, staff is asking the Board to designate *In Re: Robert Vandergoot* as precedential to prevent re-litigation of the issue.

1. Statutory Authority.

Pursuant to section 11425.60 in the California Administrative Procedure Act (APA), the Board is authorized to designate all or part of a quasi-judicial administrative decision of the Board as precedential:

(a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a

¹ The cases are fully cited as follows:

Haywood v. American River Fire Prot. District (1999) 67 Cal.App.4th 1292 (*Haywood*)

Smith v. City of Napa (2004) 120 Cal.App.4th 194 (*Smith*)

decision or part of a decision, as a precedent decision is not subject to judicial review.

(c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997. (Emphasis added.)

2. Precedential Effect.

In general, the effect of making a Board decision precedential is to give it "precedential effect," which in this context means:

- The decision may be officially cited in other administrative hearings, and also in court proceedings.
- The decision is considered "case-made" law, comparable to agency rule-making in its legal effect, and may be applied broadly to other cases and the parties involved in other cases. The decision-maker in another administrative matter may expressly rely on the precedential decision to decide the matter, that is, give the law or policy in the decision binding effect in a case involving the same issue as it affects other parties, unless the other case can be factually or legally distinguished.²

² See: 13 CCR 1290 (Office of Administrative Hearings regulation); official *Calif. Law Revision Comments* regarding APA section 11425.60, where it is stated that the statute "... recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking.", and "... is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision." Also see: *Pac. Legal Foundation v. Unemployment Insur. App. Board* (1991) 29 Cal.3d 101, 109; 21 *Jour. Nat. Ass'n Admin. Law Judges* 247 (2001), at pp. 265-267.

A precedential decision of the Board is not binding on the courts, which remain the final arbiters of the law; but a Board precedential decision, as the decision of the agency most knowledgeable and responsible for administering and making policy with respect to the California Public Employees' Retirement Law (PERL), is normally accorded great weight or given deference by the courts.³

If a Board decision is not designated as precedential, its effect is more limited. It may be referenced in other administrative matters or to a reviewing court to inform the judge regarding the Board's administration or interpretation of the PERL, but it has no precedential effect.⁴

The Board's precedential decisions are published in compliance with subdivision (c) of section 11425.60 and are listed in a special on-line index on the Board's website, at:

<http://www.calpers.ca.gov/index.jsp?bc=/about/leg-reg-statutes/board-decisions/current-prec-bd-dec.xml>

3. Board Policy.

The Board's established policy regarding the designation of precedential decisions is based on subdivision (b) of section 11425.60 and calls for consideration of the following two questions:

- Does the decision contain a significant legal or policy determination of general application that is likely to recur?
- Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied?

From the staff's perspective, the answer to both these questions is "Yes."

A. "Significant Legal or Policy Determination of General Application That Is Likely to Recur"

The significant legal and policy determination presented in *In Re: Robert Vandergoot* is the clear and concise explanation of the denial of an application for disability retirement pursuant to the holdings in *Haywood* and *Smith*. The proposed decision determined that Respondent was not entitled to file an application for industrial disability retirement. His termination permanently

³ *City of Oakland v. Pub. Employees' Ret. System* (2002) 98 Cal.App.4th 29, 39; *Hudson v. Board of Administration of the Calif. Pub. Ret. Sys.* (1997) 59 Cal.App.4th 1310, 1324-1325.

⁴ *City of Oakland, supra*, at p. 57.

severed his employment relationship with his employer. The character of the disciplinary action does not change because Respondent elected to settle his case prior to exhausting his appeal rights.

In Re: Robert Vandergoot details the analysis to be used in a *Haywood/Smith* case where an employee has been terminated for cause. *In Re: Robert Vandergoot* also details the analysis to be used where an employee has elected to resign his employment pursuant to a Settlement Agreement. *In Re: Robert Vandergoot* explains that whether the facts show a termination for cause or resignation pursuant to a Settlement Agreement, for purposes of applying *Haywood/Smith*, it's a distinction without a difference. Because both factual scenarios sever the employment relationship, both preclude an application of disability retirement pursuant to *Haywood/Smith*.

Currently, CalPERS repeatedly litigates the issues involved in denial of applications for disability retirement pursuant to *Haywood* and *Smith*.

A precedential decision analyzing the law pertaining to these issues will provide members and employers guidance, and reduce the amount of future litigation.

B. "Clear and Complete Analysis Sufficient For an Understanding of Why the Finding of Facts Were Made and How the Law Was Applied"

The factual findings in *In Re: Robert Vandergoot's* decision are straightforward and easy to understand. The decision first summarizes the facts, then follows a logical analysis of the statutes and regulations to explain the process for determining when an application for disability retirement should be denied pursuant to the holdings in *Haywood* and *Smith*.

In *In Re: Robert Vandergoot*, based on the Notice Of Adverse Action and the Stipulated Settlement Agreement, 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.

The Administrative Law Judge (ALJ) agreed. He found that 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 applies 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. In these situations, 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 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*.

The ALJ similarly found that 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.

As described, *In Re: Robert Vandergoot’s Decision* is constructed logically and interprets *Haywood* and *Smith* in the context of denial of an application for disability retirement due to termination, or resignation pursuant to a Settlement Agreement.

The staff therefore believes that the findings and legal conclusions of *In Re: Robert Vandergoot*, if the case is made precedential, will provide useful, specific rules both for staff and public entities.

Pursuant to Government Code section 11425.6:

(a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency. As a result, the current board decision may be used as persuasive authority and the Administrative Law Judge can at his or her discretion use the decision or not. If the decision is designated as precedential, then the judge would be bound to follow the holding.

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. . . . an agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.

C. Results of the Requests for Public Comments.

On August 26, 2013, a letter was mailed to over 1600 public agencies, 330 state entities, 63 school districts and the respondent in the case asking for comments on whether to designate *In Re: Robert Vandergoot* as a precedential decision.

Staff received a few calls from state agencies who did not choose to provide comments. Staff received only two written comments. The first was from Santa Barbara Unified School District which was in favor of adopting the Decision as precedential. The second was from Alta Vista Elementary School District, which was not in favor of adopting the Decision as precedential, but the District gave no reasons for their response.

Conclusion

For the reasons stated above, staff argues that *In Re: Robert Vandergoot* be designated as precedential.


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