

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Marc Blackman (Respondent) was employed by the Los Angeles County Sanitation District No. 2 (County) as an Industrial Waste Inspector II. By virtue of his employment, Respondent became a local miscellaneous member of CalPERS.

On January 15, 2010, the County terminated Respondent due to Respondent's unavailability for work. On February 3, 2011, Respondent filed an application for disability retirement with CalPERS. Respondent's application was based on "mental problems" (severe panic and anxiety attacks) and "physical injuries" (back, neck, hip and nerve functions). CalPERS staff obtained records relating to Respondent's employment with the County; and, based on the information in the records, concluded that the County had terminated him for cause. Therefore, he was not entitled to apply for a CalPERS disability retirement. CalPERS informed Respondent of its determination, and on July 8, 2011, Respondent appealed CalPERS "cancellation" of his disability retirement application, and a hearing was held on August 27 and 28, 2013, before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings in San Bernardino, California. Respondent and the County were each represented by counsel at the hearing.

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. Thus, the issue here is whether the decision in *Haywood* prevents Respondent from applying for disability retirement.

Respondent's physical problems via several work-related injuries and automobile accidents included injuries that resulted in lumbar laminectomy surgeries, headaches (including migraines), dizziness, neck pain, low-back pain, cervical strain and aggravation of cervical discogenic disease with C6-7 herniation, failed back syndrome, and trochanteric bursitis. Respondent's psychological problems via several work-related injuries and automobile accidents included diagnoses of post traumatic stress disorder (PTSD) from Respondent's two treating physicians, Dr. Chuck Leeb, Ph.D., a licensed Clinical Psychologist, and Dr. Donald S. Horowitz, a Diplomate of the American Board of Psychiatry and Neurology.

Respondent has remained on temporary total disability (TTD) under workers' compensation due to his physical injuries and PTSD, and has never been medically released for work by any of his treating doctors. Respondent's psychologist appeared at the instant hearing, and testified that Respondent was mentally incapable of attending the January 12, 2010, Skelly Hearing due to PTSD and that Respondent's appearance at the instant hearing was causing him to regress in the progress that had been made in treating his PTSD.

The ALJ noted further that CalPERS refusal to accept Respondent's application for disability retirement was based on the County's decision to fire Respondent prior to the date upon which Respondent submitted his disability retirement application. However, based on the limited information available to CalPERS when it cancelled Respondent's application, CalPERS was incorrectly led to believe that Respondent was dismissed from employment for reasons which were not the result of a disabling condition.

The ALJ made findings that Respondent was dismissed from employment based exclusively on his unavailability for work, and his unavailability for work was due to his disabling physical and psychological conditions. As a result of these findings, the ALJ concluded that Respondent's appeal should be granted. 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's appeal has been granted and Respondent is unlikely to file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

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