

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Raul L. Bautista was employed as a Refuse Truck Operator by the City of Torrance (City). The City contracted with CalPERS to provide retirement benefits to their employees. Accordingly, by virtue of his employment, Respondent was a local miscellaneous member of CalPERS. The City terminated Respondent for cause effective November 30, 2005. Respondent submitted an application for disability retirement almost two years later, on November 9, 2007. CalPERS staff reviewed the application and communicated with the City, asking for information regarding Respondent's employment. The City advised staff that Respondent had been terminated for cause as of November 30, 2005, which date Respondent acknowledged, in his application for disability retirement, was his last day on payroll with the City.

Pursuant to the decision in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App. 4<sup>th</sup> 1292, a CalPERS member who has been terminated for cause is not eligible to apply for disability retirement. The court in *Haywood* stated that there are two circumstances (exceptions) in which an employee terminated for cause can still seek a disability retirement. A CalPERS member, terminated for cause, can still apply for disability retirement if the termination was either (1) the ultimate result of a disabling condition, or (2) preemptive of an otherwise valid claim for disability retirement.

CalPERS staff determined that Respondent had been terminated for cause by the City and that Respondent's termination was neither the result of a disabling condition nor preemptive of an otherwise valid claim for disability retirement. Staff notified Respondent and the City that, pursuant to the *Haywood* decision, Respondent was ineligible to apply for disability retirement. Respondent appealed this determination and a hearing was held on November 26, 2013.

Prior to hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process handbook. CalPERS answered Respondent's questions, and provided him with information on how to obtain further information on the process.

The Assistant City Manager for the City, Mary Giordano, testified at the hearing. Relevant documents were offered and received into evidence. Based upon Ms. Giordano's testimony and the documentary evidence, the Administrative Law Judge (ALJ) found that Respondent had requested a two-week vacation in March 2005. The day after his request for vacation had been denied by his supervisor, Respondent claimed an injury to his left arm. The ALJ found that the City referred Respondent to a physician, who, based upon Respondent's complaints and his examination, ordered work restrictions for Respondent, including that Respondent not use his left arm, perform no work with his left arm or hand and wear an elbow brace and wrist brace, which were provided to Respondent by the physician's office. The City provided Respondent with modified work

duties and paid Respondent a workers' compensation benefit equal to 85% of his normal salary during the period of time that Respondent was on industrial leave for the claimed injury (approximately one month).

The ALJ also found that the City had secured sub rosa surveillance images of Respondent, following his claim of an injury to his left arm, which showed Respondent lifting and carrying large and heavy items, such as a mattress, furniture and a television. In the surveillance video tape Respondent did not appear to be in any pain or discomfort when using his left arm and clearly was not wearing the braces that had been prescribed for him by the examining/treating physician. The surveillance images were shown to the physician who had prescribed work restrictions, braces and industrial leave for Respondent. In response, the physician wrote in a letter to the City:

"Based on my observation of the films, [Respondent] could have perform [sic] his regular duties on March 26. If I had seen the films earlier, I would not have placed [Respondent] on modified work at the follow-up visit on March 29. I would have placed him on regular work."

Ms. Giordano testified and the documentary evidence established that the City determined that Respondent had engaged in misconduct by intentionally misusing and abusing the Workers' Compensation Benefit System, which resulted in his receiving pay and benefits to which he was not entitled. Respondent's demonstrated misconduct was the basis for the City's termination of his employment.

Respondent testified at the hearing, stating that he still has problems with his left arm and that the surveillance images showing him moving furniture were because, at the time, he was going through a divorce, had to move and had no one to help him. As noted by the ALJ in Factual Finding No. 20, "Respondent offered no testimony or documents to establish that the termination of his employment was not for cause or that the discharge was the ultimate result of a disabling condition or preemptive of an otherwise valid claim for disability retirement."

After considering all of the testimony and documentary evidence, the ALJ concluded that good cause did exist for CalPERS to reject Respondent's application for disability retirement. CalPERS properly rejected Respondent's application for disability retirement, pursuant to the decision in *Haywood*, because Respondent's termination from employment with the City had been for cause and Respondent had failed to present any evidence to show, or even suggest, that his termination was because of an existing disabling condition or a preemptive move by the City to prevent him from presenting an otherwise valid claim for 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.

February 20, 2014



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RORY J. COFFEY  
Senior Staff Attorney