ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent David Bowman (Respondent Bowman) was employed by respondent California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer at the Substance Abuse and Treatment Facility and State Prison at Corcoran. By virtue of his employment, Respondent became a state safety member of CalPERS.

Respondent CDCR served Respondent Bowman with a Notice of Adverse Action (NOAA) terminating his employment for cause effective February 15, 2011. According to the NOAA, the basis for Respondent Bowman's dismissal was: (1) his inexcusable neglect of duty, dishonesty, willful disobedience, and other failure of good behavior either during or outside of duty hours that caused discredit to the appointing authority or employment, within the meaning of Government Code section 19572, subdivisions (d), (f), (o), and (t); (2) his violation of California Code of Regulations, title 15, sections 3391 (employee conduct) and 3413 (incompatible activity); and (3) his violation of various sections of the Department Operations Manual, CDCR's Code of Conduct and the Law Enforcement Code of Ethics. The specific factual bases for the dismissal were: fraud surrounding a workers' compensation claim for a January 16, 2008, incident; dishonesty surrounding a personal injury claim against Chili's Grill and Bar; and his dishonesty in the investigative interview regarding the impact of his injury, his statements to his physical therapist, his statements about the Chili's incident and the sub-rosa and surveillance videos.

Despite doctors' orders and Respondent Bowman's own repeated complaints of debilitating headaches, pain to his knees, back and shoulder, Respondent Bowman was documented working out at his local health club 190 times in the 16 months following his injury. Many of the workouts occurred on the same day as doctor appointments in which Respondent Bowman claimed to be suffering from debilitating pain. Respondent Bowman was also caught moving a refrigerator by himself, riding with another person on his motorcycle and failing to disclose another alleged injury suffered at Chili's and settlement compensation paid as a result of that alleged injury.

On October 5, 2011, Respondent Bowman signed an industrial disability retirement (IDR) application. He claimed disability based on his back and left knee injuries from the January 16, 2008, injury. Respondent Bowman indicated that he was not physically able to perform the required physical duties of a correctional officer and had "limited motion and stamina."

CalPERS reviewed the facts and learned that Respondent Bowman had been terminated by Respondent CDCR, had appealed the termination to the State Personnel Board (SPB) and then later dismissed it. Based on the NOAA and dismissal of the SPB appeal, CalPERS determined that Respondent Bowman was ineligible to apply for IDR 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 IDR. Respondent appealed and a hearing was completed on October 10, 2013.

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 Bowman from filing an application for disability retirement. The *Haywood* 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 disability retirement, 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 Administrative Law Judge (ALJ) determined that in light of Respondent Bowman's termination for cause, his IDR application can be considered only if he has established that his termination from CDCR was either the "ultimate result of a disabling medical condition" or "preemptive of an otherwise valid claim for disability retirement," within the meanings of the *Haywood* and *Smith* cases.

The ALJ concluded that the evidence in this case does not support a conclusion that Respondent Bowman was terminated as the "ultimate result of a disabling medical condition" because it was based upon multiple instances of dishonesty that were related not only to the workers' compensation claim, but also Respondent Bowman's attempt to obtain an insurance payment from Chili's and his internal affairs interview statements.

The ALJ further concluded that the evidence in this case does not support a conclusion that Respondent Bowman's dismissal was "preemptive of an otherwise valid claim for disability retirement" because there was no evidence that he had a matured claim for disability before his dismissal.

The ALJ concluded that Respondent Bowman'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

CHRISTOPHER PHILLIPS
Staff Attorney