ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

The hearing on this case was completed November 12, 2013. The sole issue for hearing was whether Respondent Jackie Wilson (Respondent) is eligible to apply for Industrial Disability Retirement (IDR) following his voluntary resignation from state service. Following the hearing, a Proposed Decision was issued on December 5, 2013. The Proposed Decision found in favor of CalPERS' denial of Respondent's application to apply for IDR on the basis of *Haywood* and *Smith*. The Board voted to adopt the Proposed Decision on February 20, 2014. Respondent submitted his Petition for Reconsideration on March 25, 2014.

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.

Respondent was employed by Respondent Department of Mental Health, Atascadero State Hospital (DMH) as a Custodian. On July 26, 2011, DMH served Respondent with a Notice of Adverse Action (NOAA) terminating his employment based on Respondent's actions falsifying time records. Respondent appealed his termination. During the pendency of time for his appeal to be heard, the termination was resolved by stipulation incorporated into a Proposed Decision by the State Personnel Board (SPB) Administrative Law Judge. The SPB adopted the Decision Approving Stipulation for Settlement on October 28, 2011. The SPB Decision rescinded the termination and changed it to a voluntary resignation. DMH agreed to withdraw the NOAA, and the parties agreed Respondent would voluntarily resign from employment effective February 24, 2011.

The Stipulated Settlement contained the following provision (Paragraph 5):

> Respondent agrees that following his resignation from DMH, he shall not apply for or accept future employment with DMH or exercise any right of return, mandatory right of return, reinstatement, or rehire at any time with DMH or their successors in interest. Should Respondent be inadvertently hired by DMH at any time, after the execution of this settlement agreement, Respondent agrees and understands that his employment with DMH shall be void and immediately rescinded. Respondent further agrees and understands that he waives any and all rights of appeal from such decision and/or action, including but not limited to, any appeal to the SPB.

On May 24, 2011, Respondent signed an IDR application. He claimed disability based on an orthopedic condition (low back pain).

Based on the NOAA and the Stipulated Settlement, CalPERS determined that Respondent 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 Industrial Disability Retirement.

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 a disability retirement application. 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) found that while Respondent was initially terminated, the stipulated settlement converted the termination for cause into a resignation and waiver of any return rights. Thus the question presented is whether this separation is tantamount to termination such that the bar to an application for IDR applies.

The ALJ found this very question addressed by the CalPERS Board of Administration in a Precedential Decision entitled *In the Matter for Application for Disability Retirement of Robert C. Vandergoot, Respondent*, which was made Precedential by the CalPERS Board on October 16, 2013. The Precedential Decision in *Vandergoot* included the determination that the resignation constituted a complete severance of the employment relationship and that it was not possible to reinstate Respondent if he was no longer disabled. Therefore, the necessary pre-requisite for receiving disability benefits was not satisfied and Respondent was not eligible to apply for IDR. The Precedential Decision concluded that CalPERS "can fairly conclude the terms of the Stipulated Settlement of Respondent's SPB case as being tantamount to a dismissal for purposes of applying the *Haywood* criteria."

The ALJ concluded that the facts were not in dispute, and that Respondent was terminated because he falsified time keeping records. The termination was resolved by his resignation and waiver of return rights.

The ALJ upheld CalPERS' determination that Respondent is not entitled to file an application for IDR. Respondent's termination permanently severed his employment relationship with DMH. 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 the *Haywood* and *Smith* cases, and the Precedential Decision in *Vandergoot*, bar Respondent's eligibility to apply for IDR. Respondent's grounds for reconsideration in his petition are based on disagreement with the ALJ's findings, and disagreement with the date he submitted his IDR application. Respondent gives no evidentiary support for his petition.

With respect to Respondent's disagreement with the ALJ's findings and analysis, it is clear from the Proposed Decision that evidence was taken, and exhibits were submitted. Evidence was taken on the underlying facts and documentary evidence was admitted. The ALJ simply found against Respondent. Respondent has not raised any new facts, evidence or change in circumstances which would warrant reconsideration.

Respondent claims in his Petition that he filed for retirement August or September 2010, not 2011. However, the evidence shows that he signed and submitted his IDR application on May 24, 2011.

For all of the reasons stated above, staff argues the Board deny the Petition for Reconsideration and uphold its decision.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Petition for Reconsideration are minimal. Respondent may file a writ petition in superior court seeking to overturn the decision of the Board.

April 16, 2014

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