

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Patrick Cancilla (Respondent) was employed by respondent Department of Transportation (CalTRANS) as a Staff Services Manager II (SSMII). By virtue of his employment, Respondent became a miscellaneous member of CalPERS.

On July 8, 2010, CalTRANS served Respondent with a Notice of Adverse Action (NOAA) terminating his employment based on Respondent's failure to follow his supervisor's instructions, dishonesty, insubordination, willful disobedience and neglect of duty. Respondent elected not to have a *Skelly* hearing, and appealed his NOAA.

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 The SPB Decision rescinded the termination and changed it to a voluntary resignation. CalTRANS agreed to withdraw the NOAA, and the parties agreed Respondent would voluntarily resign from employment effective July 31, 2011.

The Stipulated Settlement contained the following provision (Paragraph 7):

Respondent agrees not to seek or accept employment with CalTRANS or its successors at any time after July 31, 2011. Should respondent obtain employment with CalTRANS at any time subsequent to that date, Respondent agrees that CalTRANS may summarily dismiss respondent, and Respondent hereby waives any right to appeal that dismissal in any forum whatsoever.

On June 3, 2011, Respondent signed a Service Pending Disability Retirement (DR) application. He claimed disability based on depression and anxiety resulting from inappropriate termination which was later withdrawn.

CalPERS reviewed the facts and learned that Respondent had been terminated, had appealed his termination to the SPB, and had entered into a Stipulated Settlement in which he agreed to permanently withdraw his appeal of the NOAA, resign from his position with CalTRANS, never apply for or accept employment with CalTRANS, and waive his reinstatement and employment rights.

Based on the NOAA and the Stipulated Settlement, CalPERS determined that Respondent was ineligible to apply for DR 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. Respondent appealed and a hearing was completed on January 22, 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.

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 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*, made Precedential by the CalPERS Board on October 16, 2013. *Vandergoot* holds that a resignation of an employee is tantamount to a dismissal for the purposes of applying the *Haywood* and *Smith* criteria when the employee: (1) resigned pursuant to a settlement agreement entered into to resolve a dismissal action; and (2) agreed to waive all rights to return to his former employer. As explained in *Vandergoot*, "a necessary requisite for DR is the potential reinstatement of the employment relationship with the employer if it ultimately is determined that the employee is no longer disabled."

The ALJ found that Respondent agreed to settle his dismissal action served upon him by resigning and waiving his right to return to employment with CalTRANS. Pursuant to *Vandergoot*, Respondent's resignation under these circumstances was tantamount to a dismissal for the purposes of applying the *Haywood* and *Smith* criteria. Respondent did not establish either: (1) that his separation from state service was the ultimate result of his disabling condition; or (2) that his separation from state service preempted his otherwise valid claim for disability retirement. In addition, Respondent did not establish that there were any equitable principles that should be applied to grant him the right to seek DR.

The ALJ upheld CalPERS' determination that Respondent is not entitled to file an application for DR. Respondent's termination permanently severed his employment

relationship with CalTRANS. 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 disability retirement.

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.

April 16, 2014

  
ELIZABETH YELLAND  
Senior Staff Attorney