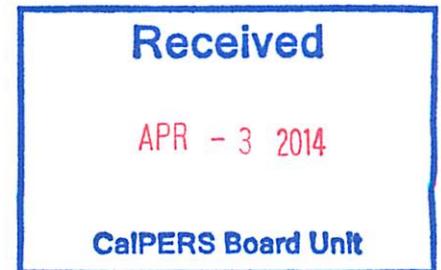


**ATTACHMENT C**  
**RESPONDENT(S) ARGUMENT(S)**

March 24, 2014

Ref No. 2012-0691

Cheree Swedensky, Assistant to the Board  
CalPERS Executive Office  
PO Box 942701  
Sacramento, CA 94229-2701



SUBJECT: Written Argument Against Proposed Decision in the Matter of the Appeal of the Disability Retirement of PATRICK CANCELLA, Respondent, and CALIFORNIA DEPARTMENT OF TRANSPORTATION

On July 9, 2010 respondent was served with a Notice of Adverse Action (NOAA) terminating him July 19, 2010. Respondent provided exhibits to the Office of Administrative Hearings directly refuting many of the charges. None of the allegations would have resulted in a findings of Termination and respondent appealed the NOAA to the SPB. A hearing was held on October 4, 2010 and the Department of Transportation (DOT) offered to settle the case by withdrawing the NOAA, providing respondent with 6 months of Administrative Time Off (ATO), and allowing respondent to use leave credits until after respondent reached voluntary retirement age. The DOT agreed to remove NOAA from respondents Personnel File as well as agreed to not file the SPB stipulated settlement, nor the SPB Decision approving the stipulated settlement, into the Official Personnel File. In exchange the DOT requested a resignation that would have been made inoperative if respondent obtained another job within the State prior to the effective date of the resignation.

Although respondent had not intended on settling the case, due to respondent's mental state, he agreed to the settlement. It is important to note that unlike *Haywood v. American River Fire Protection District* and *Smith v. City of Napa*, respondent was never "terminated". There was never any finding substantiating the NOAA. The DOT withdrew the NOAA and reinstated the employee for over a year until he Serviced Pending Disability Retired at close of business, July 31, 2011. Respondent was never informed that voluntarily resigning would result in disqualification for disability retirement and would not have settled had he known this. Very simply, respondent believed that since the DOT withdrew the termination, he had not been terminated! If respondent had not been disabled during this over one-year period he could have obtained another State job and, per the SPB agreement, the **resignation would have been inoperative.**

In Vandergoot the employer also withdrew the termination and acknowledged he could accept employment with another State Agency. Although the termination was withdrawn, Vandergoot was placed on unpaid leave. The big distinction in the present case is that in order to induce respondent to settle the SPB case, the DOT agreed to provide respondent with ATO for 6 months!

The DOT then agreed to let respondent use his sick leave until he reached the voluntary retirement age of 55. Because the DOT had no chance of winning their case, the DOT provided respondent with paid leave and essentially agreed and facilitated his applying for retirement.

Government code section 21192 states,, the governing body of the employer from whose employment the person was retired, may require any recipient of a disability retirement allowance *under the minimum age for voluntary retirement for service* applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her.

Because respondent had reached voluntary retirement age and filed for Service Pending Disability Retirement, he did not have mandatory reinstatement rights as asserted by the Judge in the present case. Respondent would not have had mandatory reinstatement rights back to DOT even absent a voluntary resignation.

The facts do not establish that respondent's resignation was tantamount to a dismissal under Haywood and Smith. The DOT withdrew their NOAA and reinstated respondent as a paid employee with all the rights and benefits of an employee. Respondent was reinstated for over one year and paid into CalPERS until he reached voluntary retirement age. These facts do constitute an admission by DOT that that its NOAA against respondent was not meritorious. Finally the respondent's employment record does not show that he resigned, but that he **Service Pending Disability Retired**. Respondent does qualify for Disability Retirement as he was never terminated from the DOT, but simply retired from DOT.

Patrick Cancilla