

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Jacob Berghorst (Respondent Berghorst) was employed by Respondent California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Sergeant at the Deuel Vocational Institution. By virtue of his employment, Respondent Berghorst became a state safety member of CalPERS.

Respondent CDCR served Respondent Berghorst with a Notice of Adverse Action (NOAA) terminating his employment for cause effective November 29, 2010. According to the NOAA, the basis for Respondent Berghorst's dismissal was violations of Government Code section 19572; including, inexcusable neglect of duty, dishonesty, discourteous treatment of the public or other employees, and other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

The incident leading to the NOAA occurred on November 14, 2009, in which Respondent Berghorst was involved in an off-duty incident where he consumed alcohol and became drunk. He engaged in a physical altercation with his girlfriend, and operated a vehicle while intoxicated. He was subsequently arrested for corporal injury upon a spouse or cohabitant. A hearing was held before the State Personnel Board (SPB) on June 20 and 21, 2011. By order dated September 28, 2011, the dismissal of Respondent was sustained. After Respondent Berghorst's SPB appeal hearing, he was found to have made material misrepresentations to law enforcement officers designed to conceal his misconduct, and was also found to have attempted to coach or influence his girlfriend's testimony regarding an Office of Internal Affairs investigation into the matters. The SPB decision was upheld on appeal to the San Joaquin County Superior Court on January 31, 2013.

On May 27, 2011, Respondent Berghorst signed an application for Industrial Disability Retirement (IDR). He claimed disability based on an orthopedic injury (herniation of lumbar disc/lumbar radiculopathy) that occurred on June 24, 2010.

CalPERS staff reviewed the facts and learned that Respondent Berghorst had been terminated by Respondent CDCR. Based on the NOAA, which was upheld by the court, CalPERS determined that Respondent Berghorst 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 Berghorst appealed and a hearing was completed on March 13, 2014.

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 Berghorst 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.

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

The Administrative Law Judge (ALJ) determined that in light of Respondent Berghorst'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 Respondent Berghorst'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.

May 21, 2014



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Staff Attorney