

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Sergio Garcia (Respondent) was employed by respondent Department of Industrial Relations (DIR) as a Senior Special Investigator. By virtue of his employment, Respondent became a state safety member of CalPERS.

On January 13, 2010, DIR served Respondent with a Notice of Adverse Action (NOAA), seeking to dismiss Respondent for cause effective January 20, 2010. Respondent appealed his termination.

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 March 8, 2012. According to the terms of the Stipulated Settlement, Respondent submitted a voluntary resignation and DIR agreed to withdraw the NOAA.

The Stipulated Settlement contained the following provisions:

4. Agreement not to Seek or Accept Future Employment by the Labor and Workforce Development Agency. Respondent agrees to never apply or reapply for employment or reemployment by DIR, or for any appointing authority within the Labor and Workforce Development Agency (LWDA), which includes but is not limited to the Department of Industrial Relations, the Employment Development Department, the Workforce Investment Act Board and the Agricultural Labor Relations Board, and never to take any steps to become so employed or reemployed and to refrain from accepting any offer of employment from any appointing authority within the LWDA. In the event any appointing authority within the LWDA hereafter employs Respondent, Respondent agrees that the fact of such employment shall not be a waiver of any of the terms of this Agreement and shall be deemed a breach of this Agreement.

5. Remedy in the Event of Respondent's Breach. In the event Respondent breaches this agreement and hereafter seeks and/or becomes employed by any appointing authority within the LWDA, Respondent agrees that such appointing authority may immediately dismiss him based upon his violation of this agreement without serving him with a Notice of Adverse Action, otherwise required by Gov. Code section 19574, and without serving him Skelly documents pertaining to said dismissal. Respondent additionally waives any right to appeal such dismissal to the State Personnel Board and waives the procedural protections set forth in Gov. Code sections 19574 and 19574.1 as they pertain to such dismissal.

On May 25, 2012, Respondent signed an Industrial Disability Retirement (IDR) application. He claimed disability based on orthopedic conditions (right shoulder, head, finger).

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 DIR, never apply for or accept employment with DIR or other appointing authority, and waive his reinstatement and employment rights.

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. Respondent appealed and a hearing was completed on May 8, 2014. Respondent was represented by counsel at hearing.

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 settlement converted the termination for cause into a resignation and waiver of any return rights to DIR. Thus the question presented is whether this separation is tantamount to termination such that the bar to 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*, 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."

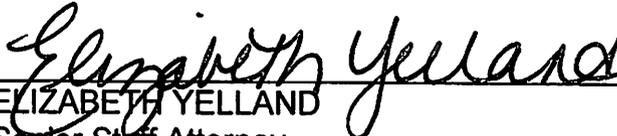
The ALJ concluded that Respondent's eligibility to file an IDR application is dependent on his having a continuing employment relationship with DIR. Respondent does not have such an employment relationship, and so is not eligible to file an IDR retirement application. By the terms of the Stipulated Settlement, Respondent resigned from employment with DIR and agreed not to reapply for employment with DIR or any other appointing authority within the LWDA. Such resignation severed the employment relationship which *Haywood* and *Vandergoot* require for CalPERS to be able to process a disability retirement application, and Respondent's application must be rejected.

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 DIR. 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.

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.

September 17, 2014


ELIZABETH YELLAND
Senior Staff Attorney