

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Gabriel Arriaga (Respondent) was employed by respondent California Department of Forestry and Fire Protection (CalFIRE) as a Fire Captain. By virtue of his employment, Respondent became a state safety member of CalPERS.

On January 7, 2012, CalFIRE investigators interviewed Respondent in connection with his alleged use of a state credit card to fuel his personal vehicle in the early morning hours of December 29, 2011.

On April 2, 2012, CalFIRE served Respondent with a Notice of Adverse Action (NOAA), seeking to dismiss Respondent for cause effective April 18, 2012. 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 November 26, 2012. According to the terms of the Stipulated Settlement, Respondent submitted a voluntary resignation and CalFIRE agreed to withdraw the NOAA.

The Stipulated Settlement contained the following provisions:

1. CalFIRE agrees to withdraw the NOAA and to remove the Notice and all accompanying documents from Respondent's Official Personnel File . . . within 10 days of the date the SPB approves the Agreement. CalFIRE further agrees to pay Respondent the sum of \$25,000.
2. Respondent shall be placed on an unpaid leave of absence, effective at the close of business April 18, 2012. Respondent has applied for Industrial Disability Retirement Benefits before the Public Employees Retirement System (PERS). In the event Respondent's application for industrial disability retirement benefits is granted, Respondent agrees to waive any permissive or mandatory reinstatement rights he might thereafter have to any position with CalFIRE. In the event Respondent's application for Industrial Disability Retirement benefits is denied by PERS or is withdrawn by Respondent, Respondent shall be deemed to have resigned from his employment with CalFIRE effective as of the date that Respondent's application for Industrial Disability Retirement benefits is denied by PERS or is withdrawn by Respondent and this Agreement shall serve as Respondent's resignation from his employment with CalFIRE. Respondent shall remain on unpaid leave of absence during the period that Respondent's application for Industrial Disability Retirement benefits is pending before PERS.
3. Respondent agrees not to apply for, or to accept, any future employment with CalFIRE. Should Respondent apply for or accept

employment with CalFIRE Respondent will be dismissed by CalFIRE without any right to appeal said dismissal. If CalFIRE inadvertently offers Respondent employment or hires respondent, respondent will be dismissed by CalFIRE without any right of appeal of said dismissal.

On April 18, 2012, Respondent signed an Industrial Disability Retirement (IDR) application. He claimed disability based on "psyche, heart, cardiovascular system, hypertension, lower back, hearing loss and hernia."

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, never apply for or accept employment with CalFIRE, 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 under the rule of law set forth in 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 appealed and a hearing was completed on June 17 and July 23, 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.

Respondent argued that he did have reinstatement rights to CalFIRE, but simply agreed to waive them if his IDR is granted. The Administrative Law Judge (ALJ), however, found that such a waiver is the very point of *Vandergoot*: just as a termination for cause severs the employer/employee relationship, the terms of Respondent's settlement with

CalFIRE sever his employer/employee relationship with CalFIRE if he is retired for disability.

The ALJ found this case was indistinguishable from the Precedential Decision *In the Matter of the Application for Industrial Disability Retirement of Robert C. Vandergoot, Respondent*, made precedential by the CalPERS Board on October 16, 2013. If anything, the ALJ found Respondent Arriaga's agreement is even more explicit in eliminating any potential reemployment rights, as it expressly precludes Respondent from ever being employed by CalFIRE in the future and provides for mandatory dismissal if he is inadvertently employed. The ALJ found that the terms of Respondent's settlement of his disciplinary action are equivalent to a termination for cause under *Haywood, Smith* and *Vandergoot*.

The ALJ found that under *Haywood, Smith* and *Vandergoot*, the terms of Respondent's Settlement Agreement with CalFIRE are tantamount to a termination for cause. As a result, his application for IDR is barred.

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 CalFIRE. 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.

November 19, 2014


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