

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Joseph Lujan (Respondent) was employed by respondent California Department of Corrections and Rehabilitation (CDCR) as a Correctional Officer. By virtue of his employment, Respondent became a state safety member of CalPERS.

On March 14, 2013, CDCR served Respondent with a Letter of Intent notifying him that an investigation into his misconduct had been completed.

On April 5, 2013, Respondent signed an application for Service Pending Industrial Disability Retirement (IDR). His claimed disability was an orthopedic (left knee) condition.

On April 12, 2013, CDCR served Respondent with a Notice of Adverse Action (NOAA) with an effective dismissal date of April 30, 2013.

On April 26, 2013, Respondent retired for Service Pending IDR, and has been receiving his service retirement allowance since then.

On April 30, 2013, the Warden at CDCR wrote a letter to Respondent confirming his retirement. Relevant portions of the letter state:

This will confirm that you service retired from employment with the CDCR effective April 26, 2013. . . .I have reviewed the circumstances present at the time of your retirement and have determined that your retirement was "under unfavorable circumstances."

If you should apply for or accept employment or re-employment with Prison Industry Authority, CDCR, Youth and Adult Correctional Agency, and/or Board of Parole Hearings, CDCR would seek to reinforce the Adverse Action which was pending at the time your retirement occurred.

CalPERS reviewed the facts and learned that Respondent had resigned in the face of an ongoing disciplinary action four days before he was to be dismissed and that he could never apply for or accept employment with CDCR, nor other related appointing authorities.

Based on the Letter of Intent, the NOAA, and the Warden's Confirmation of Retirement Letter, CalPERS determined that Respondent was ineligible to apply for IDR under the rule of law set forth in the *Haywood* and *Smith* cases, because dismissal proceedings had been instituted against him, and his dismissal was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for IDR.

On November 5, 2013, CalPERS canceled Respondent's application for IDR due to the operation of *Haywood* and *Smith*. Respondent appealed.

A hearing was completed on March 4, 2015, on the sole issue of whether Respondent was eligible to submit an application for IDR, or whether he was barred by operation of *Haywood* and *Smith*. Respondent was represented by counsel at the 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.

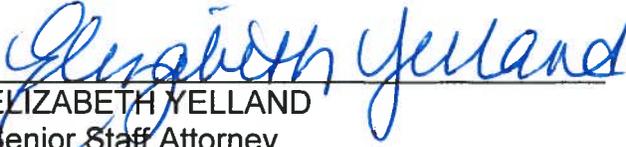
The Administrative Law Judge (ALJ) reviewed *Haywood*, *Smith* and the Precedential Decision *Vandergoot*. The ALJ found that Respondent was never terminated by CDCR. While termination procedures had begun, the effective date of his service retirement (April 26, 2013) occurred before the effective date of the termination of his employment (April 30, 2013). Since Respondent's service retirement constituted a permanent separation from state service, there was no state service from which the NOAA could dismiss him, effective April 30, 2013. Thus, the ALJ found *Haywood*, *Smith* and *Vandergoot* inapplicable.

Therefore, the ALJ found no cause exists to uphold CalPERS' determination that Respondent is not eligible to file an application for IDR. The ALJ granted Respondent's appeal to be allowed to file an application 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. Respondent's appeal was granted. The Respondent is unlikely to file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

May 20, 2015


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