ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Deanna Lewis (Respondent Lewis) was employed as a Peace Officer by the City of South Lake Tahoe (City). By virtue of her employment, Respondent Lewis was a local safety member of CalPERS. Respondent Lewis submitted an application for industrial disability retirement (IDR) and the City had agreed to approve Respondent Lewis's application for IDR. Staff, after reviewing documents related to Respondent Lewis's employment and termination from the City, determined that Respondent Lewis was not eligible to apply for disability retirement, based upon the decision in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292. CalPERS notified both Respondent Lewis and the City that Respondent Lewis was not eligible to apply for disability retirement and cancelled Respondent Lewis's application for IDR. Respondent Lewis appealed the CalPERS determination and a hearing was held on January 15, 2015. The parties submitted post-hearing briefs. The matter was submitted for decision on February 16, 2015.

Prior to the hearing, CalPERS explained the hearing process to Respondent Lewis and the need to support her case with witnesses and documents. CalPERS provided Respondent Lewis with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Lewis's questions and clarified how to obtain further information on the process. Respondent Lewis was represented by counsel at the hearing.

Pursuant to the decision in *Haywood,* a CalPERS member who has been terminated for cause is not eligible to apply for disability retirement. The court in *Haywood* stated that there are two circumstances (exceptions) in which an employee terminated for cause can still seek a disability retirement. A CalPERS member, terminated for cause, can still apply for disability retirement if the termination was either (1) the ultimate result of a disabling condition, or (2) preemptive of an otherwise valid claim for disability retirement.

Additionally, Government Code section 21156 provides, in relevant part, as follows:

> (2) In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and <u>shall not use disability retirement as a substitute for the disciplinary process.</u> (Emphasis added.)

The City did not appear at the hearing. The Administrative Law Judge (ALJ) found that adequate notice of the hearing had been provided to the City and that its election to not participate allowed the ALJ to take a default against the City, pursuant to Government Code section 11520.

Documentary evidence and testimony from Respondent Lewis established that in April 2013, the City served Respondent Lewis with a Notice of Intent to Terminate. The Notice alleged multiple acts of misconduct by Respondent Lewis, including failure to follow orders of a superior officer, insubordination, and giving false or misleading statements. Respondent Lewis requested a Skelly hearing in order to respond to the allegations. The Skelly hearing was held by the City Manager of the City on June 3, 2013. On June 17, 2013, the City Manager issued a written memo advising that she was upholding the decision to terminate Respondent Lewis's employment with the City. On June 18, 2013, Respondent Lewis, through her attorney, filed an appeal, pursuant to the applicable terms of the controlling Memorandum of Understanding.

Respondent Lewis did not file her application for IDR until August 20, 2013. At the time Respondent Lewis filed her application for IDR, she had been terminated by the City, although that termination had been appealed.

On December 13, 2013, Respondent Lewis signed a Liability Claim against the City, alleging wrongful termination and seeking one million dollars in lost wages and benefits, lost earning capacity, and general and special damages.

Under Government Code section 21156, the City is responsible for making the determination of whether to approve or deny Respondent Lewis's application for IDR. As part of that process, the City's Human Resource Manager had been requesting that Respondent Lewis provide copies of medical records/reports. In a January 14, 2014, letter the Human Resources Manager advised Respondent Lewis, in relevant part, "There is no finding that you are unable to return to your duties of Police Officer due to medical reasons."

Throughout this period, Respondent Lewis, through her attorney, had been in settlement discussions with the City. Those discussions resulted in an agreement between Respondent Lewis and the City that, in exchange for Respondent Lewis dropping her appeal of her termination and dismissing her lawsuit against the City, the City would (1) reinstate Respondent Lewis, (2) allow Respondent Lewis to "resign" from employment, and (3) approve Respondent Lewis's application for IDR.

CalPERS staff rejected the agreement between Respondent Lewis and the City, finding that Respondent Lewis had been terminated for cause and therefore was not eligible to apply for IDR.

In Factual Findings Nos. 18, 19 and 20, the ALJ made it clear that the City's actions in agreeing to reinstate Respondent Lewis, allowing her to resign and thereafter approving her application for IDR could not be allowed to stand.

> There is no dispute that the City agreed to approve [Respondent's] industrial disability retirement (IDR) application in exchange for her dismissal of all claims and her resignation. [Respondent] "resigned because the local

> contracting agency, the City, who was a party to the settlement, agreed to approve her IDR ...the sole reason for agreeing to resign was to receive her IDR." ([Respondent's] closing brief pg 9 lines 8-13.) (Factual Finding No. 18.)
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> Government Code, section 21156. (Factual Finding No. 19.)
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> The evidence is clear that the City allowed [Respondent] to reinstate from her termination and resign, and approved her IDR, in settlement of the disciplinary process and related civil claims. The evidence is that the City was only beginning to review [Respondent's] disability status and had no evidence of permanent incapacity at the time the proposal was made in settlement negotiations to grant [Respondent] IDR in exchange for releasing the City from liability and securing [Respondent's] resignation. The City agreed to the arrangement and bound itself to finding that [Respondent] had sustained a permanent industrial disability. <u>The City's actions were in contravention of the prohibition of section 21156, subdivision (2) against using approval of IDR as a substitute for the disciplinary process.</u> (Factual Finding No. 20.) (Emphasis added.)

Turning to a discussion of the application of the decisions in *Haywood*, *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 and In the Matter of *Robert C. Vandergoot* (2013) California Public Employees' Retirement System Board of Administration, Precedential Dec. No. 13-01, the ALJ rejected Respondent's argument that she had not really been terminated because, pursuant to her agreement with the City, she had actually resigned from her employment.

> [Respondent's] argument is not persuasive. [Respondent] resigned in lieu of termination and in exchange for City approval of an industrial disability pension. The employment relationship was severed. The settlement agreement [Respondent] executed did not contain explicit language acknowledging that [Respondent] was barred from seeking employment in any capacity with the City Police Department. However, [Respondent's] Resignation letter, which was attached to the settlement agreement and "contingent upon the settlement agreement," provided that [Respondent] "agree[s] to waive and relinquish any and all reinstatement rights I may have." The Resignation Letter also states that [Respondent] agrees to "withdraw any and all ...actions...whether filed or *unfiled*, which seek reinstatement of my employment." (Italics added.) (Finding 11.) [Respondent] thus does not have any present or

> potential right to reinstatement should she be determined to be fit to return to work. The holdings in *Haywood, Smith* and *Vandergoot* bar [Respondent] from eligibility for a disability retirement. (Factual Finding No. 26.)

The ALJ also found that there was no evidence to support a claim that Respondent Lewis fell within either of the two exceptions to the *Haywood* rule. Respondent Lewis was terminated for insubordination, not as the result of any disabling condition. (Factual Finding No. 27.) Respondent Lewis's claim for IDR had not matured at the time of her termination.

> At the time [Respondent] was separated from employment, the City had not determined whether [Respondent] demonstrated a substantial inability to perform her duties, as the Human Resources Officer herself noted. Even [Respondent's] treating worker's compensation physician had not found her permanently disabled, and no other medical evidence established a matured right to disability retirement. The City's ultimate 'determination' that [Respondent] was disabled, and that the disability was industrial, was made post-termination and was improperly made as a "quid pro quo" for her resignation and dismissal of a million dollar claim. (Factual Finding No. 28.)

The ALJ concluded that Respondent Lewis'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 20, 2015

Rory J. Coffey

RORY J. COFFEY
Senior Staff Attorney