ATTACHMENT C

RESPONDENT'S ARGUMENT

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BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In The Matter of Accepting the Application for Disability Retirement of DEANNA C. LEWIS, Respondent, v. CITY OF SOUTH LAKE TAHOE, Respondent.	AGENCY Case No. 2014-0859 OAH Case No. 2014090663 **WRITTEN ARGUMENT AGAINST PROPOSED DECISION**

I.
ARGUMENT

The proposed decision relies on *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 and subsequent related decisions as holding that Lewis is barred from applying for IDR because the City initially terminated her from employment for cause. *Haywood* and the other cases relied on in the proposed decision are distinguishable from Lewis and not controlling in this case. There are two critical distinctions in Lewis that set this case apart from the *Haywood* line of cases.

First, Lewis involves a local contracting agency that agreed to approve the IDR application in exchange for reinstatement and resignation.

Second, Lewis never agreed to a bar or restriction on future employment with the City. The

proposed decision findings Page 9 #24 and #25 in this regard are not supported by the evidence.

In addition, while not directly related to the case analysis, the evidence supports that the City reviewed the medical evidence in Lewis' workers compensation case for nine months prior to the settlement. The City at one point even requested and was granted an extension of time because the general six month deadline for a decision was approaching. The proposed decision finding Page 7 #20 stating that "the City was only beginning to review the applicant's disability status" is inexcusable error and not supported by the evidence.

Haywood involved a terminated employee who's application for IDR was denied by the local contracting agency. *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, involved a terminated employee who's application for IDR was rejected by the local contracting agency pursuant to the *Haywood* case. **In both cases the terminations were never reversed. In both cases the IDR was never approved. In both cases an IDR was never offered in exchange for reinstatement and resignation.**

This is a crucial distinction. The employing agency has the ability to rescind a disciplinary action. In the case of Lewis, the City could have rescinded the termination at the Skelly hearing, at the City manager review, on attorney review prior to the arbitration, or in mediation at the start of arbitration. In the case of Lewis, the termination was rescinded after attorney review prior to the arbitration. Rescinding Lewis' termination at any of these levels makes *Haywood* and *Smith* inapplicable. In those cases the termination was still in place when the IDR was rejected.

Furthermore, the local contracting agency, in this case the City, is the entity that decides whether the applicant is substantially incapacitated from the performance of duty pursuant to statute. In this case, the City agreed to approve Lewis' IDR application in exchange for reinstatement and resignation. The City sent the determination to CalPERS. This is also a critical fact that is absent from the *Haywood* and *Smith* cases.

The fact pattern in Lewis is not remotely similar to the fact patterns in *Haywood* or *Smith*. In *Haywood*, the employee was working normal duty before the termination and filed for IDR based on stress caused by dealing with a series of disciplinary actions that were each appealed, and ultimately upheld. In fact, by the time Haywood reached his administrative hearing regarding the denial of his IDR, it was determined he was no longer disabled from performing firefighter duties for another

department.

In *Smith*, the employee was working normal duty for nine years after being released to unrestricted duty from a prior workers compensation case. Smith settled ongoing disciplinary charges by agreeing to undergo remedial training and testing. After failing a test, the City terminated him. He was reinstated by the Civil Service Commission on the condition he successfully completed a series of certifications within three months of return to duty. It was only after the Civil Service Decision that Smith presented his employer with new light duty restrictions. After failing to complete the certifications, Smith was terminated again. He then filed his application for IDR.

In both cases the employee's employment status was "terminated" at the time the applications for IDR were rejected or denied. In Lewis, her status was unpaid leave of absence at the time the City agreed to approve her IDR application. In *Haywood* and *Smith*, the medical issue was not even proffered until after the discipline processes were initiated. Such timing makes the validity of the medical issue suspect. Lewis was not in the middle of a disciplinary issue or a performance issue when she was placed on modified duty. The only reason she was on modified duty was because of medical limitations stemming from her low back injury. The disciplinary issue arose in regard to her light duty performance. In *Haywood* and *Smith*, the medical issue was not proffered until after they had been fired. Lewis was on modified duty and progressing toward an IDR before the City initiated any type of misconduct investigation. The City indicated that throughout 2013, Lewis was unable to perform her duties as a police officer. Furthermore, the City indicated that during the time of unpaid leave there was no known expectation of her return to work nor any medical documentation available indicating she could return to work (See Exhibit 7). This is an important distinction because Lewis wasn't a case where the medical issue was fabricated in response to a disciplinary action. Had the disciplinary action never occurred, Lewis would still have applied for the IDR at the point the City refused to continue accommodating her.

Also of note is the fact that Haywood and Lewis lost their appeals and their terminations were upheld. Lewis never reached the point of having her evidentiary hearing concerning the merits supporting the disciplinary action. There was no advantage to continuing with the hearing in light of the City's offer to rescind the termination. If Lewis won her appeal, she would have been entitled to

reinstatement with back pay from June 17, 2014 to August 20, 2014, minus any discipline upheld by Mr. Brand. The small to negligible window of back pay is because the City would still have the authority to grant the IDR, effectively separating her from service as of the date of the filed application dated August 20, 2014. CalPERS would retroactively pay benefits to the date of application. There was no advantage to continuing with the appeal when the City was offering what Lewis was entitled to even if she continued to pursue the appeal.

The second major distinction between Lewis and the cases relied on in the proposed decision is the lack of a complete severance of the employer-employee relationship in the settlement agreement. In *Haywood* and *Smith*, there was no settlement agreement. In those cases the employees were terminated and remained terminated for misconduct. Thus, there was a complete severance of the employer-employee relationship. In the CalPERS Precedential Decision of *Vandergoot* (2013) PD 13-01, the terminated employee agreed to a Stipulation and Settlement wherein the Department agreed to withdraw the NOAA and remove the adverse action in exchange for the employee's resignation for personal reasons. In addition, during the time the employee had not received pay, the employment status would be changed to unpaid leave status with the Department. At first blush, this case seems similar to Lewis. However, there are two significant differences.

First, *Vandergoot* contained a "no future employment clause". Specifically, the provision stated as follows:

> [Respondent] agrees that he will not seek, transfer to, apply for or accept any employment in any capacity with [Department] at any time in the future. ...
> (*Vandergoot* id at P.4 #12.)

In fact, all of the state employee cases relied on in the proposed decision contained "no future employment" clauses. This was an important element in all the cases. It was explained first in *Haywood*. The court made clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the District if it is ultimately determined that the Respondent is no longer disabled.

The language in *Haywood* is reiterated in all the cases cited by CalPERS. The cases then reference the "no future employment" clauses, or in the cases of *Haywood* and *Smith,* the upheld

terminations, as constituting a complete severance of the employer-employee relationship that eliminated potential reinstatement of the employment relationship. Such facts do not exist in Lewis. The Release and Settlement Agreement does not contain a prohibition on future employment. It is a release of existing claims and resignation in exchange for rescinding the termination and approving an IDR. The agreement expresses nothing in regard to future employment or Lewis' future rights if a new action were to occur like tripping in a City sidewalk pothole, or a reevaluation of her IDR status (See Exhibit 20). Nor does the resignation proffered by Lewis contain such a clause. The resignation expresses a release of existing claims and resignation "contingent on fulfillment of each and all the settlement terms" contained in the agreement. If the IDR application is not accepted by CalPERS for processing because she is not eligible for an IDR (See Exhibit 2) the City cannot approve the IDR. Under such circumstances the resignation would not be valid and the settlement would be void. Such language does not create a complete severance of the employer-employee relationship that eliminated potential reinstatement of the employment relationship.

Second, *Vandergoot* and the decisions in Attachments C-F involved state employees who were terminated prior to executing Stipulation and Settlement agreements. It is significant when the IDR applicant is a state employee because CalPERS is the entity that decides whether the applicant is substantially incapacitated from the performance of duty pursuant to statute. The settlement agreements did not involve CalPERS as a party. There was no offer or agreement to approve an IDR application in return for the resignations. IDR was not part of the process, period. These agreements were simply resignations in leu of termination. The only benefit to the employee was the termination was changed to a resignation in the personnel file. Lewis did not resign in leu of being terminated. Lewis resigned because the local contracting agency, the City, who was a party to the settlement, agreed to approve her IDR. A single mother would not give up her arbitration appeal, wrongful termination claims, and the follow up approval of her IDR, to change her status in a file. The sole reason for agreeing to resign was to receive her IDR.

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II.
CONCLUSION

The proposed decision goes far beyond the holdings in the cited cases. Lewis is not a terminated employee still seeking disability retirement benefits. Lewis is not a state employee who agreed to resign as part of a compromise before the State Personnel Board that did not include CalPERS as a party. The City of South Lake Tahoe, a local contracting agency, granted an IDR application (pending before them for nine months) after agreeing to rescind a termination. None of the cases relied on in the proposed decision hold that Lewis' circumstances bar applying for disability retirement. Lewis respectfully requests the Board to reject the proposed decision and order the application be accepted for processing. In the alternative, Lewis requests further hearing before the Board itself.

Dated: May 8, 2015

Respectfully submitted,

MASTAGNI HOLSTEDT, APC

STEVEN W. WELTY
Attorney for Deanna Lewis

PROOF OF SERVICE

In the Matter of Deanna Lewis

AGENCY Case No. 2014-0859
OAH Case No. 2014090663

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 1912 I Street, Sacramento, California 95811-3151.

On May 8, 2015, I served the following document(s):

- **WRITTEN ARGUMENT AGAINST PROPOSED DECISION**

addressed as follows:

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, California 94229-2701
Fax: 916-795-3972

X **BY U.S. MAIL.** By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on May 8, 2015 following ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the United States Mail today, May 8, 2015, with postage thereon fully prepaid at Sacramento, California in the ordinary course of business. I caused such envelope(s) to be mailed to the offices of the addressee(s) via U.S. mail on May 8, 2015

and

X **BY FAX TRANSMISSION.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed above. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct and executed on May 8, 2015, at Sacramento, California.

YULIANA SANTILLAN