

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Dohn V. Salvador (Respondent) was employed by respondent California Department of Corrections and Rehabilitation (CDCR) as a Licensed Vocational Nurse. By virtue of his employment, Respondent became a state safety member of CalPERS.

On February 21, 2013, CDCR served Respondent with a Notice of Adverse Action (NOAA) terminating his employment effective March 1, 2013.

On February 27, 2013, Respondent submitted a letter of resignation to CDCR indicating he was resigning from his position as a Licensed Vocational Nurse, effective February 28, 2013.

On April 3, 2013, Respondent submitted an application for Industrial Disability Retirement (IDR). His claimed disability was a psychological (PTSD) condition.

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

Based on the Notice of Adverse Action (NOAA), and Respondent's employment status with CDCR, CalPERS determined that Respondent was ineligible to apply for IDR under the rule of law set forth in the *Haywood* and *Smith* cases (defined below), 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.

By letter dated March 13, 2014, CalPERS notified Respondent that his application for IDR was cancelled based on *Haywood* and *Smith*. Respondent appealed.

A hearing was completed on June 29, 2015, on the 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 present at the hearing and represented himself.

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: *In the Matter of the Application For Industrial Disability Retirement of Robert Vandergoot*, dated February 19, 2013. The ALJ found that Respondent was never terminated by CDCR. While termination procedures had begun, the effective date of his resignation (February 28, 2013) occurred before the effective date of the termination of his employment (March 1, 2013). Since Respondent's resignation resulted in a permanent separation of service from CDCR, it did not foreclose the possibility of future reinstatement. Thus, the ALJ found *Haywood, Smith* and *Vandergoot* inapplicable, and 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.

September 17, 2015



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Senior Staff Attorney