

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Evello Fernandez (Respondent) was employed by respondent County of Monterey Sheriff's Department (Respondent County) as a Correctional Cook Supervisor II. By virtue of his employment, Respondent became a local safety member of CalPERS.

On October 31, 2011, Respondent County served Respondent with a Notice of Punitive Action (NOPA), seeking to dismiss Respondent for cause effective October 31, 2011. Respondent appealed his termination.

The termination was resolved by stipulation in an Agreement on Resignation and General Release, dated February 28, 2013. According to the terms of the Settlement Agreement, Respondent submitted a voluntary resignation on September 14, 2012 and Respondent County agreed to withdraw the NOPA.

The Agreement contained the following provisions:

1. **CONSIDERATION.** . . . [Respondent] FERNANDO agrees to voluntarily resign his service to the COUNTY effective on or about September 14, 2012, with services designated satisfactory. FERNANDO may submit a resignation letter which shall be placed in his personnel file. FERNANDO agrees he will not seek employment with the COUNTY in the future. . . .

On August 1, 2013, Respondent signed an application for Industrial Disability Retirement (IDR). He claimed disability based on "depressive disorder, low back injury, was marked disabled by Monterey Sheriff." In response to the question, "When did the disability occur?" Respondent stated "September 15, 2012."

CalPERS reviewed the facts and learned that Respondent had been terminated, had appealed his termination, and had entered into a Settlement Agreement.

Based on the NOPA and the Settlement Agreement, CalPERS determined that Respondent was ineligible to apply for IDR due to operation of the *Haywood* and *Smith* cases (defined below), 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 July 15, 2015.

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

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) found that Respondent's appeal does not fall within any of the exceptions to the Haywood/Smith doctrine. The ALJ found no evidence that Respondent's termination was the result of his claimed disability. The first evidence of any claim of disability is Respondent's disability retirement application which he filed 22 months after the October 2011 NOPA, 11 months after his resignation date, and six months after his Settlement Agreement was executed.

Based on the evidence, the ALJ found that Respondent's claim for disability retirement had not matured prior to his termination. He did not apply for disability retirement until almost two years after he was terminated. The ALJ found no medical evidence that Respondent was disabled from the performance of his duties before he became the subject of disciplinary action.

The ALJ found Respondent's case to be indistinguishable from the CalPERS Board of Administration's Precedential Decision entitled *In the Matter for Application for Disability Retirement of Robert C. Vandergoot, Respondent*, made Precedential by the CalPERS Board on October 16, 2013. The ALJ found that the terms of Respondent's Settlement Agreement show that he resigned from County service and agreed to never again seek employment with the County.

The ALJ concluded that under *Haywood*, *Smith* and *Vandergoot*, the terms of Respondent's Settlement Agreement with the County of Monterey are tantamount to a termination for cause.

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 Respondent County. The character of the disciplinary action does not change because Respondent elected to settle his case prior to exhausting his appeal rights. The ALJ found that 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.

September 17, 2015


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