

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Phillip MacFarland (Respondent MacFarland) was employed by Respondent California Correctional Healthcare Services (CCHCS), a department of California State Prison, Sacramento (CDCR), as a Clinical Psychologist. By virtue of his employment, Respondent MacFarland became a state safety member of CalPERS.

On July 17, 2013, CCHCS served Respondent MacFarland with a Notice of Adverse Action (NOAA) terminating his employment effective July 26, 2013.

The NOAA states that despite being on probation by the Board of Psychology for billing fraud, Respondent MacFarland continued to be dishonest and fraudulent with his billing practices. The NOAA also states that Respondent MacFarland was issued a Letter of Instruction (LOI) on June 5, 2012, for failure to, among other things, accurately account for time spent treating inmate-patients. Although Respondent MacFarland was provided "extensive training regarding the issues addressed by the LOI," he continued to inaccurately document time spent with inmate-patients. The NOAA sets out eleven instances, which occurred in 2012 and 2013, where Respondent MacFarland was dishonest and inexcusably neglected his duty by falsifying time spent with inmate-patients.

The NOAA further states that Respondent MacFarland misrepresented himself to an Internal Affairs investigator, when questioned regarding the accusations. Although it is not stated in the NOAA, Respondent MacFarland testified that his clinical privileges were also suspended for two weeks in May 2012 due to his failure to provide services to suicidal inmates in a timely manner.

On July 19, 2013, Respondent MacFarland filed his application for industrial disability retirement on the basis of a knee injury and post-traumatic stress disorder.

On July 19, 2013, Respondent MacFarland also notified CDCR of his decision to retire effective July 23, 2013. On July 23, 2013, Respondent CCHCS notified Respondent MacFarland that his separation is considered to be "under unfavorable circumstances." On July 30, 2013, Respondent CCHCS notified Respondent MacFarland that he did not elect to pursue the Skelly hearing and the NOAA will be "upheld with the effective date of close of business, July 26, 2013."

CCHCS filed a Notice of Personnel Action Report of Separation with the State Personnel Board. A formal hearing was set. Both parties agreed to withdraw the appeal and cancel the formal hearing because Respondent MacFarland retired on July 23, 2013.

Based on the NOAA, CalPERS determined that Respondent MacFarland was ineligible to apply for Industrial Disability Retirement due to operation of the *Haywood*, *Smith* and *Vandergoot* cases, 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 Industrial Disability Retirement. Respondent MacFarland appealed and a hearing was completed on July 27, 2015.

The cases of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*) and *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot*, dated February 19, 2013 and made precedential by CalPERS Board of Administration on October 16, 2013, preclude Respondent MacFarland from filing an application for disability retirement. 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.

In *Vandergoot*, the Board agreed that "a necessary requisite for disability retirement is the potential reinstatement of the employment relationship" with the employer if it is ultimately determined by CalPERS that the employee is no longer disabled. The Board held that an employee's resignation was tantamount to a dismissal when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and agreed to waive all right to return to his former employer.

Respondent MacFarland argued that he was not terminated for cause because his resignation letter of July 19, 2013, preceded the effective date of the NOAA.

Under the facts presented here, the Administrative Law Judge (ALJ) disagreed because Respondent MacFarland was terminated pursuant to the NOAA under unfavorable circumstances and for cause, Respondent MacFarland cannot seek reemployment with CDCR, the NOAA will be enforced against him if he attempts to seek reemployment, and the letter of resignation/retirement does not prevent CCHCS from enforcing the NOAA in the event Respondent MacFarland attempts to return to CDCR.

The ALJ held that Respondent MacFarland retired to avoid termination from employment and his relationship with the employer had severed prior to retirement, when the NOAA was served on him. The ALJ found that Respondent MacFarland

cannot return to his former employment, thus *Vandergoot* and *Haywood* render him ineligible for disability retirement.

The ALJ also determined that Respondent MacFarland did not meet the exceptions identified in *Haywood* and *Smith* because he did not have a vested right to Industrial Disability Retirement, which had "matured," and his separation from employment was not the ultimate result of a disabling medical condition.

The ALJ concluded that the facts are not in dispute, and upheld CalPERS' determination that Respondent MacFarland is not entitled to file an application for Industrial Disability Retirement. Respondent MacFarland's termination permanently severed his employment relationship with CDCR. The character of the disciplinary action does not change because Respondent MacFarland's resignation letter and application for Industrial Disability Retirement preceded the effective date of the NOAA. CalPERS correctly determined that *Haywood*, *Smith*, and *Vandergoot* bar Respondent MacFarland's eligibility to apply for Industrial Disability Retirement.

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.

November 18, 2015



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PREET KAUR  
Senior Staff Attorney