

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Erlinda Velasquez (Respondent) was employed by Respondent San Jose Community College (Respondent SJCC) as a payroll technician. By virtue of her employment, Respondent became a miscellaneous member of CalPERS.

On September 25, 2009, Respondent SJCC served Respondent with a notice that she was being placed on administrative leave pending investigation concerning her receipt and processing of court-ordered garnishments for her nephew and coworker.

On October 20, 2009, Respondent SJCC served Respondent with a Notice of Proposed Discipline (NOPD) seeking to dismiss Respondent for cause. The NOPD arose from Respondent's failure to process a wage garnishment order brought to the SJCC's payroll office. SJCC determined Respondent had a conflict of interest which should have prevented her from processing the order. Instead, Respondent prepared a response under penalty of perjury, signing under a changed name, indicating that the wage garnishment was unenforceable because her nephew had filed a bankruptcy action. SJCC found that no bankruptcy action had been filed, that Respondent failed to bring the matter to her supervisor's attention, and that Respondent handled it dishonestly.

On November 5, 2009, Respondent was served with a Notice of Termination effective November 6, 2009. She appealed the termination, and the matter proceeded to arbitration.

On September 13, 2010, arbitration was completed. The arbitrator found SJCC had just cause to impose discipline.

On November 9, 2010, SJCC Board of Trustees adopted the factual findings of the arbitrator's decision and affirmed Respondent's termination.

Subsequently, Respondent submitted an application for disability retirement to CalPERS based on mental distress, anxiety and depression.

CalPERS reviewed the facts and learned that Respondent had been terminated, had appealed her termination, and the matter had been settled in arbitration.

CalPERS determined that Respondent was ineligible to apply for DR due to operation of the *Haywood* and *Smith* cases (defined below), because she had been terminated for cause and her termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for DR. Respondent appealed and a hearing was completed on October 15, 2015.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her 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 had the burden of proof to establish the right to her claimed disability retirement benefit. The ALJ found that the evidence established that Respondent was terminated for cause as a result of her handling of a wage garnishment request involving her nephew and coworker.

The ALJ found that CalPERS correctly determined that Respondent is not eligible to apply for disability retirement, and her appeal must be denied. The ALJ concluded that under *Haywood and Smith*, Respondent had been properly terminated for cause. Respondent's termination permanently severed her employment relationship with SJCC.

Pursuant to Government Code section 11517(c)(2)(C), which authorizes the Board to "make technical or other minor changes in the proposed decision," in order to avoid ambiguity, staff recommends that the word "not" be inserted before the words "result from" on page four of the Proposed Decision.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision, as modified.

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.

December 16, 2015


ELIZABETH YELLAND
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