

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Stephanie Lamb (Respondent Lamb) was employed by respondent City of Monterey (City) as a police services technician effective October 17, 2011. By virtue of her employment, Respondent Lamb became a miscellaneous safety member of CalPERS.

On or about April 17, 2014, the City served Respondent Lamb with a Notice of Release from Probation (Notice) for failure to satisfactorily complete the probationary period.

The Notice stated Respondent Lamb was "struggling with several aspects of her job, to include the areas of written communication, problem solving/decision making, records performance-routine and records performance-stress;" had "issues with attention to detail, responding to training, retaining training, command presence and most importantly with officer safety;" and ignored basic search methods for an inmate.

The City does not have a grievance process for probationary employees and Respondent Lamb never responded to the Notice.

On August 9, 2014, Respondent Lamb filed her application for disability retirement on the basis of an orthopedic (left knee) condition.

Based on the Notice, CalPERS determined that Respondent Lamb was ineligible to apply for disability retirement due to operation of the *Haywood*, *Smith* and *Vandergoot* cases 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 disability retirement. Respondent Lamb appealed and a hearing was completed on November 24, 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 (*Vandergoot*), preclude Respondent Lamb 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.

Prior to the hearing, CalPERS provided Respondent Lamb with a copy of the administrative hearing process pamphlet. CalPERS also attempted to contact Respondent Lamb but was unable to reach her. Respondent Lamb appeared at the hearing and represented herself.

Respondent Lamb argued that the discharge was the result of a disabling condition. The Administrative Law Judge (ALJ) disagreed. The ALJ held that, other than speculation, Respondent Lamb offered no proof to establish her discharge was the ultimate result of a disabling condition. Instead, evidence demonstrated that Respondent Lamb was released due to poor work performance.

The ALJ also determined that Respondent Lamb did not have a vested right to disability retirement, which had "matured."

The ALJ concluded that the facts are not in dispute, and upheld CalPERS' determination that Respondent Lamb is not entitled to file an application for disability retirement. Respondent Lamb's termination permanently severed her employment relationship with the City. CalPERS correctly determined that *Haywood*, *Smith*, and *Vandergoot* bar Respondent Lamb's eligibility to apply for 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.

February 18, 2016


PREET KAUR
Senior Staff Attorney