

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Kevin Davey (Respondent Davey) was employed by respondent California Department of Corrections and Rehabilitation, Division of Correctional Health Care Services (CDCR) as a Supervising Registered Nurse beginning April 17, 2006. By virtue of his employment, Respondent Davey was a state safety member of CalPERS.

On April 27, 2009, Respondent CDCR issued Respondent Davey a Notice of Automatic Resignation By Absence Without Leave (AWOL) terminating his employment effective May 11, 2009.

The AWOL notice states that Respondent Davey was absent without leave for at least five consecutive days, from April 20, 2009 through April 27, 2009. The AWOL notice advised Respondent Davey of his right to an informal "Coleman" hearing. A Coleman hearing was held on May 7, 2009 and the AWOL separation was upheld. Respondent Davey appealed the AWOL determination with the Department of Personnel Administration (DPA) and thereafter entered into a Stipulated Settlement Agreement with CDCR. The Stipulated Settlement Agreement stated that Respondent Davey is not allowed to seek or accept employment with CDCR at any time. CDCR agreed to modify the AWOL notice to a resignation for personal reasons.

On December 27, 2012, Respondent Davey filed his application for Industrial Disability Retirement on the basis of stress, abdomen and internal conditions beginning 2008.

Based on the Stipulated Settlement Agreement, CalPERS determined that Respondent Davey 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 Davey appealed and a hearing was completed on November 10, 2015. Respondent Davey was represented by counsel at the hearing.

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 Davey 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.

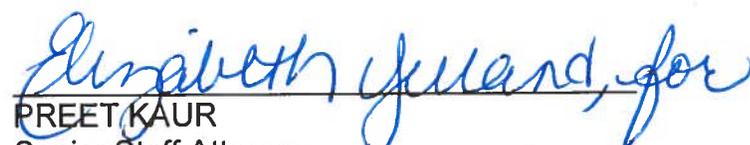
Respondent Davey argued that he retained reinstatement rights under *Haywood* because his discharge was not for cause and he is not precluded from filing for employment with another state agency. The Administrative Law Judge (ALJ) disagreed. The ALJ held that Respondent Davey’s voluntary resignation and waiver of his reinstatement rights resulted in a complete severance of the employer-employee relationship. The ALJ further held that the severance of the relationship was not due to a disabling medical condition. The ALJ also determined that Respondent Davey did not have a vested right to Industrial Disability Retirement, which had “matured.”

The ALJ concluded that the facts are not in dispute, and upheld CalPERS’ determination that Respondent Davey is not entitled to file an application for Industrial Disability Retirement. Respondent Davey’s termination permanently severed his employment relationship with CDCR. CalPERS correctly determined that *Haywood*, *Smith*, and *Vandergoot* bar Respondent Davey’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.

February 18, 2016


PREET KAUR
Senior Staff Attorney