

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Paul A. Cabacungan (Respondent Cabacungan) worked as a Correctional Officer for California Department of Corrections and Rehabilitation, Salinas Valley State Prison (CDCR). By virtue of his employment, Respondent Cabacungan was a state safety member of CalPERS, subject to Government Code section 21151.

Respondent Cabacungan began working for CDCR in February 2006 as a part-time correctional officer. On August 10, 2006, while Respondent Cabacungan was still on probation, CDCR served Respondent Cabacungan with a Notice of Adverse Action (NOAA) advising him that he would be terminated effective August 28, 2006. CDCR charged Respondent Cabacungan with using unnecessary and excessive force upon an inmate while escorting the inmate to his cell, as well as dishonesty during the internal affairs investigation, in violation of Government Code section 19572. CDCR rejected Respondent Cabacungan from probation on August 18, 2006.

On August 25, 2006, Respondent Cabacungan submitted a written resignation, for "personal reasons." CDCR responded in writing on August 28, 2006 that it accepted Respondent Cabacungan's resignation in the face of the pending Adverse Action, with recommended dismissal and rejection from probation. A copy of the letter would be placed in Respondent Cabacungan's personnel file, and was a required disclosure if Respondent Cabacungan sought employment with the State of California in the future. CDCR also stated in the letter it would continue enforcement of the Adverse Action if Respondent Cabacungan obtained employment with CDCR in the future.

On August 13, 2012, nearly six years from the date of the Adverse Action, Respondent Cabacungan submitted an industrial disability retirement (IDR) application to CalPERS. Respondent Cabacungan claimed he was disabled as a result of orthopedic injuries and psychological conditions.

CalPERS cancelled Respondent Cabacungan's IDR application pursuant to *Haywood v. American River Fire Protection District* on grounds that he had resigned in the face of an adverse action, and that Respondent Cabacungan's separation from employment with the State was not the result of a disabling condition or preemptive of an otherwise valid disability claim. Respondent Cabacungan appealed, exercising his right to a hearing before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH). A hearing was held February 3, 2016 in Salinas, California. CalPERS was represented by counsel. A custodian of records witness appeared on behalf of Respondent CDCR to authenticate Respondent Cabacungan's personnel file. Respondent Cabacungan represented himself.

Prior to the hearing, CalPERS explained the hearing process to Respondent Cabacungan and the need to support his case with witnesses and documents. CalPERS provided Respondent Cabacungan with a copy of the administrative hearing

process pamphlet. CalPERS answered Respondent Cabacungan's questions and clarified how to obtain further information on the process.

The *Haywood* case holds that a CalPERS member is ineligible for disability retirement if the member was terminated from employment for reasons that are not related to a disabling condition, and the termination does not preempt an otherwise valid claim for disability retirement.

CalPERS called a custodian of records witness from Respondent CDCR to testify to and authenticate the contents of Respondent Cabacungan's personnel file, including the Adverse Action, written resignation, rejection from probation and Respondent CDCR's response to Respondent Cabacungan's resignation.

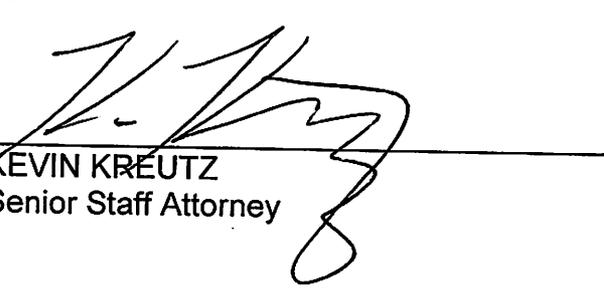
Respondent Cabacungan testified but did not call any other witnesses. He voiced his strong disagreement with the findings made in the Adverse Action, claiming it was filed against him because he challenged a decision by the warden and because he was unwilling to cooperate with other officers who allowed inmates to remove fruit from the kitchen to make alcohol. Respondent Cabacungan admitted he did not appeal the Adverse Action because he was in the process of obtaining a real estate appraiser license. He elected to resign and pursue that career path. He also felt disillusioned by the manner in which the prison was operated.

The ALJ held that Respondent Cabacungan's resignation in the face of an adverse action was "tantamount to termination." Regarding the exceptions to the *Haywood* rule, the ALJ found there was no information regarding injuries or disabilities in Respondent Cabacungan's personnel file; the basis for the Adverse Action was excessive force and dishonesty, not a disability. Respondent Cabacungan's testimony, the ALJ held, did not support a finding that either *Haywood* exception applied.

The ALJ concluded Respondent Cabacungan's appeal should be denied. 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.

April 20, 2016



KEVIN KREUTZ
Senior Staff Attorney