

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Keith Brown (Respondent) was employed by Respondent California Highway Patrol (Respondent CHP) as a Patrol Officer. By virtue of his employment, Respondent became a state safety member of CalPERS.

On May 31, 2011, Respondent CHP served Respondent with a Notice of Adverse Action (NOAA), seeking to dismiss Respondent for cause effective June 27, 2011. Respondent appealed his termination.

The termination was resolved by Stipulated Settlement and General Release (Stipulated Settlement), dated May 21, 2012. According to the terms of the Stipulated Settlement, Respondent submitted a voluntary resignation on June 27, 2011 and Respondent CHP agreed to withdraw the NOAA.

The Stipulated Settlement contained the following provision:

[Respondent] agrees to not seek or accept employment with CHP either now or in the future, and if he should obtain employment in contravention of this provision, he may be immediately dismissed without limitation to time and with no right of appeal.

On October 24, 2011, Respondent signed an application for Industrial Disability Retirement (IDR.) He claimed disability based on psychological trauma due to a fatal, officer-involved shooting of a suspect.

CalPERS reviewed the facts and learned that Respondent had been terminated, had appealed his termination, and had entered into a Stipulated Settlement.

Based on the NOAA and the Stipulated Settlement, CalPERS determined that Respondent was ineligible to apply for IDR due to operation of the *Haywood* and *Smith* cases (defined below), 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 IDR. Respondent appealed and a hearing was completed on January 19, 2016.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his 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's appeal does not fall within any of the exceptions to the *Haywood/Smith* doctrine. The ALJ also found Respondent's case to be indistinguishable from the Precedential Decision entitled *In the Matter for Application for Disability Retirement of Robert C. Vandergoot, Respondent*, made Precedential by the CalPERS Board on October 16, 2013.

The ALJ concluded that Respondent failed to sustain his burden of proof. He entered into the Stipulated Settlement while disciplinary charges that would have resulted in termination of his employment were pending against him. The Stipulated Settlement terminated Respondent's employment relationship with Respondent CHP, and he forfeited any ability to apply for, or accept, employment with CHP in the future. Pursuant to the authority of *Haywood and Vandergoot*, the ALJ upheld CalPERS determination that Respondent Brown is ineligible to receive IDR benefits.

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


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