

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Joshua P. Desmarais (Respondent) was employed by respondent California Highway Patrol (CHP) as a State Traffic Officer. By virtue of his employment, Respondent became a state safety member of CalPERS.

On May 18, 2011, CHP served Respondent with a Notice of Adverse Action (NOAA), seeking to dismiss Respondent for cause effective June 15, 2011. Respondent appealed his termination.

The termination was resolved by a stipulation incorporated into a Proposed Decision by the State Personnel Board (SPB) Administrative Law Judge (ALJ). The SPB adopted the Decision Approving Stipulation for Settlement on May 25, 2012. According to the terms of the Stipulated Settlement, Respondent agreed to resign for personal reasons and CHP agreed to withdraw the NOAA. Respondent further agreed to never seek employment with CHP at any time, and waived any/all reinstatement rights that he had.

On April 9, 2012, Respondent signed an Industrial Disability Retirement (IDR) application. He claimed disability based on orthopedic (neck, back, shoulder and hips) conditions and psychological (depression, anxiety and PTSD) conditions.

CalPERS reviewed the facts and learned that Respondent had been terminated, had appealed his termination to the SPB, and had entered into a Stipulated Settlement in which he agreed to permanently withdraw his appeal of the NOAA, resign from his position with CHP, never apply for or accept employment with CHP or other appointing authority, and waive his reinstatement and employment rights.

Based on these facts, CalPERS determined that Respondent was ineligible to apply for IDR due to precedent set by the *Haywood*, *Smith* and *Vandergoot* cases. Because Respondent 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, CalPERS cancelled Respondent's IDR application.

Respondent appealed and was represented by attorney Kenneth M. Sheppard throughout the appeal of this matter. The hearing took place on January 7, 2016. Closing briefs were submitted by CalPERS and Respondent on February 16, 2016.

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 an industrial 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.

Applying *Haywood*, the precedential *Vandergoot* decision (*In the Matter for Application for Disability Retirement of Robert C. Vandergoot, Respondent*, made precedential by the CalPERS Board on October 16, 2013) holds that resignation in the face of threatened dismissal, coupled with a waiver of the right to reinstatement, is tantamount to dismissal for cause and renders the employee ineligible for disability retirement with CalPERS.

At hearing, CalPERS presented records establishing Respondent had been terminated from his position with CHP, had appealed his termination to the SPB, and had entered into a Stipulated Settlement in which he agreed to permanently withdraw his appeal of the NOAA, resign from his position with CHP, never apply for or accept employment with CHP or other appointing authority. Furthermore, Respondent agreed to waive his reinstatement and employment rights.

At hearing, Respondent raised three arguments as to why CalPERS must be required to accept his IDR application. First, Respondent argued that he was not terminated for cause, but resigned for personal reasons. Therefore, Respondent argued *Haywood*, *Smith* and *Vandergoot* do not apply to this matter. Second, Respondent argued that the terms of the Stipulated Settlement did not preclude him from working at CHP in the future. Respondent argued that in the event his IDR application was approved and he was later, after a reevaluation, found to not be disabled, CHP would allow him to resume his employment. Third, Respondent argued that his medical condition caused the CHP termination action against him. Essentially, Respondent contended that his medical condition caused the actions that led to his termination.

To support these arguments, Respondent called Dr. Jeffrey L. Stevenson and Retired Captain Cahoon as witnesses. In addition, Respondent testified on his own behalf. The ALJ summarily rejected all of Respondent’s arguments.

First, the ALJ rejected that Respondent’s resignation for personal reasons somehow nullified the application of *Haywood*, *Smith* and *Vandergoot*. The ALJ found that those cases are controlling, apply to the facts of this matter and render Respondent ineligible to apply for IDR.

Second, the ALJ rejected Respondent's explanation that he had a continuing employee/employer relationship with CHP because he could have worked for CHP in the future if he recovered from his injuries. The ALJ concluded that Respondent's intentions or personal reasons for entering the Stipulated Settlement, not specifically addressed in the document, are excluded and are irrelevant by the terms the Stipulated Settlement itself. There was nothing in the Stipulated Settlement that in any way contemplated or allowed Respondent to work at CHP in the future, regardless of his medical condition. Therefore, there was no continuing employment relationship between Respondent and CHP.

Third, Respondent failed to provide evidence that would establish that he is entitled to one of the medical condition/disability exceptions carved out in *Haywood* and *Smith*. Namely, Respondent failed to present evidence to establish that he was either (1) terminated as a result of a disability, or (2) that his termination was preemptive of an otherwise valid disability claim, i.e., it was a foregone conclusion that he was entitled to disability retirement. The ALJ found that Respondent's evidence with respect to his medical condition was conflicted and inconsistent, overstated, and not persuasive. The ALJ also found that there "is no evidence that it was a 'foregone conclusion' at the time of the NOAA and termination that applicant would have been indisputably entitled to a disability retirement...the medical evidence was far from meeting the *Smith* standard of constituting a 'foregone conclusion....'"

The ALJ concluded that Respondent's eligibility to file an IDR application is dependent on his having a continuing employment relationship with CHP. Respondent does not have such an employment relationship, and so is not eligible to file an IDR retirement application. By the terms of the Stipulated Settlement, Respondent resigned from employment with CHP and agreed not to reapply for employment with CHP or any successors in interest. Such resignation severed the employment relationship which *Haywood* and *Vandergoot* require for CalPERS to be able to process a disability retirement application, and Respondent's application must be rejected. Furthermore, the ALJ concluded that Respondent failed to establish any of the medical condition/disability exceptions carved out in *Haywood* and *Smith* as a defense to the CHP termination action or when he entered into the Stipulated Settlement.

The ALJ upheld CalPERS' determination that Respondent is not entitled to file an application for IDR. Respondent's termination permanently severed his employment relationship with CHP. The character of the disciplinary action does not change because Respondent elected to settle his case prior to exhausting his appeal rights. CalPERS correctly determined that the *Haywood* and *Smith* cases, and the Precedential Decision in *Vandergoot*, bar Respondent's eligibility to apply for IDR.

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.

May 18, 2016



JOHN SHIPLEY
Senior Staff Attorney