

**ATTACHMENT D**  
**STAFF'S ARGUMENT**

**STAFF'S ARGUMENT IN SUPPORT OF DESIGNATION OF  
NOVEMBER 18, 2015, FINAL DECISION AS PRECEDENTIAL**

On November 18, 2015, the Board adopted the Proposed Decision *In the Matter of Accepting the Application for Industrial Disability Retirement of PHILLIP D. MACFARLAND, Respondent, and CALIFORNIA STATE PRISON, SACRAMENTO, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent*. The Board's Decision became final and effective on November 18, 2015. The Proposed Decision determined that respondent Phillip D. MacFarland (respondent MacFarland) was not entitled to file an application for Industrial Disability Retirement under the "Haywood" doctrine. Under the *Haywood* doctrine, 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. (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1297, (*Haywood*)). The dismissal constitutes a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement – the potential reinstatement of employment with the former employer if it ultimately is determined that the member is no longer disabled. (*Ibid.*) In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*), the same court that decided *Haywood* affirmed the principles of the *Haywood* decision.

Respondent MacFarland's termination permanently severed his employment relationship with his employer. The fact that respondent MacFarland resigned from employment and submitted his application for Industrial Disability Retirement prior to the effective date of the Notice of Adverse Action (NOAA) is immaterial. The character of the disciplinary action does not change because respondent MacFarland submitted his resignation prior to the effective date of the NOAA. The Board Decision holds that CalPERS correctly determined that the cases of *Haywood*, *Smith*, and *In the Matter of Application for Industrial Disability Retirement of Robert Vandergoot*, made precedential by the CalPERS Board of Administration on October 16, 2013, bar respondent MacFarland's eligibility to apply for Industrial Disability Retirement. There is no precedential decision of the Board that addresses whether a resignation preceding the effective date of the NOAA bars a member from applying for Industrial Disability Retirement on the basis of *Haywood* or *Smith*.

1. Statutory Authority

Pursuant to Government Code section 11425.60 in the California Administrative Procedure Act (APA), the Board is authorized to designate all or part of a quasi-judicial administrative decision of the Board as precedential:

- (a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.

(c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997. (Emphasis added.)

## 2. Precedential Effect

In general, the effect of making a Board decision precedential is to give it "precedential effect," which in this context means:

- The decision may be officially cited in other administrative hearings, and also in court proceedings.
- The decision is considered "case-made" law, comparable to agency rule-making in its legal effect, and may be applied broadly to other cases and the parties involved in other cases. The decision-maker in another administrative matter may expressly rely on the precedential decision to decide the matter, that is, give the law or policy in the decision binding effect in a case involving the same issue as it affects other parties, unless the other case can be factually or legally distinguished.<sup>1</sup>

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<sup>1</sup> See: 13 CCR 1290 (Office of Administrative Hearings regulation); official *Calif. Law Revision Comments* regarding APA section 11425.60, where it is stated that the statute "[r]ecognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking," and "[i]s intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision." Also see: *Pac. Legal Foundation v. Unemployment Insur. App. Board* (1991) 29 Cal.3d 101,109; 21 *Jour. Nat. Ass'n Admin. Law Judges* 247 (2001), 265-267.

A precedential decision of the Board is not binding on the courts, which remain the final arbiters of the law; but a Board precedential decision, as the decision of the agency most knowledgeable and responsible for administering and making policy with respect to the California Public Employees' Retirement Law (PERL), is normally accorded great weight or given deference by the courts.<sup>2</sup>

If a Board decision is not designated as precedential, its effect is more limited. It may be referenced in other administrative matters or to a reviewing court to inform the judge regarding the Board's administration or interpretation of the PERL, but it has no precedential effect.<sup>3</sup>

The Board's precedential decisions are published in compliance with subdivision (c) of section 11425.60 and are listed in a special on-line index on the Board's website, at:

<http://www.calpers.ca.gov/index.jsp?bc=/about/leg-reg-statutes/board-decisions/current-prec-bd-dec.xml>

### 3. Board Policy

The Board's established policy regarding the designation of precedential decisions is based on subdivision (b) of Government Code section 11425.60 and calls for consideration of the following two questions:

- Does the decision contain a significant legal or policy determination of general application that is likely to recur?
- Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied?

From the staff's perspective, the answer to both these questions is "Yes."

#### A. "Significant Legal or Policy Determination of General Application That is Likely to Recur"

The significant legal and policy determination presented in the *MacFarland* Decision is the explanation and application of the *Haywood* and *Smith* cases, when used to preclude an application for disability retirement (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194). The *MacFarland* Decision details the applicable legal analysis to be used under *Haywood* and *Smith*, and quotes the

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<sup>2</sup> *City of Oakland v. Pub. Employees' Ret. System* (2002) 98 Cal.App.4th 29, 39; *Hudson v. Board of Administration of the Calif. Pub. Ret. Sys.* (1997) 59 Cal.App.4th 1310, 1324-1325.

<sup>3</sup> *City of Oakland, supra*, 57.

most relevant portions of the cases. Furthermore, the *MacFarland* Decision provides analysis on the proper steps to be employed when an employee is served with an NOAA but resigns prior to the effective date of the NOAA in an attempt to avoid termination from employment. The Decision states that the law does not respect form over substance and the employment relationship is severed when the NOAA was served.

CalPERS staff repeatedly determines that applications for disability retirement, submitted by employees who resigned after service of the NOAA, are barred by operation of *Haywood* and *Smith*. As a result, CalPERS repeatedly litigates issues presented in *Haywood* type cases, including cases in which employees facing disciplinary proceedings resign after service of but prior to the effective date of the NOAA to avoid termination. Despite the employee's resignation, the employer continues to proceed with the disciplinary proceeding, does not withdraw the NOAA, and takes the position that the NOAA will be enforced in the event the employee attempts to return to work.

Currently, there is no Precedential Decision relating to this issue to provide guidance to members and employers. The result is that many of these determinations are challenged, and CalPERS is required to repeatedly litigate these issues, thereby expending staff resources on issues that should by now have been well settled. Therefore, a Precedential Decision analyzing the law pertaining to this issue will provide members and employers guidance, and reduce the amount of future litigation.

B. "Clear and Complete Analysis Sufficient For an Understanding of Why the Finding of Facts Were Made and How the Law Was Applied"

The factual findings in the *MacFarland* Decision are straightforward and easy to understand. The Decision follows a logical analysis of the facts, employment background and circumstances of respondent MacFarland's termination. Then it applies *Haywood*, *Smith* and *Vandergoot* to these facts. The Decision sets forth a logical analysis to explain why *Haywood*, *Smith* and *Vandergoot* preclude filing an application for disability retirement.

It finds that the employer made a decision to terminate respondent MacFarland at the time the NOAA was issued and served. Although respondent MacFarland resigned prior to the effective date of the NOAA, the evidence demonstrated that the NOAA was still in effect and the employer would enforce the NOAA and bar respondent MacFarland from reinstatement if respondent MacFarland were to attempt to return to his former position.

The Decision holds that the employment relationship was severed when the NOAA was served on respondent MacFarland, which occurred prior to his resignation. Respondent MacFarland has no employer to return to, thus he is

ineligible to apply for Industrial Disability Retirement under *Haywood, Smith and Vandergoot*.

The Decision then analyzes the holding of *Haywood* and *Smith* in detail and finds:

- 1) The termination was for cause and respondent MacFarland's separation from employment was not the ultimate result of a disabling medical condition.
- 2) Respondent MacFarland's vested interest in an Industrial Disability Retirement allowance never "matured" prior to his separation from employment.

As described, the *MacFarland* Decision is therefore constructed logically and properly interprets the Government Code, *Haywood, Smith* and *Vandergoot* in the context of applications for disability and industrial disability retirement.

Staff therefore believes that the findings and legal conclusions of the *MacFarland* Decision, if the Decision is made precedential, will provide useful, specific rules both for staff and public entities.

C. Results of the Requests for Public Comments.

On March 21, 2016, a letter was mailed to over 1,600 public agencies, 338 state entities, 63 school districts, and the respondents in this case, asking for comments on whether to designate the Decision in *In the Matter of Accepting the Application for Industrial Disability Retirement of PHILLIP D. MACFARLAND, Respondent, and CALIFORNIA STATE PRISON, SACRAMENTO, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent.*

Staff received only one written comment. The City of San Luis Obispo Attorney's Office submitted a comment in support of the proposed action and concluded that the *MacFarland* Decision

reflects a clear, complete and important articulation of a significant legal determination with potentially broad application for any agency engaged in the often lengthy process of terminating a public employee for cause. Specifically, the Board's decision unequivocally establishes that an employee cannot preempt an otherwise valid, but incomplete, termination for cause process by filing a disability retirement application prior to the conclusion of the termination process.

Conclusion

For the reasons stated above, staff argues that the Decision in *In the Matter of Accepting the Application for Industrial Disability Retirement of PHILLIP D. MACFARLAND, Respondent, and CALIFORNIA STATE PRISON, SACRAMENTO, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent*, be designated as precedential.

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