

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent George Gerber (Respondent Gerber) was employed by Respondent Sweetwater Union High School District (Respondent Sweetwater), as a AC/HVAC and refrigeration technician, beginning 1991. By virtue of his employment, Respondent Gerber became a state miscellaneous member of CalPERS.

On December 19, 2008, Respondent Sweetwater served Respondent Gerber with a Proposed Notice of Adverse Action (NOAA). The NOAA stated that Respondent Gerber was terminated for being insubordinate and failing to perform his duties in a satisfactory manner.

Respondent Gerber was placed on administrative leave on April 14, 2009. Mr. Gerber appealed the NOAA but received an adverse decision following the hearing. Respondent Gerber was terminated effective January 26, 2010.

Respondent Gerber did not file a writ of mandate to contest his termination. He did, however, file a civil lawsuit against Respondent Sweetwater, which was dismissed in 2014.

On April 5, 2013, Respondent Gerber filed his application for disability retirement on the basis of orthopedic conditions.

Based on the NOAA, CalPERS determined that Respondent Gerber was ineligible to apply for disability retirement due to operation of the *Haywood*, *Smith* and *Vandergoot* cases (cited 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 disability retirement. Respondent Gerber appealed and a hearing was completed on March 2, 2016.

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 Gerber 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 CalPERS Board concluded 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 Gerber argued that the discharge was a result of a disabling condition. The Administrative Law Judge of the Office of Administrative Hearings (ALJ) however, disagreed because Respondent Gerber offered no proof to establish his discharge was the ultimate result of a disabling condition. The ALJ noted that Respondent Gerber was dismissed in January 2010, however, his treating physician did not determine Respondent Gerber was disabled and unable to return to work until 2012. Instead, evidence demonstrated that Respondent Gerber was terminated due to his insubordination.

The ALJ concluded that the facts are not in dispute, and upheld CalPERS' determination that Respondent Gerber is not entitled to file an application for disability retirement. Pursuant to Government Code section 11517(c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." In order to avoid ambiguity, staff recommends that the word "industrial" be removed before the words "disability retirement" on page two, paragraph three, and page nine, paragraph one of the Proposed Decision.

Respondent Gerber's termination permanently severed his employment relationship with Respondent Sweetwater. CalPERS correctly determined that *Haywood*, *Smith*, and *Vandergoot* bar Respondent Gerber's eligibility to apply for disability retirement. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision, as modified.

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.

June 15, 2016



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