

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Respondent Frederick Johnson (Respondent Johnson) worked as a Supervising Correctional Cook for California Department of Corrections and Rehabilitation, Valley State Prison (Respondent CDCR). By virtue of his employment, Respondent Johnson was a state safety member of CalPERS, subject to Government Code section 21154.

In 2011, Respondent CDCR served Respondent Johnson with a Notice of Adverse Action (NOAA) advising him that he would be terminated for overfamiliarity with female inmates and dishonesty during the underlying investigation. Respondent Johnson appealed his termination to the State Personnel Board (SPB), where he was represented by counsel. SPB sustained the NOAA. On June 18, 2013, one year after the SPB proceedings, Respondent Johnson applied for Industrial Disability Retirement (IDR) with CalPERS. He claimed disability on the basis of mental stress and low back pain.

CalPERS cancelled Respondent Johnson's IDR application pursuant to *Haywood v. American River Fire District (Haywood)* on grounds that he was terminated for cause, and that Respondent Johnson's separation from employment with the State was not the result of a disabling condition or preemptive of an otherwise valid disability claim. Respondent Johnson appealed, and a hearing was held March 3, 2016, before an Administrative Law Judge (ALJ).

At hearing, Respondent Johnson argued, among other things, that his SPB lawyer committed malpractice during the SPB hearing and that he would have not been fired from Respondent CDCR but for the lawyer's misconduct. After considering this and other arguments, as well as all evidence presented by the parties, the ALJ issued a Proposed Decision (PD) denying Respondent Johnson's appeal. The Board adopted the PD on May 18, 2016.

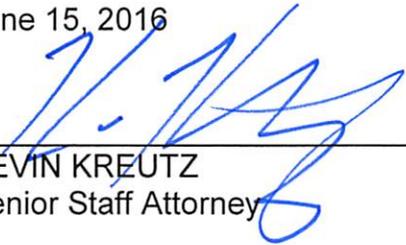
Respondent Johnson timely filed a Petition for Reconsideration, arguing the Board should not act on the PD until his civil malpractice claim is resolved. The argument lacks merit. Respondent Johnson already raised this issue in correspondence to the Board dated May 2, 2016, and during the March 3, 2016 hearing before the ALJ. The Board considered the argument and elected to adopt the PD in its entirety. The instant Petition for Reconsideration does not present new facts or argument that would justify a second review by the CalPERS Board.

Assuming, *arguendo*, that Respondent Johnson were to prevail in the malpractice action, his remedy would be damages against former counsel, not restoration of the right to apply for disability retirement. Courts have consistently held that a member who has no right to return to his or her place of public employment can never be reinstated from disability retirement, and therefore cannot apply for disability retirement. Here, Respondent Johnson cannot recover his right to reinstate to employment with Respondent CDCR through a suit for damages against former counsel. The Petition for Reconsideration therefore does not present a hypothetical scenario that, if true, would

warrant a different outcome on Respondent Johnson's administrative appeal with CalPERS.

Staff argues the Petition for Reconsideration be denied. Because the Board's Decision applies the law to the salient facts of the case, the risks of denying Respondent Johnson's Petition for Reconsideration 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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