

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Harry Mohan Singh Dhesi (Respondent Dhesi) was employed by respondent California Department of Corrections and Rehabilitation (CDCR) as a Dentist. By virtue of his employment, Respondent Dhesi became a state safety member of CalPERS.

On March 3, 2009, CDCR served Respondent Dhesi with a Notice of Adverse Action (NOAA), seeking to dismiss Respondent Dhesi for cause effective March 16, 2009. Respondent Dhesi appealed his termination.

Respondent Dhesi's appeal was heard by an Administrative Law Judge (ALJ) of the State Personnel Board (SPB). Respondent Dhesi denied all charges against him and contended that the dental care he provided met the applicable standard of care. On August 17, 2010, the SPB approved a decision finding Respondent Dhesi violated Government Code section 19572, subdivisions (b), (c), (d), (m) and (t).

On January 28, 2011, Respondent Dhesi filed a Petition for Writ of Mandate (Petition) with the Sacramento County Superior Court, appealing the SPB decision to uphold his termination. On August 8, 2011, Judge Timothy M. Frawley of the Sacramento County Superior Court denied Respondent Dhesi's Petition, and judgment was ordered against Respondent Dhesi on October 11, 2011.

On September 6, 2011, Respondent Dhesi signed an Industrial Disability Retirement (IDR) application. He claimed disability based on an orthopedic (lower back) condition.

CalPERS reviewed the facts and learned that Respondent Dhesi had been terminated, had appealed his termination to the SPB, the SPB upheld his termination, had appealed the SPB's decision to the Sacramento County Superior Court, and the Sacramento County Superior Court upheld the SPB's decision.

Based on these facts, CalPERS determined that Respondent Dhesi was ineligible to apply for IDR due to precedent set by the *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*) cases. Because Respondent Dhesi 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 Dhesi's IDR application.

Respondent Dhesi appealed CalPERS' determination, exercising his right to a hearing before an ALJ with the Office of Administrative Hearings. The ALJ presided over a three-day hearing that took place on March 8, 9 and 21, 2016. Counsel appeared on behalf of CalPERS. Respondent Dhesi was represented by counsel throughout the appeal of this matter. Respondent CDCR did not appear at the hearing and the matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

At the hearing, CalPERS presented records establishing Respondent Dhesi had been terminated from his position with CDCR, that he appealed his termination to the SPB, that SPB upheld the termination, that Respondent Dhesi appealed the SPB's decision to the Sacramento County Superior Court, and that Sacramento County Superior Court upheld the SPB's decision. CalPERS presented evidence that Respondent Dhesi was not substantially incapacitated at the time CDCR terminated his employment. CalPERS also presented evidence that established that Respondent Dhesi was neither terminated because of a disabling medical condition nor to preempt him from filing an otherwise valid claim for disability retirement. Finally, CalPERS presented evidence that Respondent Dhesi did not have a mature claim for disability at the time CDCR terminated his employment.

At hearing and in his closing and reply briefs, Respondent Dhesi raised three primary arguments as to why CalPERS must be required to accept his IDR application. Respondent Dhesi's primary argument is that he was suffering from a medical condition that left him unable to perform his usual duties, and that CDCR was obligated to file a disability retirement application on his behalf, rather than terminate his employment. Respondent Dhesi also argued that CalPERS should be required to accept his IDR application because (1) he was discharged because of a disabling condition and/or (2) he had a mature disability claim at the time of his termination.

To support these arguments, Respondent Dhesi called five CDCR employees to testify on his behalf. Respondent Dhesi also called Dr. Alicia Abels to testify on his behalf. In addition, Respondent Dhesi testified on his own behalf.

The ALJ summarily rejected all of Respondent Dhesi's arguments as to why CalPERS should be required to accept his IDR application.

Respondent Dhesi's argument that he was substantially incapacitated was primarily based on a contingency; he claimed to be incapable of performing his duties as a Dentist because he was not provided with a reasonable accommodation – a dental assistant. He essentially argued that CDCR should be held accountable for not providing him with a dental assistant because it rendered him unable to perform his duties. The testimony of the CDCR employees did not support Respondent Dhesi's arguments.

The ALJ found that Respondent Dhesi had been terminated for cause; therefore, he is precluded from filing an Industrial Disability Retirement application unless he meets one of the *Haywood/Smith* exceptions. The ALJ found that Respondent Dhesi could not meet one of the exceptions.

Dr. Abels testified that Respondent Dhesi, with reasonable accommodations, could perform the essential functions of his Dentist job. The ALJ found that Dr. Abels' conclusion that he could perform his job with a reasonable accommodation "makes respondent ineligible for a disability retirement under the substantially incapacitated standard."

Because Respondent Dhesi was terminated for cause and was not substantially incapacitated, the ALJ concluded that Respondent Dhesi "did not establish that he was discharged because of a disabling medical condition or that his firing was preemptive of an otherwise valid claim for disability. Respondent did not present evidence that he had a matured right to disability retirement before he was separated from service or that a favorable decision by CalPERS was a foregone conclusion." In addition, the ALJ found that Respondent Dhesi did not establish there were any equitable principles that should be applied to grant him the right to seek disability retirement.

The ALJ upheld CalPERS' determination that Respondent Dhesi is not entitled to file an application for IDR. The ALJ concluded that "CalPERS properly cancelled respondent's application for disability retirement."

The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

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 confusion, staff recommends that the dates the hearing took place be changed from "March 8, 9, 21 and 22, 2016" to "March 8, 9, and 21, 2016" on page one of the Proposed Decision. In addition, in order to avoid ambiguity, staff recommends that the word "industrial" be inserted before the words "disability retirement" on pages one, two, three, seven, nine and ten of the Proposed Decision

Because the Proposed Decision properly 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.

September 21, 2016



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JOHN SHIPLEY  
Senior Staff Attorney