

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Respondent Harry Mohan Singh Dhesi (Respondent Dhesi) petitions the Board of Administration (Board) to reconsider its adoption of the Proposed Decision (PD) of the Administrative Law Judge (ALJ) dated August 4, 2016. The Board adopted the PD on September 21, 2016 upholding CalPERS' cancellation of Respondent Dhesi's Industrial Disability Retirement (IDR) application. For reasons discussed below, Staff argues that Respondent Dhesi's petition be denied.

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 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). The SPB upheld CDCR's decision to terminate Respondent Dhesi for cause.

On January 28, 2011, Respondent Dhesi filed a Petition for Writ of Mandate (Writ 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 Writ Petition, and judgment was ordered against Respondent Dhesi on October 11, 2011.

On September 6, 2011, Respondent Dhesi signed an IDR application. He claimed disability based on an orthopedic (lower back) condition. CalPERS determined that Respondent Dhesi was ineligible to apply for IDR due to legal 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. An ALJ presided over a three-day hearing that took place on March 8, 9 and 21, 2016. Throughout the appeal of this matter, Respondent Dhesi was represented by attorney Kevin W. Harris.

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.

The ALJ summarily rejected all of Respondent Dhesi's arguments. The ALJ found that Respondent Dhesi was terminated for cause. In addition, the ALJ found 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."

For these reasons, 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."

Respondent Dhesi's request for reconsideration appears to be premised on the basis that the Board failed to "address specifically the Legal Issues raised in Respondent Dhesi's Written Argument for Hearing dated September 21, 2016." The grounds stated in the Petition by Respondent Dhesi are nearly identical to the arguments submitted by Respondent Dhesi as to why the Board should not adopt the PD. Respondent Dhesi has not raised any factual or legal basis that should require the Board to reconsider its decision to adopt the PD. In addition, staff does not believe that specifically addressing Respondent Dhesi's legal issues is required or would result in a different outcome with respect to Respondent Dhesi's eligibility to file an IDR application.

The first issue raised by Respondent Dhesi relates to his argument that CalPERS has the jurisdiction to determine reasonable accommodation. Staff agrees with the ALJ that the Board does not have jurisdiction to make a finding against CDCR for its alleged failure to accommodate Respondent Dhesi. However, even if one were to assume that the Board has this authority, it would not be proper for the Board to assert that authority in this matter. The only issue before the ALJ was whether Respondent Dhesi is eligible to apply for IDR benefits, or whether he is precluded pursuant to *Haywood* and *Smith*. Simply put, CDCR's actions are not at issue in this matter. Consequently, it would have

been inappropriate for the Board to make a finding against CDCR, even if it had jurisdiction to do so, when it was not an issue before the Board in this matter.

The second issue raised by Respondent Dhesi relates to whether the matter should be remanded to determine whether CDCR violated Government Code sections 21153 and 129253.5. These statutes create an obligation on an employer to file for disability on the behalf of an employee rather than terminate their employment. Again, CDCR's actions are not at issue in this matter. Therefore, remanding the matter to the ALJ to determine if CDCR violated Government Code section 21153 would essentially create an obligation for the ALJ to make a determination on an issue that was not before the ALJ. Respondent Dhesi argues this is relevant because it would possibly show that he should not have been terminated, and that CDCR should have filed for disability on his behalf. However, the SPB and the Sacramento County Superior Court determined that Respondent Dhesi's termination for cause was appropriate. Consequently, the ALJ in this matter correctly concluded Respondent Dhesi "was discharged for cause and not because of a disabling condition." For this reason, even if CDCR concurrently sought Respondent Dhesi's termination and filed for disability on his behalf, the ultimate result would be the same: Respondent Dhesi would not be eligible to apply for IDR benefits because his termination was for cause, and not a result of a disabling condition.

Third, Respondent Dhesi argues the PD should be reconsidered to the extent findings 12, 13 and 14 appear to erroneously state the Respondent Dhesi was only disabled from a warehouse position. In addition, Respondent Dhesi argues the PD should be reconsidered and amended because it is erroneous as to Finding 15. The ALJ, through findings 11 through 15 of the PD, summarized the medical testimony provided by Respondent Dhesi's treating physician, Dr. Alicia Abels. In addition, the ALJ reached certain conclusions based on Dr. Abels' testimony. There is no evidence that the ALJ incorrectly summarized the medical testimony of Dr. Abels, or reached an incorrect conclusion based on this testimony. Contrary to Respondent Dhesi's assertion, there is no evidence to support a conclusion that Dr. Abels considered Dr. Dhesi substantially incapacitated from his positions, either as a dentist or a warehouse worker. As the PD indicates, Dr. Abels believed the Respondent Dhesi "was able to work as a dentist, with reasonable accommodations, and therefore, he is not disabled under the CalPERS standard. Consequently, the ALJ considered the testimony of Dr. Abels with respect to Respondent Dhesi's ability to perform the usual duties of a dentist, and as a result of Dr. Abels testimony the ALJ found that he was not substantially incapacitated. This nullifies Respondent Dhesi's arguments regarding findings 12, 13, 14 and 15 as to why the Board should reconsider the PD, or remand the matter to the ALJ for the further taking of evidence.

Finally, Respondent Dhesi argues the Board should reconsider the PD and remand the matter due to the ALJ's failure to address the maturity date raised on appeal. Respondent Dhesi essentially argued at the hearing that he had a mature claim for disability at the time he was terminated. Respondent Dhesi's argument fails for two reasons: (1) There was a finding that Respondent Dhesi never had a mature claim for

disability; and (2) The appropriate date upon which the mature claim must exist is the date giving rise to the dismissal, not the actual termination date.

In *Smith*, the Court found that a member would not be ineligible to apply for disability benefits if, at the time of the events giving rise to dismissal, a valid claim for disability existed. Under *Smith*, Respondent Dhesi would need to present evidence that as of August 31, 2007, the last date of his actions that gave rise to his termination, he had a mature claim for disability. It was not necessary for the ALJ to directly address the maturity date of the claim for one simple reason; there was a specific finding that Respondent Dhesi was not substantially incapacitated. Essentially, Respondent Dhesi is requesting the Board remand the matter to the ALJ so there can be a specific finding in the PD that states the following: "There is no date by which Respondent Dhesi had a mature claim for disability because he was never substantially incapacitated. Nonetheless, if Respondent Dhesi did have a mature claim for disability, it would have needed to exist prior to August 31, 2007." Under no circumstance would remanding the matter to the ALJ to issue a specific finding as to maturity date result in a change in the ultimate determination. Consequently, Staff does not believe this is a valid basis for remanding the matter to the ALJ.

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 Dhesi's Petition for Reconsideration are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

November 16, 2016



JOHN SHIPLEY
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