

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

**STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Respondent Radu M. Mischiu (Respondent Mischiu) was employed by the California Department of Corrections and Rehabilitation at Solano State Prison (CDCR) as a Psychiatrist. By virtue of his employment, Respondent Mischiu was a state safety member of CalPERS. On August 11, 2014, Respondent Mischiu was served with an Absent Without Leave (AWOL) Separation Notice for his absence from work and required education on August 4 through 8, 2014. Respondent Mischiu filed a reinstatement appeal of his AWOL separation through California Department of Human Resources (CalHR). He lost that appeal after a determination by CalHR's Administrative Law Judge (ALJ). Respondent Mischiu first filed an Industrial Disability Retirement (IDR) application with CalPERS on November 18, 2014, while his CalHR appeal was pending. He failed to submit the required forms, but later refiled his IDR application on January 26, 2015. CalPERS determined that the second application should be cancelled due to the *Haywood* line of decisions which established that IDR cannot be granted after termination from employment, except in very few situations. Respondent Mischiu appealed that *Haywood* determination. A hearing was held on August 17, 2016.

The *Haywood* cases hold that if a member files an IDR application after that member was dismissed from employment for reasons which are not a result of his disability or a subterfuge by the employer to prevent a disability claim by the member, then CalPERS must reject that application for IDR. An employee must have an ongoing relationship with the employer which allows the employee to return to work, if the disability is abated, in order to be entitled to a disability retirement status.

At the hearing, Respondent Mischiu was represented by an attorney. The ALJ received into evidence multiple documents including the determination by the ALJ in the CalHR hearing concerning Respondent Mischiu's reinstatement appeal. Respondent Mischiu requested that the facts and information in the CalHR determination be considered in the CalPERS hearing.

Two of CDCR's staff counsel testified as to the reason that Respondent Mischiu was required to attend education at University of California at San Diego programs before reporting back to work at CDCR, and introduced documents wherein those requirements were discussed at length with Respondent Mischiu. The CalHR hearing decision noted that voluminous letters had been sent explaining the education requirements and competency issues. CDCR counsel additionally explained that Respondent Mischiu is permanently separated from CDCR and cannot be returned to work there. The CalHR decision explained that although Respondent Mischiu had been on a medical leave prior to the determination of AWOL, he had worked throughout that leave time as a Disability Evaluator for the Department of Industrial Relations as an Independent Contractor, doing the same type of work that he did at CDCR (psychiatric exams). Respondent Mischiu did not testify.

After considering all of the documentary evidence and testimony of witnesses, the ALJ found that Respondent Mischiu is not eligible to apply for IDR through CalPERS. The ALJ determined that, pursuant to the *Haywood* case findings, the AWOL resignation extinguished Respondent Mischiu's eligibility to apply for disability retirement because he was no longer eligible to return to work after this permanent separation. Furthermore, because his AWOL resignation was not the result of any disability, the AWOL action taken by his employer was not pre-emptive of an otherwise valid claim for IDR. Accordingly, the ALJ found that the weight of the competent evidence supported the conclusion that Respondent Mischiu is ineligible to apply for IDR.

The ALJ concluded that Respondent Mischiu's appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

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.

November 16, 2016

  
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Senior Attorney