

ATTACHMENT B
STAFF'S ARGUMENT

**STAFF'S ARGUMENT TO REMAND THE MATTER
FOR THE TAKING OF FURTHER EVIDENCE**

Respondent Michael F. Swaney (Respondent Swaney) was employed as an Assistant Information Systems Analyst by the California Department of Food and Agriculture (Department). By virtue of his employment, Respondent Swaney was a state miscellaneous member of CalPERS.

On February 13, 2015, the Department served Respondent Swaney with a Notice of Adverse Action (NOAA) seeking to terminate his employment effective February 25, 2015. The NOAA was based on Respondent Swaney's (e) Insubordination; (f) Dishonesty; (m) Discourteous treatment of the public or other employees; (o) Willful disobedience; (t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

Respondent Swaney appealed the NOAA to the State Personnel Board (SPB), and on October 15, 2015, he entered into a Settlement Agreement with the Department. Under the terms of the Settlement Agreement, Respondent Swaney agreed to resign from his position with the Department effective February 25, 2015, "never again apply for or accept any employment position" with the Department and waive all rights of returning to the Department regardless of how such permissive or mandatory return rights or privileges are derived.

On May 27, 2015, Respondent Swaney applied for Service Pending Disability Retirement citing, "Post Traumatic Stress Disorder." In the application he stated that the disability occurred in "2010" as a result of "undue stress in work environment." Respondent Swaney stated in his application that he is "unable to perform job duties due to hostility in work environment." He also stated in the application that he is "unable to work with continued harassment, hostility - hypersensitivity & hyperawareness."

CalPERS reviewed information concerning Respondent Swaney's separation from employment including the NOAA, and the Settlement Agreement, finding that he was terminated for cause, and that his termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. CalPERS determined that Respondent Swaney was not eligible for disability retirement under the holdings of *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*). Under *Haywood*, an application for disability retirement can be barred if, at the time of application, the member has been terminated for cause, and the discharge was neither the ultimate result of a disabling medical condition nor intended to prevent an otherwise valid claim for disability retirement.

CalPERS notified Respondent Swaney of its determination on February 17, 2016. Respondent Swaney appealed, and the matter went to hearing on September 6, 2016, before an Administrative Law Judge (ALJ).

Prior to the hearing, CalPERS explained the hearing process to Respondent Swaney and the need to support his case with witnesses and documents. CalPERS provided Respondent Swaney with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Swaney's questions and clarified how to obtain further information on the process.

At the hearing, CalPERS presented the NOAA and Settlement Agreement. The evidence presented by CalPERS was not refuted.

Respondent Swaney testified on his own behalf and offered the testimony of his fiancée Tammie Davis. Respondent Swaney also offered three evaluation reports into evidence: (1) a July 5, 2011 Neuropsychological Evaluation Report from Estee S. Cohen, Ph.D.; (2) a December 21, 2011 Neurology Report from Daniel Shalom, M.D. and (3) a September 30, 2014 Psychological Initial Consultation Report from Luigi Piciuccio, Ph.D. Respondent Swaney did not call any physicians or other medical professionals to testify.

The ALJ concluded that under *Vandergoot*, Respondent Swaney's resignation from the Department was tantamount to a dismissal under the criteria established by *Haywood* and *Smith*. However, the ALJ determined that the primary question for determination in this matter was whether the wrongful conduct alleged in the NOAA was the ultimate result of Respondent Swaney's alleged mental health condition. At the hearing, there were no experts called to opine about whether the behaviors alleged in the NOAA were caused by Respondent Swaney's alleged PTSD. The fitness for duty examination and psychiatric evaluations referred to in Dr. Piciuccio's September 30, 2014 written report were not offered into evidence. The ALJ concluded that there was no evidence to confirm whether, months before the Department served Respondent Swaney with the NOAA, it had sent him for a fitness for duty examination because it was contemplating filing for disability retirement on his behalf under Government Code section 19253.5 instead of dismissing him for cause under Government Code section 19574.

The ALJ found that the medical reports submitted by Respondent Swaney raised significant questions about whether: (1) Respondent Swaney was disabled by his mental health condition prior to receiving the NOAA and (2) his mental health condition caused him to engage in the wrongdoing alleged in the NOAA.

Based on the evidence presented at the hearing, the ALJ concluded that the evidence shows that Respondent Swaney's termination **may have been** the ultimate result of his disabling condition. However, the exception requires an employee establish that the dismissal was the ultimate result of the disabling condition. Notwithstanding the fact the ALJ's conclusion failed to meet the required standard, the ALJ concluded that Respondent Swaney's appeal should be granted because Respondent Swaney established that the first exception identified in *Haywood, i.e.*, his dismissal, may have been the ultimate result of his disabling condition.

CalPERS argues the matter should be remanded back to the Office of Administrative Hearings (OAH) for the taking of further evidence to determine whether Respondent Swaney's termination was the ultimate result of a disabling condition. The ALJ relies primarily on the written reports as evidence of Respondent Swaney's medical condition in contravention of Government Code Section 11513 which allows for the admission of hearsay evidence only to supplement or explain direct evidence. (Cal. Gov. Code § 11513(d).) Two of the three reports do not provide evidence regarding Respondent Swaney's mental health condition during the timeframe relevant to the NOAA or the incidents described in the NOAA.

Even if properly admitted, the ALJ's determination establishes that Respondent Swaney did not meet his burden of establishing that his PTSD was the ultimate cause of his termination. The ALJ found that the evidence shows only that Respondent Swaney's termination may have been the ultimate result of his PTSD.

For these reasons, CalPERS argues that the Proposed Decision is not supported by admissible evidence. Staff requests the matter be remanded back to OAH for the taking of further evidence.

November 16, 2016



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