

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Marty E. Gaines (Respondent Gaines) worked as a Correctional Officer for California Department of Corrections and Rehabilitation (CDCR) at Calipatria State Prison. He began working for CDCR in April 2000. By virtue of his employment, Respondent Gaines was a state safety member of CalPERS subject to Government Code section 21154.

On November 16, 2012, CDCR served Respondent Gaines with a Notice of Adverse Action (NOAA) notifying him that he would be terminated effective December 7, 2012. CDCR alleged Respondent Gaines pepper-sprayed an inmate without cause, which amounted to unnecessary and unreasonable force. The NOAA further alleged Respondent Gaines was dishonest in reporting the incident to his superiors and investigators. Respondent Gaines was terminated under Government Code section 19572 for inexcusable neglect of duty, discourteous treatment, dishonesty and other failure of good behavior.

On November 18, 2013 Respondent Gaines applied for Industrial Disability Retirement (IDR) on the basis of an orthopedic injury (herniated disc). CalPERS rejected Respondent Gaines's IDR application on grounds that Respondent Gaines had separated from his employment with CDCR, and that his separation was not the result of a disabling condition, nor was his separation preemptive of an otherwise valid disability claim pursuant to the rule set forth in *Haywood v. American River Fire District*. Respondent Gaines appealed CalPERS' determination, exercising his right to a hearing before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH).

On April 5, 2016, CalPERS sent a letter to the Respondent which explained the hearing process and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

The *Haywood* case holds that a CalPERS member is ineligible for disability retirement if the member was terminated from employment for reasons that are not related to a disabling condition, and the termination does not preempt an otherwise legitimate claim for disability retirement. To establish preemption, the member must prove that a favorable decision on the application prior to termination would have been a foregone conclusion.

A hearing was held August 30, 2016 in San Diego, California, to determine whether *Haywood* precluded Respondent Gaines's application. Respondent Gaines was not represented by counsel, however an attorney not licensed in the State of California advocated on his behalf. A representative from CDCR was also present.

Respondent Gaines testified that he was injured in February 2012 when he was hit by a cell door while bent over. He was subsequently diagnosed with a herniated disc and had three surgeries as a result of that injury.

At the hearing, CalPERS argued Respondent Gaines was not eligible for IDR because his termination for cause severed the employer/employee relationship and none of the *Haywood/Smith* exceptions applied.

The ALJ found CalPERS' arguments persuasive. Respondent Gaines did not present undisputed evidence of a disability, such that "a favorable decision on his claim would have been a foregone conclusion," the requisite showing to establish a vested right to disability retirement. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.) Because Respondent Gaines' disability pension right had not matured, the ALJ found Respondent Gaines ineligible for IDR under the *Haywood* line of cases, and issued a Proposed Decision on September 27, 2016, denying Respondent Gaines' appeal.

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 ambiguity, staff recommends that the word "industrial" be inserted before the words "disability retirement" in the caption on page one and on pages two, three, four, five, eight, and nine of the Proposed Decision. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision, as modified.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision, as modified, 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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