

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Janette E. Cain (Respondent Cain) was employed by respondent City of Gridley (Gridley) as a Dispatch Records Supervisor. By virtue of her employment, Respondent Cain became a local miscellaneous member of CalPERS.

On October 17, 2012, Gridley served Respondent Cain with an Absent Without Leave (AWOL) Separation Notice for her absence from work on October 15 through 17, 2012. Pursuant to Gridley's Personnel Rules, an employee who fails to report to duty for two consecutive work days shall be deemed to have been voluntarily terminated from the position. Respondent Cain was provided the right to a *Skelly* hearing, as well as appeal rights.

Respondent Cain challenged Gridley's determination, and a *Skelly* Pre-Disciplinary hearing took place on October 30, 2012. Subsequent to the *Skelly* hearing, Gridley issued a Notice of Disciplinary Action sustaining the determination that Respondent Cain should be terminated. Respondent Cain was provided with appeal rights. Respondent Cain did not appeal Gridley's determination through the administrative process. However, on August 30, 2013, Respondent Cain filed a lawsuit with the Butte County Superior Court (the "Lawsuit") alleging discrimination on the basis of disability and failure to provide a reasonable accommodation, as well as failure to engage in an interactive process.

On July 10, 2014, Respondent Cain and Gridley entered into a settlement agreement to settle the Lawsuit. Pursuant to the terms of the settlement agreement, Gridley denied all of Respondent Cain's claims and allegations, but agreed to pay Respondent Cain \$45,000 to settle all claims. This amount included a payment in the amount of \$25,000 to settle Respondent Cain's Workers' Compensation claim. In exchange, Respondent Cain agreed that she would never apply for or accept employment with Gridley in the future.

On February 7, 2014, Respondent Cain submitted to CalPERS two disability retirement applications: a Service Pending Disability Retirement (DR) application and a Service Pending Industrial Disability Retirement (IDR) application. She claimed disability based on not being able to work in a high stress environment.

The cases 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*) preclude Respondent Cain from filing an IDR application. The *Haywood* court found that when an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination of the employment relationship renders the employee ineligible for disability retirement. The ineligibility arises from the fact that the discharge is a complete severance of the employer-employee relationship. A disability retirement is only a "temporary separation" from public service, and a complete severance would

create a legal anomaly – a “temporary separation” that can never be reversed. Therefore, the courts have found disability retirement and a “discharge for cause” to be legally incompatible.

Applying *Haywood*, the precedential *Vandergoot* decision (*In the Matter for Application for Disability Retirement of Robert C. Vandergoot, Respondent*, made precedential by the CalPERS Board on October 16, 2013) holds that resignation in the face of threatened dismissal, coupled with a waiver of the right to reinstatement, is tantamount to dismissal for cause and renders the employee ineligible for disability retirement with CalPERS.

Based on these facts, CalPERS determined that Respondent Cain was ineligible to apply for DR or IDR due to precedent set by the *Haywood*, *Smith* and *Vandergoot* cases. Because Respondent Cain’s employment was terminated, and her termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for IDR, CalPERS cancelled Respondent Cain’s DR and IDR applications.

Respondent Cain appealed CalPERS’ determination and was represented by an attorney throughout the appeal of this matter. The hearing took place on August 22, 2016. Closing briefs were submitted by CalPERS and Respondent Cain on September 2, 2016.

At the hearing, CalPERS presented evidence supporting a conclusion that Respondent Cain was terminated from her position with Gridley as a result of violating Gridley’s Personnel Rules. Specifically, CalPERS presented evidence establishing that Respondent Cain did not provide Gridley with any documentation from a doctor excusing her absence from work during the at-issue time period, October 15 through 17, 2012. Furthermore, CalPERS presented evidence establishing that Respondent Cain disputed Gridley’s determination, and after a *Skelly* hearing the determination to terminate her employment was upheld, in large part because Respondent Cain did not dispute any of the facts supporting Gridley’s allegations. In addition, CalPERS presented evidence that established Respondent Cain, pursuant to the settlement of the Lawsuit, agreed that she would never apply for or accept employment with Gridley in the future. Consequently, Respondent Cain cannot be reinstated to her former position with Gridley.

At the hearing, Respondent Cain argued that she was not terminated for cause, but that she was terminated as a result of a disability. Consequently, Respondent Cain argued she is eligible to apply for disability retirement because one of the *Haywood* exceptions applies.

In support of her argument, Respondent Cain presented evidence that demonstrated that on June 12, 2012, she was ordered off work by Bryan Pratt, Family Nurse Practitioner (FNP), through July 9, 2012. Respondent Cain also introduced evidence that on or around July 3, 2012, Gridley placed her on Family Medical Leave Act (FMLA)

status due to its concern for Respondent Cain's health. Respondent Cain presented evidence that she was ordered off work by Mr. Pratt, FNP through October 2, 2012. In addition, Respondent Cain presented evidence that she saw Rupinder Brar, M.D., a cardiologist, and Dr. Brar ordered Respondent Cain off work until September 15, 2012. Respondent Cain presented evidence that Mr. Pratt, FNP, released her to return to work for clerical and administrative duties without restrictions as of October 3, 2012; however, Respondent Cain was not released to return to her dispatch duties at this time.

Evidence was offered that established on September 21, 2012, Gridley informed Respondent Cain that it would no longer accept medical notes signed by Mr. Pratt, FNP but that it required future medical notes to be signed by a doctor. Furthermore, evidence was offered that established that Respondent Cain was neither able to provide a note from a doctor excusing her from work, or releasing her to work with full duties, after October 3, 2012.

On October 9, 2012, Gridley informed Respondent Cain that her FMLA leave and other leave credits had been exhausted, and that she was being rescheduled to return to work on October 15, 2012.

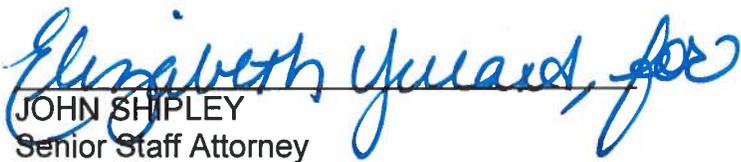
The Administrative Law Judge (ALJ) found that Gridley was on notice of Respondent Cain's medical condition as early as October 2011. The ALJ found that Gridley had informed Respondent Cain in September 2012, that it would no longer accept medical notes from her primary care provider, Mr. Pratt, FNP but they left her on FMLA leave until October 2012. In addition, the ALJ found that Gridley demanded that Respondent Cain return to work on October 15, 2012, with a doctor's medical release returning Respondent Cain to full duty with no restrictions. In addition, the ALJ found that Respondent Cain "could not obtain the requested release from a medical doctor by October 15, 2012, and as a result, she was terminated."

Despite the fact Respondent Cain's termination was determined to be a result of her violating Gridley's Personnel Rules, the ALJ concluded that Respondent Cain established that her case falls within the first exception articulated in *Haywood*, that her dismissal was the ultimate result of her disabling medical condition. The ALJ concluded that Respondent Cain's voluntary decision to completely sever her employment ties with Gridley pursuant to settling the Lawsuit is not a factor in this matter because the termination was the ultimate result of Respondent Cain's disability.

The ALJ held that Respondent Cain's appeal should be granted, and that CalPERS shall review Respondent Cain's disability retirement application on the merits to determine whether she should be granted disability retirement. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the member's appeal was granted, it is not likely she will file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

November 16, 2016

A handwritten signature in blue ink that reads "Elizabeth Yuard, for". The signature is written in a cursive style and is positioned over the printed name and title of John Shipley.

JOHN SHIPLEY  
Senior Staff Attorney