

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Cajan Nwagbara (Respondent Nwagbara) was employed by respondent California Department of State Hospitals, Coalinga Secure Treatment Facility (CDSH) as a Psychiatric Technician. By virtue of his employment, Respondent Nwagbara became a state safety member of CalPERS.

On October 2, 2014, Respondent Nwagbara signed, and thereafter submitted to CalPERS, an application for Industrial Disability Retirement (IDR). Respondent Nwagbara claimed disability on the basis of orthopedic (neck, ankle and hips), neurologic (head pain and dizziness) and ophthalmologic (vision) conditions. CalPERS evaluated Respondent Nwagbara's IDR application, and after reviewing all medical documentation, including reports from three Independent Medical Examiners, denied his IDR application.

Subsequent to denying Respondent Nwagbara's IDR application, CalPERS received information that Respondent Nwagbara was rejected during his probationary period of employment by Respondent CDSH. On August 2, 2012, Respondent CDSH served Respondent Nwagbara with a Notice of Rejection During Probationary Period. Respondent Nwagbara's rejection on probation was due, in part, to Respondent Nwagbara's failure to competently perform his duties as a Psychiatric Technician with CDSH. Respondent Nwagbara appealed Respondent CDSH's rejection on probation to the California State Personnel Board (SPB). A hearing on Respondent Nwagbara's appeal was scheduled to take place on February 19, 2013. Respondent Nwagbara failed to appear at his hearing challenging Respondent CDSH's determination. Therefore, his appeal was deemed withdrawn and he was rejected during probation for cause, effective August 9, 2012. A Decision Approving Withdrawal of Action or Appeal was approved by the SPB on February 27, 2013.

Based on these facts, CalPERS determined that Respondent Nwagbara was ineligible to apply for IDR due to 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 Nwagbara had been rejected on probation 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 Nwagbara's IDR application.

On June 17, 2016, CalPERS informed Respondent Nwagbara of its determination that he was ineligible to apply for IDR benefits based on his rejection during probation for cause by CDSH.

Respondent Nwagbara appealed CalPERS' determination, exercising his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. The ALJ presided over a one-day hearing in San Bernardino, California on

September 19, 2016. Respondent Nwagbara represented himself at the hearing. Respondent CDSH did not appear at the hearing.

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

At the hearing, CalPERS presented records establishing Respondent Nwagbara had been rejected during probation for cause from his position with CDSH, had appealed his rejection during probation for cause to the SPB, and the SPB upheld the rejection during probation for cause. CalPERS also presented evidence that established that Respondent Nwagbara 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 Nwagbara did not have a mature claim for disability at the time CDSH terminated his employment.

CalPERS argued at the hearing that the cases of *Haywood* and *Smith* preclude Respondent Nwagbara 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.

The *Smith* court explained that to be preemptive of an otherwise valid claim, the right to a disability retirement must have matured before the employee was terminated. To be mature, there must have been an unconditional right to immediate payment at the time of termination unless, under principles of equity, the claim was delayed through no fault of the terminated employee or there was undisputed evidence of qualification for a disability retirement.

At hearing, Respondent Nwagbara testified that he got into an altercation at work with an inmate, that he was injured as a result of the altercation, and that he was unable to perform his duties as a result of his injuries. Respondent Nwagbara testified that his rejection during probation was a result of his supervisor picking on him and writing him up for reasons that had nothing to do with his job performance.

The ALJ concluded that Respondent Nwagbara's eligibility to file an IDR application is dependent on his having a continuing employment relationship with CDSH. The ALJ concluded that where an employee is terminated for cause and the discharge is neither

the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability, the termination of the employment relationship renders the employee ineligible for disability retirement. The ALJ concluded that Respondent Nwagbara's termination was not based on any disabling medical condition, nor was his termination preemptive of an otherwise valid claim for disability retirement. Consequently, the ALJ held that Respondent Nwagbara is not eligible to file an application for IDR and that CalPERS properly rejected Respondent Nwagbara's IDR application.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

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 added before the words "disability retirement" on pages two, three and four of the Proposed Decision, and the words "cancellation of the" be inserted before the word "application" in the caption on page one.

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.

December 21, 2016



JOHN SHIPLEY
Senior Staff Attorney