

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

## **STAFF'S ARGUMENT TO DECLINE TO CONDUCT A FULL BOARD HEARING**

CalPERS staff requests the Board decline to adopt the Proposed Decision, in favor of its own Decision, after conducting a Full Board Hearing in accordance with its policies. Staff's argument is based on the following:

1. The Proposed Decision improperly applies principles of equity. Equity does not apply to CalPERS' compliance with the California Public Employees' Retirement Law (PERL).
2. The Proposed Decision erroneously declined to apply prior case law (*Haywood* and *Smith*), as well as the Precedential Decision *Vandergoot*, to the facts.

### Legal and Factual Background

On February 27, 2013, Respondent Sheldon Scarber (Respondent) applied for Industrial Disability Retirement (IDR). On July 9, 2013, Respondent submitted a Service Retirement Application, which was approved. Respondent has been receiving his service retirement allowance since then.

On July 22, 2013, the California Highway Patrol (CHP) issued a Notice of Adverse Action (NOAA) to Respondent. He was to be dismissed from his position as an Assistant Chief with the CHP effective August 29, 2013. The legal bases for dismissal were inexcusable neglect of duty, insubordination, dishonesty, discourteous treatment of the public or other employees, willful disobedience, misuse of state property and other failure of good behavior either during or outside working hours of such a nature that it causes discredit to the CHP.

Respondent appealed his termination. On December 12, 2013, Respondent and the CHP entered into a Stipulated Settlement. Pursuant to the terms of the Stipulated Settlement, Respondent agreed to withdraw his appeal of the termination, voluntarily resign from the CHP for personal reasons, waive any right to reinstate his employment, and waive any right to appeal the NOAA. On January 9, 2014, the State Personnel Board (SPB) approved the Stipulated Settlement.

On April 14, 2014, CalPERS notified Respondent that his IDR application had been cancelled due to operation of *Haywood*, *Smith* and *Vandergoot*. Respondent appealed, and a hearing was held on September 15, 2016.

### The Proposed Decision

The Administrative Law Judge (ALJ) found that Respondent permanently terminated his employment relationship with the CHP when he entered into the Stipulated Settlement, and Respondent's termination of the employment relationship was wholly unrelated to any disability. The ALJ also found that the termination was not the ultimate result of a disabling medical condition, nor did the termination pre-empt an otherwise valid claim for industrial disability pension.

However, the ALJ also found that Respondent's IDR application had been pending for five months before the NOAA was issued, ten months before the Stipulated Settlement was executed, and eleven months before the SPB approved the settlement. After SPB approval, CalPERS waited three more months before cancelling Respondent's IDR application. In sum, the ALJ found that Respondent had waited approximately thirteen months for the Board to rule on his IDR application before it was canceled due to *Haywood et al.*

Applying principles of equity, the ALJ found that Respondent's eligibility for IDR is deemed to have survived the termination of his employment relationship with the CHP. The ALJ therefore granted his appeal.

### Why the Proposed Decision Should Be Rejected

I. The Proposed Decision improperly applies principles of equity. Equity does not apply to CalPERS' compliance with the PERL.

The law is clear that the power of equity "cannot be intruded in matters that are plain and fully covered by positive statute." *Barrett v. Stanislaus Co. Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1608. CalPERS may only pay benefits that are authorized by law. To the extent that the ALJ relies on inaction by CalPERS staff (thirteen months delay), that equitable doctrine is called laches.

The law is clear that equity is barred where the government agency does not possess the authority to do what it appears to be doing. *Medina v. CalPERS* (2003) 112 Cal.App.4<sup>th</sup> 864, 870. Principles of equity cannot be invoked to contravene statutes and provisions that define an agency's powers. *Fleice v. Chualar Union Elem. School Dist.* (1988) 206 Cal.App.3d 886, 893.

CalPERS may only grant retirement benefits that are authorized by the PERL and case law. CalPERS has no authority to grant additional retirement benefits, no matter the equities involved. Even if Respondent Scarber relied to his detriment on inaction by CalPERS staff, CalPERS staff does not possess the authority to do what it appeared to be doing. *Medina, supra* and *Pomona Police Officers Assoc. v. CalPERS* 58 Cal.App.4<sup>th</sup>, 585. Therefore principles of equity, including laches, do not apply to the facts here.

Even if laches were available to Respondent, the facts in this case do not rise to the level of a laches claim. Laches is an equitable remedy based on unreasonable delay. "The first element of laches is delay." (*Magic Kitchen LLC v. Good Things Intern. Ltd.*, 153 Cal.App.4<sup>th</sup> at p. 1157.) Courts have concluded that some delay is permissible, including "when it is necessitated by the exhaustion of remedies," or "when it is used to evaluate and prepare a claim." (*Id.* at p. 1160.)

Laches applies to an unreasonable delay in making an assertion, such as asserting a right, which may result in refusal. Here, Respondent's IDR application was pending for

only 5 months prior to the NOAA being issued. When CalPERS receives any IDR application, it investigates all the underlying facts, including claimed medical condition and employment status. During CalPERS' investigation, it found out for the first time, that Respondent was served with an NOAA. Once CalPERS had notice of Respondent's termination, it could not ignore it. The NOAA had to be finalized either through a hearing at SPB, or as here, through a Stipulated Settlement. CalPERS had to wait for the NOAA to be final, in order to determine whether *Haywood* applied.

Further, laches is not available to provide Respondent a benefit not otherwise available to him. For an equitable theory to survive, an important element must be met - which the ALJ fails to address at all - that the interests of the private party must outweigh the effect on the public interest and policies. *Precedential Decision: In Re Henderson*, p. 10-11 (citing *Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489). Here, Respondent's interest in IDR cannot possibly outweigh strong public interest in maintaining the Public Employees' Retirement Fund, particularly when Respondent's appeal conflicts directly with case law and prior Precedential Decisions.

The Proposed Decision is inconsistent with *Haywood, Smith* and *Vandergoot*. Thus, the Board should conduct a hearing on the record to correct the erroneous analysis and conclusion in the Proposed Decision.

II. The Proposed Decision erroneously failed to apply prior case law (*Haywood* and *Smith*), and the Precedential Decision *Vandergoot*, to the facts.

Relying on a partial quote from *Smith*, the ALJ used principles of equity to grant Respondent's appeal. The ALJ reasoned that because Respondent waited approximately thirteen months for the Board to rule on his IDR application before it was canceled, somehow Respondent's eligibility for IDR is deemed to have survived his termination.

The ALJ's reasoning is seriously flawed because it ignores the full language and reasoning in *Smith*, which states in its entirety:

It is not as if the plaintiff had an impending ruling on a claim for disability pension that was delayed, through no fault of his own, until after his dismissal. Rather, he did not even initiate the process until after giving cause for his dismissal.  
*Id.*

Identical to the plaintiff in *Smith*, Respondent Scarber did not initiate the IDR process until two years after giving numerous causes for his dismissal. According to the NOAA, beginning in May 2011, pornographic images were accessed and saved on Respondent's work computer's hard drive. In July 2011, Respondent inappropriately used for private gain or advantage his prestige and influence as a member of the CHP when he requested and was allowed extra visitation privileges and physical contact to visit his son arrested and incarcerated in Fresno county jail, facing rape and burglary charges. In November 2012, Respondent directed a subordinate employee to

unlawfully access California Law Enforcement Telecommunications System in order to run an unauthorized driver's history check. Beginning in September 2012, Respondent sent and received unauthorized emails of police reports regarding his son's arrest. On December 2012, Respondent willfully disobeyed a direct order given to him by a CHP Supervisor, after his police powers were suspended when he discussed the nature of an ongoing investigation involving Respondent personally. On December 2012, Respondent aided in and conspired to assist his son to evade prosecution, filed a false missing persons report, and made dishonest statements to law enforcement, when he helped his son escape Fresno county jurisdiction by transporting him to Mexico.

All the above events happened *before* respondent filed his IDR application on February 27, 2013. The ALJ ignores all these facts when arriving at his erroneous decision. Respondent did not even initiate the IDR process until after giving numerous significant causes for his dismissal for cause.

Second, *Smith* recognizes that the key issue is whether Respondent's "right to a disability retirement matured before [his] separation from service." *Id.* According to *Smith*, "a vested right matures when there is an unconditional right to immediate payment." *Id.* The Supreme Court noted that "a duty to grant a disability pension does not arise at the time of injury itself, but when the pension board determines that the employee was no longer capable of performing his duties." *Id.* Here, a CalPERS determination of eligibility did not antedate the facts giving rise to Respondent's termination. Any "right" Respondent may have had to a disability retirement was immature, and his dismissal for cause defeated it. *Id.*

Third, the ALJ ignores the clear language in *Smith* which states, "As we stated in *Haywood*, the timeliness of the application is a procedural issue without any significance to the substantive entitlement to a disability retirement." *Smith*, citing *Haywood*, 67 Cal.App.4<sup>th</sup> at p. 1307. Here Respondent has no substantive entitlement to a disability retirement. He was terminated for reasons wholly unrelated to any disability he may have been suffering at the time, and the reasons for his termination occurred long before he submitted his IDR application.

#### Proposed Board Action

Based on the serious flaws of the Proposed Decision, CalPERS staff urges the Board to reject the Proposed Decision and hold a Full Board Hearing. Once the Board considers all the evidence and arguments in full context, the Board can then decide for itself whether the ALJ has analyzed the applicable law correctly. In short, the Board should grant a Full Board Hearing so that the Board's final Decision, whatever it may be, is supported by a correct and reasonable application of law.

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