

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

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Respondent Grace S. Herrera ("Respondent Herrera") was employed as an Accounting Technician II by California State University, Sonoma ("CSUS"). As such, Respondent Herrera was a local miscellaneous member of CalPERS.

On February 6, 2013, CSUS served Respondent Herrera with a Notice of Pending Dismissal ("Notice of Dismissal") seeking to dismiss her from her position effective February 20, 2013. The Notice of Dismissal cited Respondent Herrera's unprofessional conduct, incompetence and her failure and refusal to perform the normal and reasonable duties of her job as the grounds for dismissal. The Notice of Dismissal specifically cited to Respondent Herrera's attendance problems, poor performance and sleeping on the job.

Respondent Herrera submitted a written response to the Notice of Dismissal on February 14, 2013. CSUS conducted a Skelly review on February 18, 2013. CSUS affirmed the allegations and upheld the determination to terminate Respondent Herrera.

Respondent Herrera was terminated effective February 20, 2013. She did not appeal her termination.

On July 29, 2015, Respondent Herrera submitted an application for disability retirement citing her "bipolar disorder, brain injury, attention deficit hyperactivity disorder (ADHD) and schizophrenia" conditions.

CalPERS reviewed information concerning Respondent Herrera's separation from employment, including the Notice of Dismissal and the Skelly review documents and determined that she was not eligible to apply for disability retirement because she was terminated for cause, and her termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement.

CalPERS notified Respondent Herrera of its determination on September 28, 2015. Respondent Herrera appealed CalPERS' determination to cancel her disability retirement application by letter dated October 24, 2015, and requested an administrative hearing.

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

At the hearing, CalPERS presented the testimony of the Manager of Labor and Employee Relations for CSUS regarding the Notice of Dismissal and the circumstances surrounding Respondent Herrera's separation from employment.

Respondent Herrera testified that CSUS improperly terminated her because they considered conduct that was precluded by the terms of an October 8, 2012 settlement agreement between Respondent Herrera and CSUS. She also testified that the termination was improper because CSUS failed to provide ADA accommodations that would have addressed the problems cited in the Notice of Dismissal.

When considering all of the evidence presented, the ALJ determined that Respondent Herrera failed to establish that her termination was the ultimate result of a disabling condition. She also failed to present sufficient medical evidence, including a physician's note or verification, to establish that her medical condition caused the poor attendance, poor performance or sleeping on the job.

The ALJ concluded that CalPERS' decision to cancel Respondent Herrera's application for disability retirement was correct and that Respondent Herrera's appeal should be denied. 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 deleted from the caption on page one, and in any other place it may appear in 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 are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

December 21, 2016

  
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AUSTA WAKILY  
Senior Staff Attorney