

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

At its November 16, 2016 meeting, the CalPERS Board of Administration adopted the Proposed Decision of the Administrative Law Judge ("ALJ"). The Decision denied Respondent Linda Martinez' (Respondent Martinez) appeal and found that Respondent Martinez was ineligible to apply for disability retirement due to operation of the *Haywood* and *Smith* cases because Respondent Martinez had been 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. Respondent Martinez filed a timely Petition for Reconsideration. A Stay of Execution in the above matter has been granted so that the Petition for Reconsideration may be presented to the Board.

Respondent Martinez was employed as a Disability Evaluation Analyst by Respondent Department of Social Services ("Department"). By virtue of her employment, Respondent Martinez was a state miscellaneous member of CalPERS. Respondent Martinez and the Department have been notified of the date of the Board meeting and of their opportunity to present written argument at the Board meeting on December 21, 2016.

On January 8, 2014, the Department served Respondent Martinez with a Notice of Adverse Action (NOAA) seeking to terminate her employment effective January 17, 2014. The NOAA was based on Respondent Martinez' incompetence; inefficiency; inexcusable neglect of duty; insubordination; dishonesty; discourteous treatment of the public and other employees; willful disobedience; misuse of state property; violation of prohibitions in accordance with section 19990; other failure of good behavior and unlawful retaliation.

Respondent Martinez appealed the NOAA to the State Personnel Board (SPB), and on September 22, 2014, she entered into a Settlement Agreement with the Department. Respondent Martinez did not identify disability as a ground for appeal of the NOAA. Under the terms of the Settlement Agreement, Respondent Martinez agreed to resign from her position with the Department and, "never again apply for or accept any employment position" with the Department. The Settlement Agreement also included the following clauses: that Respondent Martinez "will be deemed to be on unpaid leave of absence from ... January 17, 2014 through ... August 31, 2014" and "on unpaid medical leave of absence from ... September 1, 2014 through ... September 30, 2014" and that the Department "agrees to cooperate with any application for disability retirement filed by [Respondent] within the next six months."

On November 17, 2014, Respondent Martinez submitted an application for disability retirement citing her "bilateral arms and neck, endometriosis, severe GERD vocal cord damage, DM2, anxiety cumulative trauma" conditions.

CalPERS reviewed information concerning Respondent Martinez' separation from employment, including the NOAA and the Settlement Agreement and determined 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 Martinez and the Department of its determination on June 22, 2015. Respondent Martinez, through her counsel, appealed the determination. A hearing before an ALJ was completed on July 27, 2016.

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 Martinez from filing a disability retirement 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.

In *Smith*, the Court reiterated its position in *Haywood* holding that if a dismissal for cause makes an applicant ineligible for reinstatement in her position, she is also disqualified from receiving disability retirement. To hold otherwise, the Court explained, would override "the power of public agencies to discipline employees, and would reward poor employees with early retirement." (*Id.*, at 203.)

The CalPERS precedential decision *In the Matter of the Application for Disability Retirement of Robert C. Vandergoot* (adopted effective October 6, 2013) applied the *Haywood* and *Smith* rulings in the context of a stipulated settlement of a dismissal action. The precedential decision in *Vandergoot* provides that CalPERS "can fairly conclude the terms of the Stipulated Settlement of Respondent's SPB case as being tantamount to a dismissal for purposes of applying the *Haywood* criteria."

The *Vandergoot* case presents the same law and issues as this case. Mr. Vandergoot was served with a NOAA and subsequently resigned pursuant to the terms of a settlement agreement. Mr. Vandergoot submitted a disability retirement application to CalPERS. The application was rejected on the grounds that he had been terminated for cause and, therefore, ineligible for disability retirement under the criteria set forth in *Haywood* and *Smith*. Mr. Vandergoot argued that *Haywood* and *Smith* were not controlling because those cases involved employees who were terminated for cause whereas he voluntarily resigned from his position. The ALJ disagreed, finding that the character of the disciplinary action terminating Mr. Vandergoot's employment did not change because he elected to voluntarily resign prior to exhausting his appeal rights. But for the pendency of the disciplinary action, Mr. Vandergoot would not have entered into a settlement agreement with his employer and would not have resigned from his

position. The ALJ found that Mr. Vandergoot's resignation was a distinction without a difference. His resignation resulted in his permanent separation of service. Gov. Code section 19996; *Collins v. Co. of Los Angeles* (1976) 55 Cal.App.3d 594, 597.

The ALJ concluded that the facts were not in dispute and fell squarely within the *Haywood* and *Smith* cases and the Precedential Decision in *Vandergoot*. The ALJ determined that the basis of Respondent Martinez' separation from the Department was the original action terminating her from her position as a Disability Evaluation Analyst. But for the termination, there would have been no settlement. The ALJ found no evidence that a medical condition caused or led to Respondent Martinez' termination or that the Department terminated her to prevent her from retiring for disability.

The ALJ upheld CalPERS' determination that Respondent Martinez is not entitled to file an application for disability retirement. Respondent Martinez' termination permanently severed her employment relationship with the Department. The character of the disciplinary action does not change because Respondent Martinez elected to settle her case prior to exhausting her appeal rights. CalPERS correctly determined that the *Haywood* and *Smith* cases and the Precedential Decision in *Vandergoot* bar Respondent Martinez' eligibility to apply for disability retirement.

For the reasons stated above, staff recommends the Board deny the Petition for Reconsideration and uphold its Decision.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Petition for Reconsideration are minimal. The respondents may file a writ petition in superior court seeking to overturn the Decision of the Board.

December 21, 2016



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