

ATTACHMENT A
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DECLINE TO ADOPT PROPOSED DECISION

At its December 21, 2016 meeting, the Board considered the Proposed Decision in this matter and concluded not to adopt it, but to decide the matter itself on the record. CalPERS staff argues 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. A Proposed Decision was issued on October 21, 2016, granting Respondent's appeal.

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, that equitable doctrine is called laches. Staff argues that the ALJ incorrectly calculated a thirteen month delay. To the extent any delay occurred, at most it was two months.

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.4th 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 relied to his detriment on inaction by CalPERS staff, CalPERS staff does not possess the authority to grant his application. *Medina, supra* and *Pomona Police Officers Assoc. v. CalPERS* 58 Cal.App.4th, 585. Therefore principles of equity, including laches, cannot 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.4th 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. And the NOAA had to be finalized through "the exhaustion of remedies": either through a hearing at SPB, or as here, through a Stipulated Settlement (*Magic Kitchen*, p. 1157). The SPB approved the Stipulated Settlement on January 9, 2014. Once it was final, CalPERS could determine whether *Haywood* applied. Only three months later, April 14, 2014, CalPERS staff notified Respondent that his application was canceled due to operation of *Haywood*.

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.

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 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 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 who was 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. In 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. In 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 initiate the IDR process until well after his conduct and actions gave rise to numerous significant causes for the dismissal and the ultimate dismissal action 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.4th 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.

Finally, to resolve the issue in this case, the ALJ should have been guided by CalPERS' Precedential Decision *In the Matter of the Application for Disability Retirement of Robert Vandergoot and CA Dept. of Forestry and Fire Protection (Vandergoot)*. The facts here are remarkably similar to those in *Vandergoot*. Vandergoot had voluntarily resigned his employment after being served with an NOAA. In exchange for agreeing to resign, his employing department agreed to withdraw the pending NOAA (*Vandergoot*, p. 11). Vandergoot agreed in a Stipulation and Settlement to not seek, transfer to, apply for, or accept any employment in any capacity with his employing department in the future. If

he returned to employment with the department in violation of the agreement, he would be subject to dismissal without any right of appeal (*Vandergoot*, p. 4).

CalPERS denied Vandergoot's application for disability retirement, arguing that because he resigned while disciplinary charges were pending, he was no longer eligible for a disability retirement. During the appeal of CalPERS' denial of Vandergoot's disability retirement application, CalPERS argued that, "But for the pendency of the [NOAA and] disciplinary action, [Vandergoot] would never have entered into the Stipulation and Settlement resigning from his position" (*Vandergoot*, p. 6). CalPERS further argued, "the fact [Vandergoot] 'resigned' from employment is a distinction without a difference." *Id.*

Vandergoot specified that the case "raises the question of whether CalPERS may properly apply *Haywood* in the absence of an actual dismissal for cause." (*Vandergoot*, p. 6). After considering the above circumstances, the ALJ determined that,

Haywood makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the [employer] if it ultimately is determined that respondent is no longer disabled (citation omitted). Such is not possible here. The employment relationship has not only been severed, but the terms of the Stipulation and Settlement Agreement expressly lock [Vandergoot] out from being reinstated. (*Vandergoot*, p. 7).

The focus in *Vandergoot* was whether Respondent could be reinstated to his prior position with his employing department. The ALJ in *Vandergoot* concluded,

Were respondent to receive a disability retirement allowance, he would have no employer who could require him to undergo a medical examination under Government Code section 21192. And it is no longer possible for him to be reinstated under Government Code section 21193. These necessary prerequisites for receiving a disability retirement allowance are simply not present in this case. For this reason alone, CalPERS can fairly consider the terms of the Stipulation and Settlement of respondent's [disciplinary] case as being tantamount to a dismissal for purposes of applying the *Haywood* criteria. (*Vandergoot*, p. 8).

In this case, Respondent is similarly not eligible for a disability retirement because his employment relationship with Respondent CHP has been completely severed. Identical to the facts in *Vandergoot*, the way in which Respondent separated his employment with CHP was such that he cannot be rehired or reinstated by CHP. In fact, just like *Vandergoot*, the Stipulated Settlement provides that if he is somehow reemployed by CHP, he may be immediately dismissed without limitation to time, with no right of appeal, and no right to contest his dismissal.

Such a situation must be viewed as wholly inconsistent with the policy explained in *Smith* and *Haywood*. Were Respondent to receive a disability retirement allowance, he would have no employer who could require him to undergo a medical examination under Government Code section 21192 for the position of Assistant Chief for the CHP; and it is no longer possible for him to be reinstated to such a position under Government Code section 21193. For these reasons alone (just like in *Vandergoot*), the way in which Respondent separated from employment with the CHP was tantamount to a dismissal for purposes of applying the *Smith* and *Haywood* criteria.

Respondent's resignation while charges were pending pre-empted his termination for cause. Respondent's resignation, however, does not undermine the fact that reinstatement to his former position is not possible. Just like *Vandergoot*, whether Respondent's separation from CHP is characterized as a resignation or a termination is a distinction without a difference. Either way, his employment relationship with CHP has been completely severed.

Proposed Board Action

Based on the serious flaws of the Proposed Decision, CalPERS staff urges the Board to reject the Proposed Decision in its entirety and adopt as its own the attached Proposed Decision, which is supported by a correct and reasonable application of law.

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