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9 Employees' Retirement System

10 BOARD OF ADMINISTRATION
11 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

12	In the Matter of the Cancellation of)	CASE NO. 2015-0243
13	Application for Industrial Disability)	
14	Retirement of:)	OAH NO. 2016-050434
15)	
16	SHELDON K. SCARBER,)	CalPERS' CLOSING BRIEF IN
17)	SUPPORT OF DETERMINATION
18	Respondent,)	
19)	Hearing Date: September 15, 2016
20	and)	Hearing Location: Fresno
21)	
22	CALIFORNIA HIGHWAY PATROL,)	ALJ Coren Wong, presiding
23)	
24	Respondent.)	
25)	

26 Petitioner California Public Employees' Retirement System (CalPERS) submits
27 the following Closing Brief in its official capacity, and not otherwise.

28 **ISSUE**

29 This appeal is limited to the issue of whether Respondent Scarber may file an
30 application for Industrial Disability Retirement (IDR) based on a cardio, epilepsy,
31 anxiety and hypertension; or whether his application and eligibility for IDR is precluded
32 by operation of *Haywood, Smith and Vandergoot*.

33 CalPERS determined Respondent is ineligible to apply for IDR, and canceled
34 his IDR application. Respondent appealed.



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STATEMENT OF THE CASE

Under the CA Public Employees' Retirement Law, Gov. Code §20000 *et seq.*, (the PERL), an employee is not eligible to apply for or be granted IDR unless he is eligible for potential reinstatement, if it is ultimately determined that he is no longer disabled (Gov. Code §21193).

Respondent is not eligible to apply for IDR because there has been a complete severance of his employment relationship with CHP and no reinstatement is possible:

1. CHP served Respondent with a Notice of Adverse Action on July 29, 2013, effective date of termination August 29, 2013 (Exhibit 10);
2. Respondent appealed his termination;
3. A Stipulated Settlement was reached on December 12, 2013 which provided that Respondent would
 1. withdraw his appeal from the NOAA;
 2. waive any rights to appeal the NOAA;
 3. would submit a resignation for personal reasons to CHP effective August 29, 2013; and
 4. **would not seek or accept employment with CHP now or in the future** (Exhibit 11).
4. The SPB approved the Stipulated Settlement on January 9, 2014 (Exhibit 12).

This complete severance precludes Respondent from being eligible to apply for IDR as a matter of law (*Haywood, Smith and Vandergoot*).

PARTIES

Respondent Sheldon Scarber (Respondent) was employed by Respondent CHP as an Assistant Chief until a Notice of Adverse Action was served on him July 29,

1 2013. By virtue of this employment, Respondent is a state safety member of CalPERS
2 subject to Government Code sections 21154 and 21156.

3 Respondent CA Dept. of Highway Patrol (CHP) is a state agency that
4 contracts with CalPERS for retirement benefits for its eligible employees. As such,
5 CHP is bound to comply with the provisions of its CalPERS contract and the PERL.

6 The California Public Employees' Retirement System (CalPERS) is the
7 government agency charged with administering the Public Employees Retirement Law,
8 Gov. Code sections 20000 *et seq.* (PERL). CalPERS is an entity created wholly by
9 statutes codified in the PERL, which grant CalPERS certain powers. CalPERS has no
10 authority other than that granted by statute. It has the authority to pay benefits to a
11 member only when the statutes authorize it, and then only in the amount authorized.

12 Hudson v. Posey (1967) 255 Cal.App.2d 89.

13 **STATEMENT OF FACTS**

14 On February 27, 2013, Respondent submitted an Industrial Disability
15 Retirement (IDR) Application to CalPERS (Exhibit 3).

16 On July 9, 2013, Respondent submitted a Service Retirement Application to
17 CalPERS (Exhibit 4).

18 On July 29, 2013, Respondent Scarber was served with a Notice of Adverse
19 Action (NOAA) (Exhibit 10). The effective date of termination was August 29, 2013.
20 Respondent appealed his termination.

21 On October 31, 2013, CalPERS notified Respondent that he had been placed
22 on the service retirement roll (Exhibit 5).

23 During pendency of Respondent's termination appeal, he and CHP entered
24 into a Stipulated Settlement and Release of all Claims (Exhibit 11). Respondent was
25 represented by Charles Magill during the appeal and settlement proceedings.

1 On December 12, 2013, Respondent and Mr. Magill signed the Stipulated
2 Settlement which provides:

3 **Future Employment:** Appellant agrees to not seek or accept employment
4 with the CHP, either now or in the future, and if he should obtain
5 employment in contravention of this provision, he may be immediately
6 dismissed without limitation to time and with no right of appeal and no right
7 to contest his dismissal. (Exhibit 11, para. 4, p. 2)

8 On January 9, 2014, the State Personnel Board (SPB) approved the Stipulated
9 Settlement (Exhibit 12). It is now final.

10 During review of Respondent's IDR application, CalPERS requested documents
11 from the CHP. The CHP informed CalPERS that Respondent Scarber was served with
12 a NOAA to terminate him from his position of Assistant Chief on July 29, 2013; the
13 parties had entered into a Stipulated Settlement; and Stipulated Settlement had been
14 approved by the SPB. CHP provided relevant documents to CalPERS (Exhibits 10, 11
15 and 12). CHP also provided a Declaration of Authenticity for the documents (Exhibit 9).

16 CalPERS reviewed the documents provided by the CHP, and determined that
17 Respondent had been terminated for cause effective August 29, 2013 on the following
18 grounds: accessed and viewed pornographic images and adult related content on his
19 dept. laptop; used or attempted to use for private gain or advantage his prestige or
20 influence as a member of the CHP; directed a subordinate employee to unlawfully
21 access CLETS in order to run a driver history check on a family member; misused the
22 CHP email system by sending and receiving non-work related materials through his
23 CHP email account; insubordinate and willfully disobeyed a direct order given, directing
24 him not to discuss the nature of an ongoing investigation involving himself; aided in
25 and conspired to assist his son evade prosecution, filed a false missing persons report
and dishonest statements to Fresno Sheriff's Office personnel; and giving dishonest
statements to the US Postal Inspection Service personnel (Exhibit 10, p. 2).

1 CalPERS is also aware that Respondent is facing felony criminal charges due to
2 these violations. CalPERS obtained the Court Reporter's Transcript from Preliminary
3 Hearing, Sheldon Kyle Scarber Held to Answer, dated March 11, 2016 (Court
4 Reporter's Transcript identified as #14).

5 CalPERS reviewed the cases of *Haywood v. American River Fire Protection*
6 *District* (1998) 67 Cal.App.4th 1292 (*Haywood*), *Smith v. City of Napa* (2004) 120 Cal.
7 App. 4th 194 (*Smith*), the Judgment on Petition for Writ of Mandate of *Sergio Garcia v.*
8 *CalPERS (Garcia)*, and the Precedential Decision *In the Matter of the Application for*
9 *Industrial Disability Retirement of Robert Vandergoot (Vandergoot)* (See Request for
10 Official Notice, Exhibits 15 and 16).

11 CalPERS determined that Respondent was facing disciplinary action as of July
12 29, 2013, his termination date was effective August 29, 2013, that he appealed but
13 settled his appeal, and the provisions of the Settlement Agreement barred any future
14 employment with the CHP. On those facts, CalPERS canceled Respondent's IDR
15 application (Exhibit 6)

16 On April 14, 2014, CalPERS notified Respondent that his IDR application had
17 been canceled due to operation of *Haywood, Smith and Vandergoot* (Exhibit 6).

18 On May 14, 2014 and March 11, 2015, Respondent appealed (Exhibits 7 and 8).

19 **THE CHP FOUND THAT RESPONDENT IS DISHONEST.**

20 Respondent's credibility is a central issue in this case. This Court is tasked with
21 deciding what weight to give to any statement made by or attributed to Respondent.

22 One of the findings made by the CHP in the Notice of Adverse Action
23 terminating Respondent is "**dishonesty**" (Exhibit 10, p.1). Specifically, CHP's
24 investigation revealed that Respondent "aided in and conspired to assist [his son]
25 evade prosecution, [he] filed a **false** missing persons report, and [he] made **dishonest**

1 statements to Fresno County Sheriff's Office (FSO) personnel. [He] made **dishonest**
2 statements to United States Postal Inspection Service (USPIS) personnel." (Exhibit
3 10, pp. 1-2).

4 The facts in this matter are not in dispute – but Respondent's credibility
5 certainly is.

6 **BURDEN OF PROOF**

7 In this matter, CalPERS made the determination that Respondent is ineligible to
8 apply for IDR benefits, to which Respondent appealed. As the appeal is presented to
9 the hearing officer, it is controlled by the provisions of the Administrative Procedure Act
10 (APA), the PERL, relevant CCR sections, and case law.

11 In *McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044, 1051, the Court
12 of Appeal considered the issue of burden of proof in an administrative hearing
13 concerning retirement benefits and found as follows:

14 As in ordinary civil actions, the party asserting the affirmative
15 at an administrative hearing has the burden of proof,
16 including both the initial burden of going forward and the
burden of persuasion by a preponderance of the evidence.

17 In the absence of a statutory provision to the contrary, the applicant for a benefit
18 has the burden of proof as the moving party to establish a right to the claimed
19 entitlement or benefit, and that burden is unaffected by the general rule that pension
20 statutes are to be liberally construed. (1 Cal. Public Agency Practice, sec. 39.03 [9];
21 *see also, Glover v. Board of Retirement* (1989) 214 Cal. App. 3d 1327, 1332.)

22 CalPERS exercised its official duty in responding to Respondent's application
23 for IDR, made a determination that Respondent was ineligible to apply for IDR, and
24 canceled his application. CalPERS is entitled to the presumption that this official duty
25 was regularly performed, which places the burden to rebut this presumption upon

1 Respondent (Evid. Code 664; *Roelfsema v. DMV* (1995) 41 Cal. App.4th 871; *Coffin v.*
2 *Dept. of ABC* (2006) 139 Cal.App.4th 471).

3 For all the foregoing reasons, Respondent has the burden of proof, including
4 the burden of persuasion by a preponderance of the evidence. *McCoy, supra*, at p.
5 1051.

6 **LEGAL AUTHORITIES**

7 The following provisions of the Government Code were in effect at all times
8 pertinent to this appeal:

9 Section 21151 provides in pertinent part:

- 10 (a) Any patrol, state safety, state industrial, state peace officer/firefighter,
11 or local safety member incapacitated for the performance of duty as
12 the result of an industrial disability shall be retired for disability,
pursuant to this chapter, regardless of age or amount of service.

13 Section 21152 provides in pertinent part:

14 Application to the board for retirement of a member for
disability may be made by: . . .

- 15 (d) The member or any person in his or her behalf.

16 Section 21154 provides in pertinent part:

17 The application shall be made only

- 18 (a) while the member is in state service, or
19 (b) while the member for whom contributions will be made
under Section 20997, is absent on military service, or
20 (c) within four months after the discontinuance of the state
service of the member, or while on an approved leave of
absence, or
21 (d) while the member is physically or mentally incapacitated
to perform duties from the date of discontinuance of state
22 service to the time of application or motion. . . .

23 On receipt of an application for disability retirement of a
24 member . . . the board shall, or of its own motion it may,
order a medical examination of a member who is otherwise
25 eligible to retire for disability to determine whether the
member is incapacitated for the performance of duty.

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LEGAL ARGUMENT

**CALPERS PROPERLY CANCELED RESPONDENT'S IDR APPLICATION
DUE TO OPERATION OF HAYWOOD, SMITH AND VANDERGOOT**

THE HAYWOOD CASE

"The pension roll is a roll of honor--a reward of merit, not a refuge from disgrace; and it would be an absurd construction of the language creating it to hold that the intention of the Legislature was to give a life annuity to persons who, on their merits, as distinguished from mere time of service, might be dismissed from the force for misbehavior." *Haywood, supra* at p. 1305 [citations omitted].

CalPERS reviewed the case of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), determined that Respondent was removed for cause and that Respondent's removal was neither the ultimate result of a disabling medical condition, nor preemptive of an otherwise valid claim for disability retirement (Exhibit 6). Severance of the employment relationship renders Respondent ineligible for disability retirement. *Haywood, supra*, at page 1297.

In *Haywood*, the Third District Court of Appeals held that a firefighter who had been terminated for cause was not eligible to file for disability retirement benefits. *Haywood, supra*, at p. 1307. The Court stated that Haywood's termination constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement – the potential reinstatement of his employment if it is ultimately determined that he is no longer disabled. *Id.* at p. 1297. The Court stated that granting Haywood disability retirement would override his termination for cause, despite his inability to set aside the termination through the grievance process. *Id.*

For almost two decades, California case law has consistently recognized that a

1 complete severance of the employment relationship will extinguish the eligibility to
2 apply for a disability retirement under the CalPERS system (*Haywood* and *Smith*).
3 This conclusion "is consistent with holdings in similar cases involving claims for
4 benefits after a termination of employment" extending long before its specific
5 application to CalPERS disability retirement. *Haywood, supra*, at p. 1307.

6 Under *Haywood*, a proper termination of the employment relationship renders
7 the employee ineligible for disability retirement, regardless of whether a timely
8 application for disability benefits has been filed. *Haywood, supra*, at p. 1307. A
9 severance of the employment relationship negates a "necessary requisite" of eligibility
10 for a disability retirement – that being, the employee's possible return to service if he
11 is found no longer disabled. *Haywood, supra*, at pp. 1277, 1306.

12 This rule recognizes that in providing an option for a disability retirement, the
13 pension law has, as an objective, to "induce persons to enter and continue in public
14 service", while the merit employment system recognizes that "the public is best served
15 when department officials are permitted to eliminate unqualified or undesirable
16 personnel, and to replace them with persons better qualified." *Haywood, supra*, at p.
17 1304, citing *Hostetter v. Alderson* (1952) 38 Cal.2d 499, 504.

18 The *Haywood* Court specifically states that legislative purpose is paramount and
19 the rule of liberal construction cannot be permitted to eradicate the legislative purpose
20 of the law or to allow eligibility for those for whom it obviously is not intended.
21 *Haywood, supra*, at p. 1304. According to *Haywood*, the disability retirement system is
22 not to be used for poorly performing employees or to resolve disciplinary problems.

23 **THE SMITH CASE**

24 The *Haywood* holding was clarified by the same Court in *Smith v. City of Napa*
25 (2004) 120 Cal. App.4th 194 (*Smith*). CalPERS reviewed the *Smith* case prior to

1 rendering its determination (Exhibit 6).

2 In *Smith*, the Third District Court of Appeals reiterated its holding in *Haywood*.

3 The Court then explained that if a disability claim had "matured" before an event
4 extinguishing the right to a disability retirement, the employee could not be deprived of
5 a disability pension during the duration of the disability. This maturation did not occur
6 at the time of the injury, but when the pension board determined that the employee
7 was no longer capable of performing his duties. *Smith, supra* at p. 206.

8 The *Smith* court discussed timing of Smith's application for disability retirement
9 stating that:

10 Equally immaterial is the plaintiff's emphasis on the filing date of his application
11 for disability retirement. That he filed it on the effective date of his dismissal
12 rather than thereafter is a distinction without a difference. 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. (*Id.*, p. 205).

13 Under *Haywood* and *Smith*, the timing of respondent's application is immaterial. The
14 complete severance of the employment relationship controls – the timing of when the
15 IDR application is filed does not matter. *Smith, supra*, at p. 205.

16 The Third District Court of Appeals in both *Haywood* and *Smith* found that these
17 policies have been carried through in the provisions of the PERL and are applicable to
18 a claim for disability retirement benefits under CalPERS. The undisputed facts in this
19 case establish that Respondent did not have a matured right to a disability retirement
20 prior to the severance of the employment relationship. The *Haywood* decision might
21 not apply where the severance of the employment relationship was preemptive of an
22 otherwise vested and matured right to a disability retirement. *Haywood, supra*, at p.
23 1307. The *Smith* court made abundantly clear that a right to a disability retirement will
24 not be considered vested and matured where it has not already been granted by
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1 CalPERS, or that such approval was a "forgone conclusion" based on "unequivocal
2 evidence" (such as the loss of a limb). *Smith, supra*, at p. 207.

3 In *Smith*, the court specifically revisited its earlier decision in *Haywood* for the
4 express purpose of explaining what it had previously stated to be a "conceivable"
5 exception to the general rule of precluding an application where a severance was
6 preemptive of a matured right to a disability retirement. The standard to be applied
7 when assessing whether such a right may be deemed in equity to exist is very high,
8 and not even remotely met in the present case:

9 A vested right matures when there is an unconditional right
10 to immediate payment (citations omitted). In the course of
11 deciding when the limitations period commenced in a
12 mandate action against a pension board, the Supreme Court
13 noted that a duty to grant the disability pension (i.e., the
14 reciprocal obligation to a right to immediate payment) did not
15 arise at the time of the injury itself but when the pension
16 board determined that the employee was no longer capable
17 of performing his duties. (*Tyra v. Board of Police etc.*
Commrs. (1948) 32 Cal.2d 666, 671-672 [197 P.2d 710]
["the right has not come into existence until the commission
has concluded that the condition of disability renders
retirement necessary."]¹ In the present case, a CalPERS
determination of eligibility did not antedate the unsuccessful
certification on the ladder truck. His right to a disability
retirement was thus immature, and his dismissal for cause
defeated it.

18 Conceivably, there may be facts under which a court,
19 applying principles of equity, will deem an employee's right
20 to a disability retirement to be matured and thus survive a
dismissal for cause. This case does not present facts on
which to explore the outer limits of maturity, however.

21 It is not as if the plaintiff had an impending ruling on a claim
22 for a 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.

23 ¹ [fn 12 in original decision] *Dickey* pointed out that *Tyra's* discussion of when the right to disability was
24 sufficiently *mature* to enforce did not apply to the question of when the right had *vested* so as to entitle
25 the employee to the independent judgment standard of review in a writ of administrative mandate.
(*Dickey, supra*, 16 Cal.3d at pp. 749-750, 751.)

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Nor, for that matter, is there undisputed evidence that the plaintiff was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb). At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers' compensation claims. But a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different. (Citations.) And for purposes of the standard for a disability retirement, the plaintiff's medical evidence is not unequivocal. The defendants would have a basis for litigating whether this evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal. App. 3d 854, 862 [143 Cal. Rptr. 760]; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal. App. 3d 873, 877 [86 Cal. Rptr. 450]; *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.) Thus, an *entitlement* to a disability retirement cannot rest on the medical evidence of the plaintiff.

In short, the plaintiff does not come within the exceptions to *Haywood*. His dismissal for cause consequently extinguished his right to a disability retirement (emphasis added.)

Any claim Respondent might make now, that he experienced a disabling condition before or at the time of his termination, is suspicious and not borne out by the evidence -- so does not come anywhere close to satisfying the high threshold of an "unequivocal foregone conclusion" -- such as the loss of a limb, articulated by the *Smith* court.

Government Code §§21191 and 21192 provide for reinstatement, but an employee whose employment relationship has been severed with his employer cannot be reinstated. An employee such as Respondent who has been properly terminated, and by virtue of settling his termination via Stipulated Settlement, has had his employment relationship severed with the CHP, which precludes him from being eligible to apply for IDR as a matter of law (*Haywood, Smith, Vandergoot*).

1 Respondent was removed for cause and his IDR application was cannot be
2 accepted. His employment relationship was severed and final as of August 29, 2013,
3 and it cannot be resurrected (Exhibits 10, 11 and 12).

4 **THE VANDERGOOT PRECEDENTIAL DECISION**

5 The *Vandergoot* Decision, designated Precedential by the CalPERS Board of
6 Administration, provides guidance (Exhibit 16). Once a final decision has been
7 designated as precedential, it binds all future appeals to the extent that the disputed law
8 and issues are the same. Gov. Code section 11425.60.

9 The *Vandergoot* case cites to *Haywood* and *Smith*, and the facts are virtually
10 identical to this case. In *Vandergoot*, the member's application was rejected on the
11 grounds that Respondent had been terminated for cause. Like here, Vandergoot
12 entered into a stipulated settlement during the pendency of his termination appeal with
13 the SPB. Like here, Vandergoot claimed that *Haywood* and *Smith* are not controlling,
14 because those cases involved employees who were terminated for cause. Like here,
15 Vandergoot argued he was not terminated, but had voluntarily resigned from his position
16 pursuant to a stipulated settlement. The ALJ disagreed with Vandergoot, and upheld
17 CalPERS' determination.

18 The ALJ cited *Haywood* and *Smith*, holding that key appellate court decisions
19 have interpreted Gov. Code §21154 to mean that a CalPERS member terminated for
20 cause is ineligible to apply for disability retirement after termination. Case law holds that
21 a continuing employment relationship is required, in order to make possible
22 reinstatement to employment, if the disability resolves. The ALJ was not persuaded by
23 Vandergoot's contentions that he was not precluded by *Haywood* and *Smith* from
24 applying for disability retirement because he had resigned.

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1 The ALJ further reasoned that if Vandergoot was allowed to receive a disability
2 retirement allowance, he would have no employer who could require him to undergo a
3 medical examination under PERL §21192. And it was no longer possible for him to be
4 reinstated under PERL §21193. The necessary prerequisites for receiving a disability
5 retirement allowance were absent, so the ALJ found that CalPERS can fairly consider
6 the terms of the Stipulated Settlement as being tantamount to a dismissal, for purposes
7 of applying the *Haywood* and *Smith* criteria (*Vandergoot*, Exhibit 16, para. 19, p. 8).

8 The ALJ explained it as follows: Vandergoot's employer commenced disciplinary
9 action against him, and terminated him from employment for cause pursuant to a NOAA.
10 The character of the disciplinary action terminating Vandergoot's employment did not
11 change because Vandergoot elected to settle the case prior to exhausting his appeal
12 rights. But for the pendency of the disciplinary action, Vandergoot would not have
13 entered into a settlement agreement with his employer resigning from his position.
14 Furthermore, the ALJ found that Vandergoot's resignation is a distinction without a
15 difference. His resignation resulted in his permanent separation of service. Gov. Code
16 section 19996; *Collins v. Co. of Los Angeles* (1976) 55 Cal.App.3d 594,597. Therefore,
17 Vandergoot's employment relationship was terminated on the effective date of his
18 NOAA, and his termination for cause bars his eligibility to apply for disability retirement.

19 The ALJ reasoned that *Haywood* makes it clear that a necessary prerequisite for
20 disability retirement is the potential reinstatement of the employment relationship with
21 the employer if it ultimately is determined that respondent is no longer disabled.
22 *Haywood, supra*, at p. 1296-1997. In *Vandergoot*, the employment relationship was
23 severed through operation of a Settlement Agreement. Whether the termination is
24 through a Settlement Agreement or a Notice of Termination is irrelevant. Either way,

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1 when an employee is locked out of future employment, that is "wholly inconsistent with
2 the policy behind disability retirement" (*Vandergoot*, Exhibit 16, para. 17-18, pp. 7-8).

3 **THE GARCIA DECISION**

4 The *Sergio Garcia* case was initially heard by ALJ Samuel J. Reyes on May 8,
5 2014. ALJ Reyes issued a Proposed Decision recommending rejection of Garcia's
6 disability retirement application on the basis of *Haywood*, *Smith* and *Vandergoot*. The
7 CalPERS Board adopted ALJ Reyes' Decision on September 22, 2014. Garcia took a
8 writ of mandate, and the Los Angeles Superior Court rejected his arguments.

9 Both ALJ Reyes and the Superior Court reviewed and interpreted *Haywood*,
10 *Smith* and *Vandergoot* in a case with similar facts to this one, and found that Garcia's
11 disability retirement application was properly canceled (Exhibit 15).

12 In explaining his Order, the Superior Court Judge states:

13 It is the potential for return to active service that is important, whether the
14 employer compels it through medical exam or the employee seeks a return
15 based on his or her recovery. Moreover, the potential for reinstatement was
16 only one of 'the reasons stated above' for determining that a termination of the
17 employment relationship generally renders the employee ineligible for disability
18 retirement. *Haywood, supra* at 1307. Another reason was that the disability
19 retirement system could not be permitted to interfere in the employer's authority
20 to discipline recalcitrant employees. *Id.* at 1306. [Court's Footnote: That Garcia
21 would not seek a return to service is immaterial; it is the potential for return that
22 is important.] (Exhibit. 15, p. 8)

23 Respondent Scarber argues that since he could seek work with another state
24 department, he could be reinstated. The courts have rejected that argument.

25 The ALJ dismissed *Vandergoot's* argument that he was eligible for disability
retirement because he could be reinstated to state service, just not with his current
employer. The ALJ reasoned that while *Vandergoot* might obtain another civil service
position with the State of California in the future, such employment will not resurrect his
eligibility to apply for disability retirement with his terminating employer. That claim is

1 foreclosed due to Vandergoot's termination for cause. As Vandergoot's employment
2 relationship was completely severed, there is no potential for reinstatement if he is found
3 no longer disabled (*Vandergoot, supra*, p. 7).

4 *Garcia* agrees:

5 That argument suggests that all State Agencies are a single employer. They are
6 not. As the ALJ correctly found, if Garcia obtained employment with another
7 State agency . . . , it would not reinstate his eligibility to seek disability retirement
8 for injuries sustained while working for [his terminating employer]. Nor would it
9 make the new employing agency responsible for those injuries. Consequently,
10 Respondent's right to seek other State employment does not affect the complete
11 severance of his employment relationship with [his terminating employer].
12 (Exhibit 15, p. 9).

13 CONCLUSION

14 It bears repeating: "The pension roll is a roll of honor--a reward of merit, not a
15 refuge from disgrace; and it would be an absurd construction of the language creating
16 it to hold that the intention of the Legislature was to give a life annuity to persons who,
17 on their merits, as distinguished from mere time of service, might be dismissed from
18 the force for misbehavior." *Haywood, supra* at p. 1305.

19 Respondent is not eligible to apply for IDR as a matter of law, because his
20 employment relationship with CHP was severed as of August 29, 2013. The NOAA
21 clearly shows that Respondent "was dismissed from the force for misbehavior" (*Id.*).
22 Respondent's termination was neither the ultimate result of a disabling medical
23 condition nor preemptive of an otherwise valid claim for disability retirement. This
24 complete severance precludes Respondent from being eligible to apply for IDR as a
25 matter of law (*Haywood, Smith and Vandergoot*).

Respondent is precluded from filing an IDR application based on the PERL, the
CCR and case law.

1 The facts and law clearly show that Respondent cannot meet his burden of
2 proof.

3 For all the foregoing reasons, CalPERS' determination should be upheld.
4 Respondent's appeal should be denied.

5 Dated: October 17, 2016.

Respectfully submitted,

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7 ELIZABETH YELLAND
8 SENIOR STAFF ATTORNEY
9 CA PUBLIC EMPLOYEES RETIREMENT SYSTEM
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PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On October 17, 2016, I served the foregoing document described as:

CalPERS' CLOSING BRIEF IN SUPPORT OF DETERMINATION - In the Matter of the Cancellation of the Application for Industrial Disability Retirement of SHELDON K. SCARBER, Respondent, and CALIFORNIA HIGHWAY PATROL, Respondent.; Case No. 2015-0243; OAH No. 2016050434.

on interested parties in this action by placing ___ the original XX a true copy thereof enclosed in sealed envelopes addressed and/or e-filed as follows:

Sheldon Scarber

[REDACTED]

Office of Administrative Hearings
2349 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833-4231
VIA EMAIL TO: sacfilings@dgs.ca.gov

Tim Castle
California Highway Patrol
Disability and Retirement Section
P.O. Box 942898
Sacramento, CA 94298-0001

- [X] BY CERTIFIED MAIL/RETURN RECEIPT REQUESTED -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.
- [X] BY ELECTRONIC TRANSMISSION: I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.

Executed on October 17, 2016, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Allyson McCain
NAME


SIGNATURE