ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Scot Legeman (Respondent) worked as a Correctional Officer for California Department of Corrections and Rehabilitation, California Institution for Women (CDCR). He began working for CDCR in August 2006. By virtue of his employment, Respondent was a state safety member of CalPERS subject to Government Code section 21154.

On May 12, 2012, CDCR served Respondent with a Notice of Adverse Action (NOAA) notifying him that he would be terminated effective May 25, 2012. CDCR charged Respondent with "inexcusable neglect of duty, insubordination, dishonesty, discourteous treatment of the public or other employees, willful disobedience, other failure of good behavior either during or outside the duty hours of such a nature that it caused discredit to the appointing authority or the person's employment and unlawful retaliation against a state officer or employee who reported misconduct."

On May 23, 2014, more than two years after his termination for cause, Respondent filed an application for Industrial Disability Retirement (IDR) due to orthopedic conditions. CalPERS rejected Respondent's IDR application on grounds that Respondent had separated from his employment with CDCR, and that his separation was not the result of a disabling condition, nor was his separation preemptive of an otherwise valid disability claim pursuant to the rule set forth in *Haywood v. American River Fire District.* Respondent appealed CalPERS' determination, exercising his right to a hearing before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH).

The *Haywood* case holds that a CalPERS member is ineligible for disability retirement if the member was terminated from employment for reasons that are not related to a disabling condition, and the termination does not preempt an otherwise legitimate claim for disability retirement. To establish preemption, the member must show a vested right to retirement, such that a favorable decision on the application prior to termination would have been a foregone conclusion.

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

A hearing was held September 29, 2016 in San Bernadino, California, to determine whether *Haywood* precluded Respondent's IDR application. Respondent did not appear at the hearing, and therefore it proceeded as a default under Government Code section 1152 . CalPERS presented testimony from one witness, an employee from CDCR who testified to the circumstances of Respondent's termination.

At the hearing, CalPERS argued Respondent was not eligible for IDR because his termination for cause severed the employer/employee relationship and none of the *Haywood/Smith* exceptions applied.

The ALJ found CalPERS' arguments persuasive. Respondent did not present undisputed evidence of a disability, such that "a favorable decision on his claim would have been a foregone conclusion," the requisite showing to establish a vested right to disability retirement. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.) Because Respondent's disability pension right had not matured, the ALJ found Respondent ineligible for IDR under the *Haywood* line of cases, and issued a Proposed Decision on December 22, 2016, denying Respondent's appeal.

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 date of the hearing be corrected from December 12, 2016 to December 13, 2016. 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.

February 15, 2017

TERRI L. POPKES
Senior Staff Attorney