

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

William Flores (Respondent Flores) worked as a Parole Agent II for the California Department of Corrections and Rehabilitation (Respondent CDCR). By virtue of his employment, Respondent Flores is a state safety member of CalPERS.

Respondent Flores was hired by Respondent CDCR in 1988 as a Correctional Officer. In 1998, Respondent Flores became a Parole Agent I, and was promoted to Parole Agent II in 2006. On July 7, 2011 Respondent Flores was served with a Notice of Adverse Action (NOAA). The NOAA advised Respondent Flores that he would be terminated from employment effective September 1, 2011. The NOAA alleged Respondent Flores engaged in misconduct under various subsections of Government Code section 19572, including, but not limited to, inexcusable neglect of duty, immorality, discourteous treatment of the public, willful misconduct, and unlawful discrimination.

Respondent Flores timely appealed his termination to the State Personnel Board (SPB). On April 17, 2012, Respondent Flores withdrew his appeal, which effectively finalized his termination for cause from Respondent CDCR.

On April 4, 2016, Respondent Flores applied for Industrial Disability Retirement (IDR) with CalPERS. Respondent Flores claimed disability on the basis of an orthopedic (bilateral plantar fasciitis) condition.

Based on the NOAA, CalPERS determined that Respondent Flores was ineligible to apply for IDR due to operation of the *Haywood*, *Smith* and *Vandergoot* cases (cited below), because he had been terminated for cause and his termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement.

Respondent Flores appealed, exercising his right to a hearing before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH). A hearing was held January 5, 2017 in Los Angeles, California. Respondent Flores appeared on his own behalf. Respondent CDCR did not appear.

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

The cases of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*) and *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (dated February 19, 2013 and made precedential by CalPERS Board of Administration on October 16, 2013) (*Vandergoot*), preclude Respondent Flores's IDR 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, so a complete severance would create a legal anomaly – an irreversible “temporary separation.” Disability retirement and a “discharge for cause” are thus legally incompatible.

The *Smith* court explained that to be preemptive of an otherwise valid claim, the right to a disability retirement must have matured prior to termination. To be mature, there must have been an unconditional right to immediate payment at the time of termination unless, under principles of equity, the claim was delayed without fault to the terminated employee or qualification for a disability retirement was a foregone conclusion.

In *Vandergoot*, the CalPERS Board concluded that “a necessary requisite for disability retirement is the potential reinstatement of the employment relationship” with the employer if it is ultimately determined by CalPERS that the employee is no longer disabled. The Board held that an employee’s resignation was tantamount to a dismissal when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and agreed to waive all right to return to his former employer.

Respondent Flores testified on his own behalf at hearing. Respondent Flores did not dispute his termination, nor did he dispute his inability to be reinstated to because of his termination. However, Respondent Flores alleged that he suffered from various health conditions that antedated his termination for cause.

Ultimately, Respondent Flores’s termination permanently severed his employment relationship with Respondent CDCR. The ALJ held that CalPERS correctly determined that *Haywood*, *Smith*, and *Vandergoot* precluded Respondent Flores’s eligibility to apply for IDR. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision, as modified.

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 inconsistency and ambiguity, staff recommends that “is” between “that” and “causes” in subsection (t) in Paragraph 9 on Page 3 be changed to the word “it.”

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.

March 15, 2017



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