

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Kirk A. Acosta ("Respondent Acosta") worked as a Correctional Officer for Respondent California Department of Corrections and Rehabilitation - North Kern State Prison ("CDCR"). By virtue of his employment, Respondent Acosta was a state safety member of CalPERS.

In August 2015, CDCR served Respondent Acosta with a First Amended Notice of Adverse Action ("NOAA") seeking to dismiss him from his position as a Correctional Officer, effective September 4, 2015. Respondent Acosta appealed the NOAA.

Respondent Acosta and CDCR resolved the NOAA by a Stipulation and Release Agreement incorporated into a Proposed Decision by the State Personnel Board ("SPB") Administrative Law Judge. The SPB adopted the Decision approving the stipulation for settlement on April 19, 2016. The Stipulation and Release contained the following provisions:

3. [CDCR] agrees to amend the penalty imposed by the NOAA from a Dismissal to a Suspension without pay effective from the close of business on September 4, 2015, to the close of business on April 18, 2016.
4. [Respondent Acosta] will be on unpaid leave status from the close of business on April 18, 2016, until CalPERS makes a final determination regarding [Respondent Acosta]'s disability retirement as long as that occurs prior to the close of business on April 17, 2017. In the event CalPERS approves [Respondent Acosta]'s application for disability retirement prior to the close of business on April 17, 2017, Appellant's employment status with [CDCR] will conclude with his disability retirement.
5. In the event that CalPERS has failed to make a final determination by the close of business on April 17, 2017, [Respondent Acosta] agrees that his imposed penalty of dismissal will have been effective as of the close of business on April 18, 2016.
6. [Respondent Acosta] waives any and all backpay and benefits to which he normally may be entitled to from [CDCR] from the close of business on September 4, 2015, through the period the disability retirement determination is pending.
7. [Respondent Acosta] waives rights to reinstate and agrees not [to] reapply for a position with [CDCR] [¶] ... [¶]

On April 14, 2016, Respondent Acosta completed an application for Industrial Disability Retirement on the basis of orthopedic (neck, left shoulder, upper back, cervical spine, and left hand) conditions. CalPERS received the application on April 15, 2016.

CalPERS reviewed information concerning Respondent Acosta's separation from employment, including the NOAA and the Stipulation and Release. CalPERS determined that Respondent Acosta was not eligible for disability retirement because he left his employment with CDCR for reasons which were not the result of a disabling medical condition, and his separation was not preemptive of an otherwise valid claim for disability retirement.

CalPERS notified CDCR and Respondent Acosta of its determination by letter dated July 14, 2016. Respondent Acosta filed a timely written appeal, and the matter proceeded to hearing before an Administrative Law Judge (ALJ) on February 6, 2017.

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

At the hearing, CalPERS presented the testimony of the Warden for CDCR regarding the NOAA and the circumstances surrounding Respondent Acosta's separation from employment.

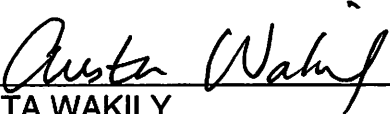
Respondent Acosta testified on his own behalf. He did not present evidence to establish that the filing of the NOAA involved an underlying disabling medical condition.

When considering all of the evidence presented, the ALJ determined that Respondent Acosta's separation from CDCR with no right to reinstatement barred his eligibility for disability retirement under the holdings of *Haywood, Smith and Vandergoot*. The ALJ further determined that Respondent Acosta failed to establish that his separation from CDCR was the ultimate result of a disabling condition or preemptive of a valid claim for disability.

The ALJ concluded that CalPERS' decision to reject Respondent Acosta's application for Industrial Disability Retirement was correct and that Respondent Acosta's appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

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.

April 19, 2017



AUSTA WAKILY
Senior Staff Attorney