

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

At its February 15, 2017 meeting, the CalPERS Board of Administration adopted the Proposed Decision of the Administrative Law Judge (ALJ). The Decision denied Respondent Tracy Craig's (Respondent Craig) appeal and found that Respondent Craig was ineligible to apply for disability retirement due to operation of the *Haywood* and *Smith* cases because Respondent Craig had been permanently separated from employment, and her permanent separation was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. Respondent Craig filed a timely Petition for Reconsideration. A Stay of Execution in the above matter has been granted so that the Petition for Reconsideration may be presented to the Board.

Respondent Craig worked as a Tax Program Technician I for the California Franchise Tax Board (Respondent FTB). By virtue of her employment, Respondent Craig was a state miscellaneous member of CalPERS.

Starting on July 10, 2009, Respondent Craig was absent without leave (AWOL) for five consecutive working days. Respondent FTB sent Respondent Craig a Notice of AWOL Separation on July 24, 2009, intending to invoke the AWOL statute found in Government Code section 19996.2. Respondent Craig did not request a hearing under *Coleman v. Department of Personnel Administration (Coleman)*. So, effective August 6, 2009, Respondent Craig was automatically resigned from employment at FTB pursuant to the AWOL statute. Respondent Craig then appealed her automatic resignation to the Department of Personnel Administration (DPA). Respondent Craig failed to appear at her appeal hearing before DPA. Thus, DPA considered Respondent Craig's appeal withdrawn, and dismissed her appeal with prejudice.

On March 23, 2015, Respondent Craig applied for disability retirement with CalPERS. She claimed disability on the basis of orthopedic (back, tendonitis, carpal tunnel) and psychological conditions.

CalPERS cancelled Respondent Craig's application pursuant to *Haywood v. American River Fire District* (1998) 67 Cal.App.4th 1292 (*Haywood*) on grounds that her automatic AWOL resignation was a separation from which Respondent Craig had no reinstatement rights. Also, Respondent Craig's separation from employment with Respondent FTB was not the result of a disabling condition or preemptive of an otherwise valid disability claim.

Respondent Craig appealed, exercising her right to a hearing before an ALJ of the Office of Administrative Hearings (OAH). A hearing was held November 15, 2016 in Sacramento, California. Respondent Craig appeared on her own behalf. Respondent FTB did not appear.

Prior to the hearing, CalPERS explained the hearing process to Respondent Craig and the need to support her case with witnesses and documents. CalPERS provided

Respondent Craig with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Craig'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*) and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*) preclude Respondent Craig from filing a disability retirement application.

The *Haywood* Court found that when an employee is terminated 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, and a complete severance would create a legal anomaly – a "temporary separation" that can never be reversed. Therefore, the courts have found disability retirement and a "discharge for cause" to be legally incompatible.

In *Smith*, the Court reiterated its position in *Haywood* holding that if a dismissal for cause makes an applicant ineligible for reinstatement in her position, she is also disqualified from receiving disability retirement. To hold otherwise, the Court explained, would override "the power of public agencies to discipline employees, and would reward poor employees with early retirement." (*Id.*, at 203.)

The CalPERS precedential decision *In the Matter of the Application for Disability Retirement of Robert C. Vandergoot* (adopted effective October 6, 2013) applied the *Haywood* and *Smith* rulings in the context of a stipulated settlement of a dismissal action. The precedential decision in *Vandergoot* provides that CalPERS "can fairly conclude the terms of the Stipulated Settlement of Respondent's SPB case as being tantamount to a dismissal for purposes of applying the *Haywood* criteria."

Regarding the *Haywood* exceptions, Respondent Craig testified that her mental health issues began in 2003. Thus, Respondent Craig alleged at the hearing that her alleged disability ultimately caused her automatic resignation. Respondent Craig also testified to certain medical conditions at the time of her automatic resignation.

However, the ALJ concluded that there was no evidence showing Respondent Craig's permanent severance from FTB resulted from a disabling medical condition. Nor was the severance preemptive of an otherwise valid claim for disability retirement pursuant to *Haywood*. In addition, applying the principles of *Smith*, the ALJ found that Respondent Craig did not have a matured right to a disability retirement before her AWOL resignation.

For the reasons stated above, staff recommends the Board deny the Petition for Reconsideration and uphold its Decision.

Because the Decision applies the law to the salient facts of this case, the risks of adopting the Petition for Reconsideration are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

April 19, 2017



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