ATTACHMENT B
STAFF'S ARGUMENT
STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Kevin J. Venema (Respondent) was employed by Respondent California Department of Corrections & Rehabilitation - California Men's Colony (Respondent CDCR) as a Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS.

On September 25, 2012, Respondent was questioned regarding allegations that he was selling contraband to inmates at California Men's Colony, and found in possession of several items of contraband. Thereafter, Respondent was charged with violating Penal Code section 68, a felony, which prohibits employees from asking for, receiving, or agreeing to receive, any bribe. Respondent pleaded no contest to one count of violating Penal Code section 68.

The day he was questioned and found with contraband on his person, Respondent entered into a “Stipulation and Release” (Resignation Agreement) with CDCR, by which Respondent agreed to have resigned from state service effective September 25, 2012. The Resignation Agreement was irrevocable, and Respondent agreed to never seek or accept employment with CDCR now or in the future. The Resignation Agreement was not provided to CalPERS, and CalPERS was not a party to the Agreement.

One week later, Respondent submitted an industrial disability retirement (IDR) Application to CalPERS. In his application, Respondent claimed he suffered from herniated discs and carpal tunnel syndrome. Respondent also claimed he was unable to lift, run, bend, kneel, or conduct physical restraints and holds. The CalPERS application asked Respondent whether he was currently working in any capacity. Respondent stated that he had “[r]esigned for upcoming 10-5-2012 R-hand carpal tunnel surgery, previous work injuries...” Respondent did not state in his IDR application that he had been found in possession of contraband, had been accused of selling contraband to inmates, or that he had resigned from CDCR employment that same day, agreeing to never seek reemployment with the agency. Shortly after submitting his IDR application, Respondent submitted a handwritten letter to CalPERS stating “I am unable to be employed do [sic] to my work injuries.”

CalPERS processed Respondent's IDR application and approved it due to the condition of his left shoulder, based upon information provided by his treating physician, Dr. Cyril Rebel. Respondent retired for disability effective September 26, 2012.

Respondent was convicted of violating Penal Code section 68 on July 10, 2013. Shortly thereafter, CalPERS issued correspondence to CDCR thanking the agency for advising CalPERS of Respondent's felony conviction. On September 20, 2013, CDCR provided CalPERS with the felony conviction records and a copy of the Resignation Agreement between Respondent and CDCR. CalPERS issued a felony forfeiture determination arising from the conviction, which Respondent did not appeal, as it pertained to only one forfeited day of creditable public service, the day he was found with contraband on his person and resigned.

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, 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.

The *Smith* court explained that to be preemptive of an otherwise valid claim, the right to a disability retirement must have matured before the employee was terminated. 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 through no fault of the terminated employee or there was undisputed evidence of qualification for a disability retirement.

In *Vandergoot*, the Board agreed 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 rights to return to his former employer.

CalPERS sent a letter to Respondent on July 22, 2016, advising him that pursuant to the *Haywood* line of cases, it was cancelling his IDR benefits effective immediately. The IDR cancellation resulted in an overpayment of IDR benefits to Respondent of approximately $149,625. After retroactively approving Respondent to his earliest effective service retirement date, CalPERS reduced the overpayment amount to $29,403.63. The amended overpayment amount was due to Respondent being placed on IDR approximately 11 months prior to his fiftieth birthday, the day he was deemed to have retired for service with CalPERS.

Respondent appealed CalPERS’ determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on September 1, 2017. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing.
At hearing, Respondent testified on his own behalf and offered the testimony of his treating physician, Dr. Rebel, an orthopedic surgeon. Respondent testified to having a history of work-related injuries beginning with an attack by an inmate in 1997. In February 2012, Respondent re-injured his left shoulder while lifting heavy bags at work, fracturing his clavicle. He did not report the injury because he had exhausted sick leave time. Dr. Rebel scheduled Respondent to undergo surgery in October 2012 for carpal tunnel syndrome.

At hearing, Respondent admitted bringing contraband into the prison for reasons not fully explained at hearing, though he referenced being in fear for his family, and other issues.

Dr. Rebel testified at hearing that he began treating Respondent in February 2012 for a fractured clavicle and carpal tunnel syndrome. Dr. Rebel deemed Respondent temporarily totally disabled, a workers' compensation designation, as of February 27, 2012, due to his broken left shoulder. In a May 11, 2012 chart note, Dr. Rebel wrote, however, that Respondent’s shoulder was getting better, and he released Respondent for regular work. Dr. Rebel performed carpel tunnel release surgery on Respondent on October 5, 2013, approximately one week after Respondent signed the Resignation Agreement. As part of its evaluation of Respondent's IDR application, CalPERS requested Dr. Rebel explain whether he felt Respondent's shoulder injury or carpal tunnel syndrome made him unable to perform his usual and customary duties. In a letter dated February 11, 2013, Dr. Rebel advised CalPERS that Respondent was disabled due to his left shoulder injury effective February 7, 2012, and disabled due to carpal tunnel syndrome effective October 5, 2012. At hearing, however, when presented with medical records showing Dr. Rebel had returned Respondent to full duty after the shoulder injury, Dr. Rebel conceded that he would not recommend a patient be returned to full duties if he felt that the patient was disabled.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that because it was taking away a benefit, CalPERS bore the burden of proof. The ALJ held that CalPERS met its burden to prove that Respondent had voluntarily resigned from employment and could not return to work with CDCR. Respondent claimed in his IDR application that he resigned due to medical conditions, but the evidence established that Respondent was working full-time, without limitation, at the time he was confronted with “allegations of extremely serious misconduct.” The evidence also established that Respondent chose to leave work rather than face discipline, the ALJ held. Dr. Rebel’s testimony established that Respondent’s left shoulder condition did not render him disabled, and that the carpal tunnel-related disability did not arise until after Respondent had resigned in the face of discipline. For these reasons, the Haywood line of cases applied, and Respondent’s separation from employment was not the result of a disabling medical condition. Even though Respondent was approved for disability retirement, the ALJ held that his right to IDR had not yet vested or matured when he resigned in the face of discipline, meaning neither of the Smith exceptions to Haywood applied.
At hearing, Respondent argued hardship resulting from being taken off the IDR roll, as it caused him to lose medical benefits due to his amended service retirement date being more than 120 days after his separation from service with CDCR. The ALJ rejected Respondent's argument that he had no opportunity to retire for service within 120 days of resignation, noting that Respondent could have applied for service pending industrial disability retirement. The ALJ further held that Respondent presented no evidence at hearing "regarding how, or why, this apparent lack of opportunity occurred. Respondent did not contend either that he timely applied for service retirement, or that CalPERS prevented him from applying."

The ALJ also held that CalPERS' right to collect overpayment of benefits from Respondent was reduced by the three-year statute of limitations governing recoupment of "erroneous payments" to a member, pursuant to California Government Code section 20164. CalPERS offered no evidence to rebut the application of the three-year statute, and the ALJ's decision is consistent with the law and facts governing this particular matter.

In the Proposed Decision, the ALJ concludes that Respondent's appeal should be denied. For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

December 20, 2017

KEVIN KREUTZ
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