ATTACHMENT B

STAFF’S ARGUMENT
STAFF’S ARGUMENT TO ADOPT THE PROPOSED DECISION

Karen Helton-Jorgensen (Respondent) was employed by Respondent Department of Industrial Relations (Respondent DIR) as an Associate Safety Engineer. By virtue of her employment, Respondent was a state miscellaneous member of CalPERS.

Respondent DIR served a Notice of Adverse Action (NOAA) on Respondent effective on August 12, 2016, seeking Respondent’s dismissal on the basis of Government Code section 19582, including:

(d) Inexcusable neglect of duty.
(e) Insubordination.
(f) Dishonesty.
(m) Discourteous treatment of the public or other employees.
(o) Willful disobedience.
(r) Violation of prohibitions set forth in Section 19990.
(t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person’s employment.

Respondent appealed the NOAA to the State Personnel Board (SPB) and requested a hearing to challenge the termination. Respondent and Respondent DIR reached an agreement and entered into a stipulated settlement which provided for a Resignation Pursuant to a Settlement Agreement.

On May 5, 2017, Respondent signed an application for service pending disability retirement which was received by CalPERS on May 9, 2017. Respondent claimed disability on the basis of orthopedic (knee and back), lupus, and psychological (PTSD, depression, and anxiety) conditions. Respondent is currently receiving service retirement.

Based on the Notice of Adverse Action, Termination, and Resignation Pursuant to a Settlement Agreement, CalPERS determined that Respondent was ineligible for disability retirement pursuant to 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); In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot dated February 19, 2013, and made precedential by the CalPERS Board of Administration on October 16, 2013 (Vandergoot); and In the Matter of Accepting the Application for Industrial Disability Retirement of Philip D. MacFarland dated October 7, 2015, and made precedential by the CalPERS Board of Administration on June 15, 2016 (MacFarland).
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.

In *MacFarland*, the character of the disciplinary action does not change because a resignation was submitted prior to the effective date of the Notice of Adverse Action. The Board held that a resignation preceding the effective date of the Notice of Adverse Action bars a member from applying for industrial disability retirement on the basis of *Haywood* or *Smith*.

Respondent appealed the CalPERS determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. A hearing was held on January 17, 2019. Neither Respondent nor Respondent DIR appeared at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her 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. Respondent continued the hearing one time in order to better prepare herself.

No evidence or witnesses were presented on behalf of the member or the employer. CalPERS presented evidence of the decision of the California Department of Human Resources/State Personnel Board.
After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that Respondent was terminated for cause, and her termination had nothing to do with a matured claim of disability. Respondent DIR did not seek to terminate Respondent for any reason related to disability. Neither the termination notice nor the Settlement Agreement for resignation contemplated any reason for termination that related to disability. In the Settlement Agreement, the parties agreed that she will not return to this employment or seek rehire. These conditions eclipse a disability retirement, as return to work must be a possibility.

In the Proposed Decision, the ALJ concludes that there was no evidence to support any claim that the dismissal was the ultimate result of a disabling condition, or that Respondent had a matured right to a disability allowance. Respondent resigned to settle a dismissal action. As part of the settlement, she gave up all return rights to DIR. Given these facts, in accordance with Vandergoot, Respondent’s resignation must be treated as a tantamount to the dismissals at issue in Haywood and Smith. Therefore, Respondent did not establish that she should be allowed to file an application for disability retirement.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

April 17, 2019

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