ATTACHMENT B

STAFF’S ARGUMENT
STAFF’S ARGUMENT TO ADOPT THE PROPOSED DECISION AFTER SECOND REMAND

Justin Hendee (Respondent Hendee) was employed by California State University San Bernardino (Respondent CSUSB) as a Police Officer. By virtue of his employment, Respondent Hendee was a state safety member of CalPERS. On or about July 5, 2011, Respondent Hendee submitted an application for industrial disability retirement based on orthopedic (back, neck, and left shoulder) conditions. Respondent Hendee’s application was approved by CalPERS and he retired for disability effective January 1, 2011.

In 2014, CalPERS notified Respondent Hendee that CalPERS conducts re-examination of persons on disability retirement, and that he would be re-evaluated for purposes of determining whether he remains substantially incapacitated and is entitled to continue to receive industrial disability retirement. CalPERS determined that Respondent Hendee was no longer substantially incapacitated. Respondent Hendee appealed this determination. A hearing before the Office of Administrative Hearings was held on July 10, 2017.

July 10, 2017 Hearing

As part of CalPERS’ review of Respondent Hendee’s medical condition, Robert J. Kolesnik, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Kolesnik interviewed Respondent Hendee, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Kolesnik opined that Respondent Hendee is not substantially incapacitated from the performance of his usual and customary job duties.

The Administrative Law Judge (ALJ) agreed with Dr. Kolesnik’s findings, and concluded in his September 27, 2017, Proposed Decision (PD) that Respondent Hendee is no longer substantially incapacitated from the performance of his usual and customary duties as a Police Officer for Respondent CSUSB. The PD also ordered Respondent CSUSB to immediately reinstate Respondent Hendee to his former position. Neither Respondent Hendee nor Respondent CSUSB submitted written argument challenging the ALJ’s PD. The Board adopted the PD on November 15, 2017, and the Decision was issued on November 20, 2017.

Petitions for Reconsideration filed by Both Respondent CSUSB and Respondent Hendee

Both Respondent CSUSB and Respondent Hendee then petitioned the Board to reconsider its adoption of the PD. Respondent Hendee sought reconsideration of the ALJ’s determination that he was no longer substantially incapacitated from his job as a Police Officer. The Board denied Respondent Hendee’s Petition. Since Respondent Hendee’s Petition was denied, the Board was not seeking further evidence regarding the evaluation of Respondent Hendee’s disability.
Respondent CSUSB argued in its Petition that Respondent Hendee had been permanently separated from employment prior to his application for industrial disability retirement. Respondent CSUSB thus contended that Respondent Hendee could not be reinstated, as the permanent separation from employment precluded such reinstatement.

The Board granted Respondent CSUSB’s Petition and remanded the matter back to the Office of Administrative Hearings for the taking of further evidence regarding Respondent Hendee’s permanent separation from employment, and the effect that the permanent separation had on Respondent Hendee’s reinstatement to his former position.

**April 19, 2018 Remand Hearing**

At the April 19, 2018 Remand Hearing, CalPERS introduced documents showing that Respondent Hendee was in fact rejected on probation. The documents showed that on December 14, 2010, Respondent CSUSB notified Respondent Hendee of his rejection during probation from his position as a Police Officer. The rejection during probation was effective January 1, 2011.

The evidence showed that Respondent Hendee appealed his rejection to the State Personnel Board (SPB). Respondent CSUSB filed a motion to dismiss the appeal, arguing that the SPB had no jurisdiction to hear appeals regarding rejections during probation of California State University employees. The SPB agreed with Respondent CSUSB, and dismissed the appeal since Education Code section 89539 did not confer SPB jurisdiction to hear such cases. The SPB noted, though, that Respondent Hendee had remedies under the Memorandum of Understanding (MOU) between the Statewide University Police Association (SUPA) and the California State University. The SPB adopted the decision on May 17, 2011.

SUPA, Respondent Hendee’s former labor union, filed a grievance on Respondent Hendee’s behalf. The grievance addressed the issue of whether or not the California State University made a good faith effort to place Respondent Hendee into another position following his rejection during probation. The arbitrator hearing the grievance found that the California State University made a good faith effort to place Respondent Hendee into another position. The grievance was thus denied.

All appeal periods have expired for both the SPB appeal and Respondent Hendee’s grievance.

Respondent Hendee appeared by telephone at the April 19, 2018 hearing. Documents showed that dishonesty served as a basis for the rejection during probation, and Respondent Hendee disagreed with the charges of dishonesty. Respondent Hendee felt that he had a vested property right in his disability retirement benefits.

Respondent CSUSB appeared in person at hearing. Respondent CSUSB’s staff testimony confirmed Respondent’s Hendee’s rejection during probation.

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.

The ALJ determined that Respondent Hendee’s right to reinstatement was extinguished by his 2010 rejection during probation. In addition, the ALJ concluded that the exceptions articulated in *Haywood* and *Smith* did not apply.

The ALJ then indicated that CalPERS made a correctable mistake in granting Respondent Hendee’s disability retirement application. Under Government Code section 20160(b), the Board is required to correct errors made by CalPERS. The ALJ stated that CalPERS established a right of correction. Because Respondent Hendee was rejected during probation prior to his application for industrial disability retirement, he cannot be reinstated to his former position.

The Proposed Decision on Remand did not incorporate the ALJ’s findings from the September 27, 2017 Proposed Decision stating that Respondent Hendee was no longer substantially incapacitated based on his orthopedic condition. Thus, adopting only the Proposed Decision on Remand would not provide a complete resolution to this case.
The Proposed Decision on Remand addressed Respondent Hendee’s inability to reinstate due to his permanent separation from employment prior to applying for industrial disability retirement. However, the Proposed Decision on Remand did not incorporate the ALJ’s findings from the September 27, 2017 Proposed Decision stating that Respondent Hendee was no longer substantially incapacitated based on his orthopedic condition. The matter was remanded for a second time so that the September 27, 2017 Proposed Decision regarding Respondent Hendee’s lack of substantial incapacity could be consolidated with the conclusions in the Proposed Decision on Remand.

The Staff’s Argument to Adopt the Proposed Decision After Second Remand

Following the second remand of this matter by the Board, the ALJ held a telephonic prehearing conference to discuss the issues. Because the only issue on the second remand was the consolidation of the two previous proposed decisions, no formal hearing was held. However, the ALJ invited briefing from all parties prior to the issuance of his Proposed Decision After Second Remand. Following the briefing, the ALJ consolidated the two previous proposed decisions. In his Proposed Decision After Second Remand, the ALJ determined the Respondent Hendee is no longer entitled to a disability retirement allowance.

Therefore, the staff argues that the Second Proposed Decision After Remand be adopted by the Board.

August 21, 2019

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