

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Elizabeth Serrato (Respondent) was employed by Respondent Salinas Valley State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer. By virtue of her employment, Respondent was a state safety member of CalPERS.

Respondent stopped working for Respondent CDCR in approximately February 2017, when she claimed to be temporarily totally disabled and made a claim for Workers' Compensation benefits.

On April 20, 2017, Respondent CDCR served Respondent with a Notice of Adverse Action (NOAA), advising that Respondent would be terminated from her employment with CDCR. Respondent appealed the NOAA, first by way of a *Skelly* hearing, and thereafter by appealing to the State Personnel Board (SPB).

Respondent and Respondent CDCR agreed to resolve the appeal of the NOAA. A written settlement agreement was prepared by the CDCR attorney. Respondent – and Respondent's attorney – both signed the Stipulated Settlement Agreement and Release (Settlement Agreement) on May 21, 2018. The Settlement Agreement provided, in relevant part, that:

- Respondent agreed to voluntarily resign from State Service;
- Respondent's resignation from employment with CDCR was irrevocable;
- Respondent agreed to never apply for and/or accept employment with CDCR again, in the future; and
- CDCR agreed to withdraw the NOAA.

The Settlement Agreement did not mention or refer to any potential right Respondent may have had to apply for disability retirement with CalPERS.

On June 21, 2018, the SPB approved or accepted the Settlement Agreement "as its decision in the case."

On July 31, 2018, 17 months after Respondent stopped working for Respondent CDCR, 15 months after Respondent had been served with the NOAA, and 2 months after Respondent, on the advice of her attorney, had signed the Settlement Agreement, Respondent signed an application for industrial disability retirement (IDR), which was received by CalPERS on August 1, 2018. Respondent claimed disability on the basis of an orthopedic (bilateral knees, left leg, bilateral hips, back, head, and right shoulder) and psychological conditions.

Initially, by letter dated September 25, 2018, CalPERS notified Respondent that her application for IDR had been approved. At that time, CalPERS was not aware of the

NOAA and the Settlement Agreement. CalPERS received information from Respondent CDCR regarding the NOAA and Settlement Agreement. Thereafter, on October 17, 2018, CalPERS wrote to Respondent, advising her that her application for IDR could not be accepted and/or processed.

Based on the NOAA, Settlement Agreement and the SPB's adoption of the Settlement Agreement as its Decision regarding Respondent's appeal of the NOAA, CalPERS determined that Respondent was ineligible for IDR 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*); and *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.

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 this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A

hearing was held on July 8, 2019. Respondent was represented by counsel prior to and during the hearing. A representative of Respondent CDCR appeared at the hearing.

The ALJ made the following Factual Findings:

On April 20, 2017, [Respondent] was served with a NOAA dismissing her from employment as a CDCR correctional officer. No physical or mental disability gave rise to the alleged misconduct described in the June 2016 NOAA. While [Respondent] had been off work on temporary total disability for about two months before the NOAA was issued, she had worked continuously for about eight months after the alleged misconduct giving rise to the NOAA. She did not file an application for disability retirement in that eight month period. In fact, [Respondent] did not file an application for disability retirement until more than 15 months after the NOAA was issued...

On May 21, 2018, [Respondent] and CDCR settled the appeal related to [Respondent's] dismissal. In the settlement agreement, [Respondent] resigned her employment with CDCR and agreed to never apply for or accept employment with CDCR or any entity that provides services to inmates or wards within CDCR. Slightly more than two months later, on July 31, 2018, [Respondent] filed the application for disability retirement...

[Respondent] did not establish the alleged misconduct that gave rise to the NOAA was the result of a disability, or that her right to an industrial disability retirement allowance had matured before she resigned, or there was an impending ruling on a claim for a disability pension that was delayed, through no fault of her own, until after her resignation, or that undisputed evidence existed that would establish that she was eligible for a CalPERS disability retirement such that a favorable decision on her claim would have been a foregone conclusion. CalPERS did not advise [Respondent] that settling the dismissal-for-cause appeal would have no impact on her right to seek an industrial disability allowance; according to [Respondent], her attorney provided that mistaken advice. Nor does CalPERS's acceptance and initial approval of [Respondent's] application for industrial disability retirement provide sound reason in law or equity to depart from CalPERS's position that when resignation arises out of the settlement of a dismissal-for-cause situation, the resignation is tantamount to a dismissal for purposes of applying the *Haywood* criteria.

The ALJ reviewed and discussed, in some detail, the decisions of the Court of Appeal in *Haywood* and *Smith*. Similarly, the ALJ reviewed and discussed the Board's Precedential Decision of *Vandergoot*. Finally, the ALJ reviewed and discussed the Appellate Court's most recent decision of *Martinez v. Public Employees' Retirement System* (2019) 33 Cal. App. 5th 1156, which held that the *Vandergoot* Precedential

Decision “should be accorded great weight.” (See Legal Conclusions, Paragraphs 6–9, on Pages 11–15, of the Proposed Decision.)

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal and affirmed the CalPERS determination that Respondent was not eligible to submit an application for IDR because her resignation was “tantamount to a dismissal, thus precluding a disability retirement.” (*Vandergoot*)

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

September 18, 2019

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