ATTACHMENT B

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

Susan Willis (Respondent) was employed by Respondent California Department of Corrections and Rehabilitation (CDCR) as an Attorney III. By virtue of her employment, Respondent was a state miscellaneous member of CalPERS.

While working for CDCR, Respondent developed medical issues that required repeated absences from work and certain accommodations upon her return. CDCR satisfied her request for reasonable accommodation. Respondent worked one day in her new position, but never reported to work after that. Instead she filed three claims in connection with her request for reasonable accommodation with the State Personnel Board (SPB): an appeal from Constructive Medical Action, an appeal from Involuntary Transfer and an appeal from Medical Termination/Demotion/Suspension/Transfer. After hearing on the consolidated appeal, the SPB Administrative Law Judge (ALJ) denied all three appeals, and the decision became final.

In addition to the SPB appeals, Respondent filed complaints with the United States Equal Employment Opportunity Commission, the Department of Fair Employment and Housing, alleging an age discrimination claim and a workers’ compensation claim.

On April 25, 2017, Respondent signed an application for industrial disability retirement (IDR) which was received by CalPERS on April 28, 2017.

Also on April 25, 2017, Respondent executed a Settlement Agreement and Release with CDCR resolving all her present and future claims in exchange for her agreement never to work for CDCR again, and a monetary payment. The relevant terms include:

1. CDCR agrees to pay Complainant a lump sum in the amount of eighty thousand dollars ($80,000) in full, final and complete settlement of all claims inclusive, without limitation. . . .

4. The parties agree that this Agreement is contingent upon the Workers’ Compensation Appeals Board (WCAB) approval of a separate compromise and release agreement which settles all of [Respondent’s] workers’ compensation claims. . . .

5. In exchange for the consideration set forth in this Agreement, the sufficiency of which is acknowledged by [Respondent] and her attorneys, [Respondent] shall voluntarily and irrevocably resign from her employment with CDCR effective on the date when the WCAB approves the compromise and release which settles all of
[Respondent’s] workers’ compensation claims. If [Respondent] is unable or unwilling to resign from her employment with CDCR on the date when the WCAB approves the compromise and release which settles all of [Respondent’s] workers’ compensation claims, [Respondent] agrees that CDCR has the authority to summarily separate her from her employment effective on such date, without further notice to her. Under no circumstances will [Respondent’s] employment with CDCR continue after the date when the WCAB approves the compromise and release which settles all of [Respondent’s] workers’ compensation claims. From the time this Agreement is executed, and until the date when the WCAB approves the compromise and release which settles all of [Respondent’s] workers’ compensation claims, CDCR will restore [Respondent] to her Attorney III position, with the Office of Legal Affairs, Risk Management Team, as determined in CDCR’s sole discretion, consistent with the collective bargaining agreement applicable to [Respondent].

6. [Respondent] further agrees, as part of the consideration and inducement for execution of this Agreement, the sufficiency of which is acknowledged by [Respondent] and her attorneys, to never apply for or accept re-employment with CDCR, the California Correctional Health Care Services (CCHCS), or any entity providing services to inmates or wards within CDCR. If CDCR inadvertently offers [Respondent] a position, [Respondent] breaches this Agreement by accepting a position with CDCR or CCHCS. [Respondent] agrees that if she becomes re-employed by CDCR or CCHCS, she may be immediately dismissed without limitation to time and with no right to appeal. [Respondent] hereby waives any right she may have to appeal such termination in any forum. . .

7. As further consideration and inducement for execution of this Agreement, the sufficiency of which is acknowledged by [Respondent] and her attorneys, [Respondent] voluntarily and irrevocably waives any rights to reinstatement that she may have to her civil service position with CDCR, independently of any action by any other agency.
In an Addendum to the Settlement Agreement, CDCR agreed to pay Respondent an additional $20,000 to resolve her age discrimination claim. Respondent received a total of $100,000 to settle all her claims and agree never to work for CDCR in the future.

On May 4, 2017, the WCAB approved Respondent’s workers’ compensation award in the amount of $433,194.62. Thereafter, on May 5, 2017, CDCR signed the Settlement Agreement. Also on May 5, 2017, Respondent resigned from employment with CDCR pursuant to the terms of the Settlement Agreement.

On August 17, 2017, CalPERS requested and received information regarding Respondent’s employment history with CDCR to begin processing her IDR application.

Based on the SPB Final Decision, Settlement Agreement and Respondent’s resignation CalPERS determined that Respondent was ineligible for industrial 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 the Application for Industrial Disability Retirement of Philip 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 (NOAA). 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 ALJ with the Office of Administrative Hearings (OAH). Prior to the hearing, Respondent requested that the matter be submitted entirely on paper rather than by oral testimony. Her request was granted. CalPERS and Respondent filed briefs on their own behalf. CDCR did not participate in briefing.

Even though Respondent was an attorney herself, 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 argued that CalPERS’ decision was based on the mistaken view of her settlement with CDCR because the settlement was not reached as a result of any actual or pending disciplinary action. She claimed that since she was never terminated, *Haywood et al.* does not apply to her. She also argued that her application should be granted due to reasons of due process and fundamental fairness.

CalPERS included the SPB Proposed Decision, SPB Resolution and Order adopting the Proposed Decision and the Settlement Agreement with its exhibits. Respondent presented only two exhibits: the WCAB Order Approving Joint Compromise and Release, and CalPERS’ Disability Retirement Resource Guide.

CalPERS also presented the Court of Appeals Decision in *Martinez v. CalPERS* (2019) 33 Cal.App.5th 1156. The *Martinez* case was decided after CalPERS issued its Determination Letter, and is the most recent case based on *Haywood et al.* The *Martinez* Court affirmed *Haywood and Smith* and confirmed *Vandergoot*. In *Martinez*, a former state employee served with an NOAA filed an unfair labor practices complaint against her employer. To settle her complaint, the parties entered into a Settlement Agreement. Respondent Martinez agreed to “voluntarily resign from her position after [her employer] accepted the Settlement Agreement” and that “she [would] never again apply for or accept any employment position” with her employer. (*Martinez, supra,* 33 Cal.App.5th, at p. 696). Respondent’s employer agreed to withdraw the NOAA and other documents from Martinez’s personnel file, and pay her $30,000. CalPERS cancelled Martinez’s application for disability retirement based on the Settlement Agreement with her employer, asserting that the settlement permanently severed the employer/employee relationship. The *Martinez* Court, relying on *Vandergoot, Haywood, and Smith*, upheld CalPERS’ cancellation of the disability retirement application.
After considering all of the evidence introduced, as well as briefs submitted by the parties, the ALJ denied Respondent’s appeal. The ALJ found that Respondent permanently terminated her employer/employee relationship with CDCR when she entered into the Settlement Agreement, resigned from her employment, and agreed never to seek reinstatement with CDCR. The ALJ cited to Government Code section 19996 which provides in relevant part, “Any…employee may be…permanently separated through resignation,” and to California Code of Regulations Section 446, which states in part, “Permanent separations from state service shall include…resignation.” The ALJ found that termination of Respondent’s relationship with CDCR was precipitated solely by her voluntary resignation and her waiver of any right to reinstatement to her former position in return for financial consideration for doing so, and no evidence was presented that it was related to any disability from which she may have been suffering at the time. The fact that she filed her IDR Application prior to termination of her relationship with CDCR is irrelevant. (Haywood, supra, 67 Cal.App.4th at p. 1307). The ALJ also cited to Public Employees’ Retirement Law section 21154 which “provides a procedural time limit within which an application for disability retirement must be filed but does not provide for substantive eligibility whenever a timely application is filed.” The ALJ also found that none of the exceptions articulated in Haywood and Smith apply here.

The ALJ reviewed CalPERS’ exhibits including the Determination Letter, Statement of Issues and correspondence, and then denied Respondent’s claims of lack of due process and fundamental fairness. The ALJ found that Respondent had received sufficient notice regarding CalPERS’ position in cancelling the IDR Application.

The ALJ concluded that in accordance with Haywood, Smith, Vandergoot and Martinez, Respondent’s eligibility to file a disability application is dependent on her having a continuing employment relationship with CDCR. By virtue of the Settlement Agreement, in which she resigned from her employment and permanently waived her right to reinstatement, Respondent no longer has an employment relationship with CDCR and accordingly is not eligible to file an IDR application.

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

September 18, 2019

ELIZABETH YELLAND
Senior Attorney