

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Vanessa Alcaraz (Respondent) was employed by Respondent City of Seaside (Respondent City) as a Police Officer. By virtue of her employment, Respondent was a local safety member of CalPERS.

The issue in this case is whether Respondent was precluded from applying for industrial disability retirement (IDR) as a result of her resignation from employment with Respondent City and her agreement not to seek re-employment as a condition of settlement pursuant to the *Haywood, Smith, Vandergoot* and *Martinez* line of cases.

Respondent began working for Respondent City as a Police Officer in 2015. On June 21, 2018, she submitted an IDR application based on a psychiatric condition. On September 10, 2018, CalPERS notified her that her IDR application was canceled. On October 17, 2018, she appealed.

A hearing was held on August 6, 2019. Respondent was represented by counsel at all phases of her appeal. Respondent City did not appear at the hearing.

At the hearing, Respondent testified that she experienced harassment from coworkers, largely organized by her former brother-in-law. As a result of the harassment, she experienced physical symptoms, including vomiting, sleeplessness and sadness. She also called Dr. Allan Hedberg to testify to her psychological condition. Dr. Hedberg testified that Respondent showed signs of PTSD, including memory loss and confusion.

CalPERS produced evidence that showed Respondent was subpoenaed to testify at a traffic court hearing on December 6, 2016. On December 5, 2016, she texted the defendant in the case who was a friend of hers, to tell him she would not appear in court, "Only because it's you!!". Respondent City investigated her failure to appear. On October 27, 2017, the City issued a Notice of Intent to Terminate Respondent.

On December 14, 2017, Respondent City issued a Termination Letter to Respondent, terminating her employment effective December 14, 2017. She appealed.

On May 3, 2018, during pendency of the appeal, Respondent and the City reached a Settlement Agreement and Release. The Settlement Agreement provides:

1. ALCARAZ will, at the same time this settlement agreement and general release is signed by her, submit a letter of resignation from her employment with the City of SEASIDE for personal reasons, postdated back to December 14, 2017. That letter of resignation will constitute the official reason for the termination of ALCARAZ' employment with THE CITY.

2. ALCARAZ will, if she has not already done so by the time this Agreement is signed by all parties, immediately file an application for industrial disability retirement with CALPERS and with the city of SEASIDE.
3. Once received, SEASIDE will be required to submit ALCARAZ' application for an industrially related disability retirement to CALPERS for its initial review for eligibility. The determination of her eligibility to apply for and move forward with an industrially related disability retirement is in the exclusive authority of CALPERS and may include a review the contents of ALCARAZ' personnel file, including but not limited to, any and all internal affairs investigations, past and present, involving ALCARAZ, and any and all prior and current disciplinary actions taken against ALCARAZ. ALCARAZ understands and acknowledges that review by CALPERS is required to be conducted before her application moves forward and that a determination of ineligibility is in the exclusive authority of CALPERS.
10. ALCARAZ agrees never to re-apply for any employment with THE CITY of SEASIDE, to never in the future seek to undo or in any way further challenge the denial of her CCW privilege and to never petition CALPERS to reverse her industrial disability retirement in order to again work for the SEASIDE Police Department.

Pursuant to the terms of the Settlement Agreement, Respondent submitted a voluntary letter of resignation to the City post dated to December 14, 2017, stating her resignation was "for personal reasons."

On June 21, 2018, Respondent submitted her IDR Application, with a requested retirement date of December 17, 2017. CalPERS requested and received information regarding Respondent's employment from the City, including the Notice of Intent to Terminate, Termination Letter, Settlement Agreement and resignation letter.

CalPERS reviewed Respondent's employment status with the City and the cases of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194; CalPERS Precedential Decisions *In the Matter of Robert Vandergoot* (2013) and *In the Matter of Phillip MacFarland* (2016); and subsequently, *Martinez v. CalPERS* (2019) 33 Cal.App.5th 1156.

On September 10, 2018, CalPERS notified Respondent and the City that Respondent's employment ended for reasons which were neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement; that Respondent's termination permanently severed her employment relationship with the City; and she had no right to return to her employment which is a prerequisite in qualifying to apply for disability retirement under PERL section 21154. Consequently, CalPERS determined that Respondent was ineligible to apply for IDR and cancelled her application.

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*.

The *Martinez v. CalPERS* (2019) 33 Cal.App.5th 1156 case was decided after the Determination Letter was written here. Nevertheless, CalPERS re-reviewed all information provided by Respondent City in conjunction with *Martinez*, and again determined that Respondent is ineligible to apply for IDR. The *Martinez* Court affirmed *Haywood and Smith* and confirmed *Vandergoot*. In *Martinez*, a former state employee served with a 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 *Haywood, Smith* and *Vandergoot*, upheld CalPERS’ cancellation of the disability retirement application.

After considering all of the evidence introduced, as well as briefs submitted by the parties, the Administrative Law Judge (ALJ) denied Respondent's appeal. The ALJ found that Respondent permanently terminated her employer/employee relationship with the City when she entered into the Settlement Agreement, resigned from her employment, and agreed never to seek reinstatement. The ALJ determined that Respondent is ineligible to receive IDR. She is barred from employment with Respondent City which is a prerequisite to qualifying to apply for IDR under Government Code section 21154. She did not establish that she had a matured right to an IDR before the alleged misconduct prompting her eventual resignation.

The ALJ also found that equitable exceptions articulated in *Haywood* and *Smith* do not apply. Respondent had not been waiting for a ruling on a claim for IDR that had been delayed through no fault of her own. Nor was there "undisputed evidence" that Respondent's claimed psychological disability was so severe that it rendered a favorable decision by CalPERS a "foregone conclusion (as perhaps a loss of limb)" as articulated in *Smith*. Moreover, the ALJ found the Notice of Intent to Terminate was not based on physical or mental disability. Therefore, the ALJ found Respondent's IDR Application was precluded by the holdings in *Haywood*, *Smith*, *Vandergoot*, *MacFarland* and *Martinez*.

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

November 20, 2019

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