ATTACHMENT B

STAFF'S ARGUMENT

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STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Carla J. Harrison (Respondent) was employed by Respondent Franchise Tax Board (Respondent FTB) as a Compliance Representative. By virtue of her employment, Respondent was a state member of CalPERS.

On January 18, 2008, Respondent FTB served Respondent with a Notice of Adverse Action of Dismissal (NOAA) with an effective termination date of February 4, 2008. The NOAA was based on Respondent's failure to meet performance expectations, poor customer service, falsification of comments in the collections system, and misuse of the internet.

Respondent appealed the NOAA and the matter went before the an Administrative Law Judge of the State Personnel Board (SPB) on February 17, 2010, for pre-hearing and settlement conference. At the pre-hearing and settlement conference, Respondent and Respondent FTB entered into a stipulation for settlement whereby Respondent FTB would withdraw the NOAA and Respondent agreed to withdraw her appeal and resign from her employment as a Compliance Representative with Respondent FTB. As part of the settlement, Respondent also agreed to "neither seek nor accept re-employment in any capacity with the FTB or any successor agency or department."

Respondent filed an application for service pending disability retirement on January 29, 2010 and service retired effective February 01, 2010. She has been receiving benefits since that time. Respondent filed various disability retirement and industrial disability retirement applications, which were canceled because they were incomplete.
On September 15, 2018, Respondent signed an application for disability retirement which was received by CalPERS on September 18, 2018. Respondent claimed disability on the basis of psychological (PTSD, depression, and anxiety) conditions.

Based on the Notice of Adverse Action, Notice of Intent to Discipline, Notice of Discipline, 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*); 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.

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 August 20, 2019. Respondent was represented by counsel at the hearing. Respondent FTB did not appear at the hearing.

Prior to the hearing, CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS also provided her attorney all documents requested by him.

Respondent testified on her own behalf. She did not call any witnesses to testify on her behalf.

Evidence including the decision of SPB and the testimony of Respondent were admitted into evidence. Testimony was also submitted by a representative of Respondent FTB.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that CalPERS’ met its burden of proving that Respondent was terminated for cause or that she resigned under circumstances that were tantamount to a dismissal for cause.

In the Proposed Decision, the ALJ concludes that Respondent failed to establish “that any of the *Haywood* exceptions apply. Thus under the criteria set forth in *Haywood* and its progeny, Respondent was properly precluded from applying for disability retirement.”

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to “make technical or other minor changes in the proposed decision.” In order to avoid

ambiguity, staff recommends that the word “safety,” in the second sentence of paragraph 3, of page 8 be deleted as Respondent is not a safety member but only a state miscellaneous member of CalPERS. Staff also recommends the word “CalPERS” be replaced with the word “FTB” on the last line of paragraph 9, page 6 as Respondent was employed by FTB, not CalPERS.

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

November 20, 2019

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PREET KAUR
Senior Attorney