

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION AS MODIFIED

Curt Hawker (Respondent) was employed by Respondent County of Butte (County) as a Senior Social Worker. By virtue of his employment, Respondent was a local miscellaneous member of CalPERS.

On February 26, 2018, County sent Respondent a Letter of Intent to Terminate, terminating Respondent from his employment effective March 9, 2018, based on the following causes of Personnel Rule 2.54: unsatisfactory performance; inefficiency; discourteous, or disrespectful treatment of the public or other employees; conduct either during or outside duty hours which causes discredit to the department or the County; and violation of a departmental rule or county policy, to wit: Non-Discrimination Policy.

According to the Letter of Intent to Terminate, County conducted an investigation and found that Respondent had sent inappropriate text messages to an Adult Protective Services client's daughter. In addition, Respondent's job performance had been problematic.

A *Skelly* hearing was held on March 6, 2018. On March 8, 2018, County sent Respondent a Letter of Intent to Impose Disciplinary Action informing him that following the *Skelly* hearing, County determined the proposed disciplinary action was appropriate and upheld the proposed termination.

Respondent filed an application for service retirement on July 24, 2018 with a requested retirement date of March 11, 2018 and has been receiving service retirement benefits since that time.

On September 5, 2018, Respondent signed an application for disability retirement, which was received by CalPERS on September 5, 2018. Respondent claimed disability on the basis of back and neck injuries, right knee and heel injuries, anxiety and depression disorders, and insomnia conditions.

Based on the Letter of Intent to Terminate and Letter of Intent to Impose Disciplinary Action, 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*) and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*). 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.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on December 10, 2019. Respondent represented himself at the hearing. County did not appear at the hearing.

At the hearing, the ALJ received documentary evidence demonstrating that CalPERS had provided both Respondent and County with proper notice of the date, time and place of the hearing. The ALJ found that the matter could proceed as a default against County, pursuant to Government Code section 11520.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his 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.

At hearing, Respondent testified on his own behalf. He testified that he recalled the incident that caused his termination and that he made a “poor decision” and “shouldn’t have done it.” He also testified that he considered the County’s decision to terminate him to be “extreme” and that he should have received a lighter discipline. He further testified that his alleged disability is permanent and was present before he was terminated from his employment with County.

Documentary evidence, including the Letter of Intent to Terminate and Letter of Intent to Impose Disciplinary Action, and the testimony of Respondent were admitted into evidence. A representative of County also confirmed in testimony that Respondent was terminated for cause, was not terminated due to any claimed medical disability, and Respondent did not have return rights to County.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that:

The County permanently terminated its employer-employee relationship with [R]espondent, and he retained no right of reemployment for reasons unrelated to any disability he may

have been suffering at the time. Although he stated he was on a modified duty schedule at an indeterminate time before he received the notice of intent to terminate his employment, he was capable of working in his position at the time he was terminated, and a work-related incident led to the termination. No evidence was submitted to show that he was suffering from a disabling medical condition at the time he resigned [*sic*] from his position or that the termination of the employment relationship was the ultimate result of a disabling medical condition. Nor did the evidence establish that termination of that relationship preempted an otherwise valid claim for an industrial [*sic*] disability pension.

In the Proposed Decision, the ALJ concludes that Respondent is ineligible to apply 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 deleting the word “industrial” prior to the word “disability” on page 2, in the “Issue” paragraph; on page 3, in paragraph 4; on page 12, in paragraph 7; on page 13, in paragraphs 8 and 9; and in the Order of the Proposed Decision and replacing “he resigned from his position” with “he was terminated from his position” on page 12, in paragraph 8, line 8 of the Proposed Decision.

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

February 19, 2020

Helen L. Louie
Attorney