

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Won B. Baek (Respondent) was employed by Respondent Mule Creek State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Supervising Correctional Cook. By virtue of his employment, Respondent was a state safety member of CalPERS.

On October 4, 2017, Respondent CDCR served Respondent with a Notice of Adverse Action (NOAA), seeking to dismiss him from employment for cause. The dismissal became effective on October 13, 2017.

On November 28, 2018, Respondent signed an application for industrial disability retirement which was received by CalPERS on November 28, 2018. Respondent claimed disability on the basis of an orthopedic (cervical strain) condition. Based on the Notice of Adverse Action, 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*); 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.

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 October 14, 2019. Respondent was represented by counsel at the hearing. A Korean translator was also in attendance. Respondent CDCR did not appear at the hearing.

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.

Respondent appealed the termination to the State Personnel Board (SPB). However, Respondent did not proceed with the SPB appeal. The SPB issued a Decision Approving Withdrawal of Action or Appeal. Accordingly, the NOAA and resulting termination for cause were never set aside or modified with a less severe form of discipline.

Respondent testified on his own behalf. He claimed that he injured his neck while at work and could not perform the duties of a Supervising Correctional Cook. He also alleged that he was terminated because he was a whistleblower, not because of any bad behavior on his part. However, even if this were true, that fact does not qualify him as eligible for one of the exceptions to *Haywood*.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent worked in a supervisory capacity for the majority of 2015 and 2016. Respondent continued to work until he was dismissed in October 2017. Accordingly, the ALJ found that Respondent did not establish that his dismissal was the ultimate result of a disabling condition.

The ALJ also found that Respondent did not demonstrate that his termination was preemptive of an otherwise valid claim for disability retirement. The ALJ addressed the question of whether Respondent had a vested interest in a disability retirement that had matured before his termination:

A vested right matures when there is an unconditional right to immediate payment. (Smith, supra, 120 Cal. App. 4th at p. 206.) Typically, this arises when a pension board determines that the employee was no longer capable of performing his or her duties. (Ibid.) Here, respondent continued to perform his job duties until he was terminated for cause. There has been no determination by CalPERS that respondent was eligible for disability retirement at any time. Accordingly, respondent's right to disability retirement could not have matured before his dismissal.

The ALJ also addressed the issue of whether principles of equity should be applied to grant Respondent disability retirement. The ALJ found that Respondent did not produce "undisputed evidence" regarding his eligibility for disability retirement. Respondent's testimony was treated as his subjective complaints of pain, not adequately corroborated by medical reports. The ALJ commented as follows:

As in Smith, for purposes of the standard for disability retirement, the medical evidence here is not unequivocal. CalPERS would have a basis

for litigating whether the evidence provided by respondent demonstrated a substantial incapacity to perform his job duties or instead only made it difficult to perform his duties, which is insufficient. (Smith, supra, 120 Cal. App. 4th at pp. 206-207.)

In the Proposed Decision, the ALJ concludes that the appeal should be denied and that the CalPERS determination should be affirmed.

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

February 19, 2020

Rory J. Coffey
Senior Attorney