

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

William C. Bailey (Respondent) was employed by Respondent City of San Fernando (Respondent City) as a Police Sergeant. By virtue of his employment, Respondent was a local safety member of CalPERS.

On March 21, 2014, Respondent signed an application for industrial disability retirement (IDR Application) which was received by CalPERS on the same date. Respondent claimed disability on the basis of orthopedic (back, knee) conditions.

At the time CalPERS received Respondent's IDR Application, CalPERS was not aware that on March 18, 2014, three days prior to submitting his IDR Application, Respondent was served by Respondent City with a Notice of Intent to Terminate his employment. Respondent City's termination action was based on Respondent misrepresenting his educational background on an application he submitted on September 30, 2013 seeking to promote to Sergeant (2013 Application). Respondent Bailey, in part because of the educational background he provided in the 2013 Application, was actually promoted to Sergeant.

On April 24, 2014, Respondent City, following a pre-disciplinary Skelly hearing, determined that Respondent's employment should be terminated, effective immediately. Respondent appealed his termination, which ultimately resulted in the parties (Respondent and Respondent City) entering into a settlement agreement (Settlement Agreement). Pursuant to the terms of the Settlement Agreement, Respondent City agreed to certify Respondent's IDR Application. In exchange, Respondent agreed to withdraw his appeal of his termination, and never again seek or maintain employment with Respondent City.

In August 2016, CalPERS conducted an internal audit to determine if individuals receiving disability or industrial disability benefits had actually been separated from their prior employment because of termination. The audit disclosed that Respondent had potentially been terminated from his position with Respondent City. CalPERS immediately sought information from Respondent and Respondent City. Nearly one year later, on July 6, 2017, Respondent City provided CalPERS with documents establishing that Respondent had been terminated from his position with Respondent City for cause, and that his termination ultimately resulted in Respondent and Respondent City entering into the Settlement Agreement.

Based on these facts, 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* (*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.

CalPERS determined that it had been a mistake to accept and approve Respondent’s IDR Application. CalPERS determined that Respondent, as a result of his termination and the Settlement Agreement forever severing his employment relationship with Respondent City, was ineligible to receive industrial disability retirement benefits. CalPERS determined that, pursuant to Government Code section 20160, it was obligated to correct its mistake and cancel Respondent’s IDR Application, thus resulting in a cancellation of his industrial disability retirement benefits. CalPERS also determined that it was obligated to recover the industrial disability benefits that Respondent received for which he was not entitled.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings.<sup>1</sup> A hearing was held on November 7, 2019. Respondent represented himself at the hearing. Alex Y. Wong, Esq. represented Respondent City of San Fernando at the hearing.

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<sup>1</sup> In Respondent’s appeal letter, he requested that CalPERS suspend/stop issuing disability retirement payments pending the resolution of his appeal. Subsequent to his appeal, Respondent submitted an application for service retirement, but again requested that CalPERS apply any retirement benefits he is eligible to receive to the overpayment amount he is determined to owe CalPERS, if any.

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, CalPERS presented evidence establishing Respondent had been terminated from his position with Respondent City, had appealed his termination, and had entered into the Settlement Agreement in which he agreed to withdraw his appeal and never apply for or accept employment with Respondent City. In exchange, Respondent City agreed to certify Respondent was disabled in connection with the IDR Application he had submitted to CalPERS.

CalPERS also presented evidence that at the time it initially accepted Respondent's IDR Application, it was not aware of the fact Respondent's employment had been terminated for cause. CalPERS also submitted evidence with respect to the manner in which CalPERS discovered the fact he had potentially been terminated, and the efforts CalPERS took to obtain evidence with respect to Respondent's employment being terminated by Respondent City. In addition, CalPERS presented evidence of the amount of industrial disability benefits that Respondent had received, for which CalPERS argued he was ineligible to receive pursuant to the *Haywood* line of cases.

Respondent testified on his own behalf. Respondent did not dispute the fact his job was terminated, or that he settled the appeal of his termination. Instead, Respondent argued that he submitted the IDR Application while he was pursuing a workers' compensation claim, as well as appealing his termination. Respondent testified that a medical examination discovered that he was disabled, which led to the Settlement Agreement that resolved his IDR Application, workers' compensation claim, and employment termination appeal.

Respondent argued that CalPERS should not be able to retroactively correct the acceptance and approval of his IDR Application since CalPERS should have realized he had been terminated when he submitted the IDR Application. Respondent argued that retroactively cancelling his IDR Application now is not fair, since it puts him in a position that is fundamentally different than if his IDR Application has been cancelled when it was received and approved.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. At the hearing, the parties agreed that the issue on appeal is whether CalPERS is entitled, under Government Code section 20160, to correct its mistake in approving Respondent's IDR Application. The ALJ determined that CalPERS, as the party seeking to invoke Government Code section 20160, initially has the burden of presenting documentation or other evidence establishing the right to correction. The ALJ found that CalPERS met its burden.

The ALJ determined that CalPERS reasonably relied on Respondent City's representation that Respondent was substantially incapacitated from performing his job duties when CalPERS initially approved the IDR Application. The ALJ found that CalPERS did not discover that Respondent's employment had been terminated for cause until two years after the IDR Application had been approved. Furthermore, the ALJ found that it appears Respondent City, through certifying that Respondent was substantially incapacitated after terminating his employment, was substituting the certification of Respondent's disability for the disciplinary process.

The ALJ rejected Respondent's argument that CalPERS should be estopped from retroactively cancelling Respondent's IDR Application. The ALJ found that estoppel is not available when it would require CalPERS to act in excess of its statutory authority. The ALJ found that providing Respondent with industrial disability benefits, which he is not allowed under the law, would require CalPERS to act in excess of its authority. The ALJ also rejected Respondent's argument that approval of the IDR Application was CalPERS' fault.

In the Proposed Decision, the ALJ concludes that CalPERS was entitled to correct its mistake in initially approving Respondent's IDR Application. In addition, the ALJ concludes that CalPERS, pursuant to Government Code section 20164, was entitled to collect any industrial disability retirement payments made to Respondent on or after August 15, 2015, or three years prior to the date CalPERS sent its determination letter to Respondent.

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

March 18, 2020

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John Shipley  
Senior Attorney