

ATTACHMENT B

STAFF'S ARGUMENT

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

Dustin E. Morgan (Respondent) was employed by Respondent California State Prison Corcoran, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS.

On July 19, 2019, Respondent signed and submitted an application for industrial disability retirement. Respondent claimed disability on the basis of an orthopedic condition (fracture of right orbital socket) and psychological conditions (major depressive disorder, anxiety, and post-traumatic stress disorder (PTSD)). In processing Respondent's application for industrial disability retirement, CalPERS staff communicated with Respondent CDCR in order to determine Respondent's employment status. Respondent CDCR advised that in September 2017, they had concluded an internal affairs investigation of Respondent, decided to dismiss – or terminate – Respondent from employment with CDCR, and had served Respondent with a Notice of Intent. The Notice of Intent was signed by the warden and informed Respondent that it was the intent of CDCR to dismiss him.

Based on the Notice of Intent to Discipline and Notice of Discipline, 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.

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. 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*.

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 February 4, 2020. Respondent represented himself at the hearing. Respondent CDCR did not appear and participate in the hearing. A representative/witness from Respondent CDCR was called by counsel for CalPERS and did testify 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.

Documentary evidence and the testimony of the CDCR witness established that on September 11, 2017, Respondent was served with a Letter of Intent, following an investigation of alleged on-the-job misconduct by Respondent. The Letter of Intent informed Respondent that a decision had been made to discipline him and that the recommended discipline “is Dismissal.”

The CDCR witness explained that at CDCR “dismissal” is the same as a termination. The CDCR witness also explained that because Respondent has been off work since February 2018, on a claim for Workers’ Compensation benefits, Respondent CDCR has not yet served him with a Notice of Adverse Action (NOAA). As the ALJ summarized the CDCR witness’ testimony:

As a result, [Respondent’s] Internal Affairs disciplinary matter remains open, but only because he remains out on leave. If and when he returns to his CDCR position, he will be served with the Notice of Adverse Action and immediately dismissed. Following his dismissal, respondent would have standard employee appeal rights, and if successful, he could reapply for industrial disability retirement. But at present, he will be terminated for cause upon his return, which means he currently lacks standing to apply for industrial disability retirement.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found, in relevant part, as follows:

Respondent's pending dismissal has the effect of permanently terminating his employer-employee relationship with CDCR; ...There is no evidence that his pending termination was related to any disability from which he may have been suffering at the time or was preemptive of a valid claim for disability retirement.

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

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 Proposed Decision be modified in order to reflect the correct date upon which Respondent CDCR served Respondent with the Letter of Intent. Accordingly, based upon the documentary evidence and testimony presented at the hearing, on page 4, at Paragraph 6 of the Proposed Decision, the date of "September 11, 2018" should be changed and corrected to be "September 11, 2017."

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

April 22, 2020

Rory J. Coffey
Senior Attorney