

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Regina R. Mack (Respondent) was employed by Respondent Department of State Hospitals - Coalinga Secure Treatment Facility (Respondent DSH) as a Clinical Social Worker. By virtue of her employment, Respondent was a state safety member of CalPERS.

On March 4, 2019, Respondent DSH served Respondent Mack with a Notice of Nonpunitive Action, terminating her from her employment effective start of business on March 14, 2019. The Notice of Nonpunitive Action (NONA) was based on Respondent's failure to timely secure a valid license as a Licensed Clinical Social Worker (LCSW), a required minimum qualification of her position as a Clinical Social Worker.

The Notice of Nonpunitive Action provided Respondent an opportunity to challenge the termination through a "Skelly hearing" and informed her of her right to appeal the termination to the State Personnel Board. Respondent did not request a "Skelly hearing" nor did she appeal the termination.

Respondent filed an application for service pending industrial disability retirement on April 16, 2019 and service retired effective May 1, 2019. She has been receiving service retirement benefits since that time. Respondent claimed disability on the basis of left shoulder, left hand, right hand, back, left foot, bilateral arms, left knee, right knee, right foot, right leg/knee, buttocks and right shoulder conditions.

Based on the Notice of Nonpunitive 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*) 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 her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on March 3, 2020. Respondent represented herself at the hearing. Respondent DSH did not appear at the hearing.

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

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her 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 and how to contact OAH.

At hearing, Respondent testified on her own behalf. She testified about her medical conditions how those conditions prevent her from taking and passing the LCSW examinations and securing her LCSW license. She also testified that she was able to sit through and pass the first examination notwithstanding her medical conditions and that she has made no attempt to take the second examination. She further testified that she has not even attempted the second examination because she is not prepared, and her knowledge base is not sufficient. Respondent submitted medical reports which were admitted into evidence. She did not call any witnesses to testify on her behalf.

Evidence including the Notice of Nonpunitive Action and the testimony of a representative of Respondent DSH were also admitted into evidence. The witness from Respondent DSH testified that Respondent was properly served with the Notice of Nonpunitive Action and terminated for not meeting the minimum qualifications for her position with Respondent DSH, and that Respondent did not appeal the termination. She also testified that Respondent was not terminated due to a medical condition but solely on her failure to meet the requirements of her position – to secure a valid LCSW license. She further testified that Respondent did not have a right to reinstatement to DSH.

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

Respondent's failure to obtain her LCSW license in the required time, not her physical condition, caused the DSH to serve the NONA. Respondent's testimony that her disabilities prevented her from taking and passing the LCSW exams is not persuasive. She took and passed the

first exam, and she has not attempted to take the second exam.

Respondent also did not establish that her separation from state service preempted an otherwise valid claim for disability retirement. There was no indication in the NONA or any other evidence that the DSH instituted dismissal proceedings to preempt respondent from filing an application for disability retirement based upon a disabling physical condition.

In the Proposed Decision, the ALJ concluded that CalPERS met its burden of proof and established that Respondent was terminated for cause and that the termination did not preempt an otherwise valid claim for disability. The ALJ further concluded that Respondent failed to establish that “any of the *Haywood* exceptions apply.” Thus, under the criteria set for in *Haywood* and its progeny, [R]espondent was properly precluded from applying for disability retirement.”

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

June 17, 2020

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Attorney