

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Geri E. Chilelli (Respondent) was employed by Respondent Department of Consumer Affairs (Respondent DCA) as an Office Technician. By virtue of her employment, Respondent was a state miscellaneous member of CalPERS.

On June 26, 2018, Respondent DCA served Respondent with a Notice of Automatic Resignation by Absence Without Leave (AWOL) letter. The AWOL letter informed Respondent that Respondent DCA was invoking Government Code section 19996.2 (the AWOL statute) because Respondent was AWOL for five or more consecutive working days from June 20 through 26, 2018. The letter informed Respondent she could request reconsideration through a *Coleman*<sup>1</sup> hearing with Respondent DCA, and through an appeal with the California Department of Human Resources (CalHR).

Following her *Coleman* hearing with Respondent DCA, Respondent DCA provided Respondent a letter informing her of the outcome: there was no cause to "amend, modify, or revoke" the AWOL resignation. Respondent appealed to CalHR. On October 3, 2018, Respondent, her union representative, and Respondent DCA signed a Stipulation for Settlement and Release (Stipulation).

Through the Stipulation, Respondent DCA agreed to withdraw the June 26, 2018 AWOL Letter. In return, Respondent agreed to withdraw the appeal of her AWOL resignation, and she waived any right to appeal the June 26, 2018 AWOL Letter. Respondent further agreed that, should she apply for a future position with Respondent DCA, she would notify Respondent DCA of her AWOL separation and attach a copy of the Stipulation to her job application. CalHR approved the Stipulation on October 2, 2018.

On February 1, 2019, Respondent signed an application for service pending disability retirement, which was received by CalPERS on February 1, 2019. Respondent claimed disability on the basis of a broken hip and liver disease conditions. Respondent requested a retirement date of June 20, 2018. Respondent began receiving her service retirement allowance in April 2019, with a retroactive effective date of June 20, 2018.

Based on the June 26, 2018 AWOL Letter and the Stipulation, 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*); *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

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<sup>1</sup>*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102 (due process requires that an employee be given notice and opportunity to respond before her employer invokes the provisions of Government Code section 19996.2).

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. 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 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 CalPERS ultimately determines 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.

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 July 14, 2020. Respondent represented herself at the hearing. Respondent DCA did not appear at the hearing.

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.

Respondent testified on her own behalf. Respondent explained that she was in the hospital during the period she was considered AWOL, but she did not dispute that she signed the Stipulation.

At the hearing, CalPERS submitted an affidavit in lieu of personal testimony (Affidavit) from a Respondent DCA representative. Attached to the Affidavit were all of the documents supporting Respondent’s AWOL resignation, including the June 26, 2018 AWOL Letter and the Stipulation.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that a condition precedent for disability retirement is the member’s ability to reinstate. Because Respondent’s AWOL resignation and subsequent Stipulation were tantamount to a termination for cause, Respondent could not be reinstated to her former position. The ALJ further reasoned that Respondent did not have a mature right to a disability retirement at the time of her AWOL resignation. Although Respondent testified at hearing that

she had health issues and was hospitalized, there was no evidence that the Department severed respondent's employment due to a disabling medical condition, nor was the severance preemptive of an otherwise valid claim for disability retirement pursuant to *Haywood*.

The ALJ thus concluded that Respondent is unable 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 that “CalPERS” in the first line of paragraph three on page five be changed to “CalHR”. In addition, staff recommends that a portion of the definition of disability from Government Code section 20026 in paragraph seven on page six be changed from “mean disability of permanent or extended and uncertain duration, as determined by the board” to “mean disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board...”

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

September 16, 2020

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