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Santa Barbara Unified School District

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5 September 2013

CalPERS Legal Office
Attn: Elizabeth Yelland, Sr. Staff Attorney
400 Q Street, Lincoln Plaza North, Room 3340
Sacramento, CA 95811
By Fax: 916-795-3659

Inre: Request for Public Comments – Designation of Board Decision in the Robert Vandergoot Matter

Dear Ms. Yelland:

The Santa Barbara Unified School District supports making the Board's final decision in the Vandergoot matter precedential. We believe the two questions presented in your August 26, 2013 memorandum can be answered in the affirmative.

Sincerely,


Brian Tanguay
Classified Personnel Coordinator

ALTA VISTA ELEMENTARY SCHOOL DISTRICT

Lora Haston
Superintendent/Principal
Cliff Cantrell
Assistant Principal

Board of Trustees
Hellema Miley, President Sheena Williams, Clerk
Lee Beltrons, Member Maria Perez, Member
Trevi Leach, Member

August 29, 2013

CalPERS Legal Office
Attn: Elizabeth Yelland, Senior Staff Attorney
400 Q Street, Lincoln Plaza North, Room 3340
Sacramento, CA 95811

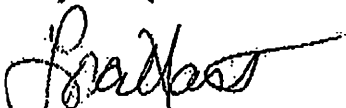
RE: Request for Public Comments re: Designation of Board Decision in the ROBERT
VANDERGoot Matter as Precedential

To Whom It May Concern:

I am of the opinion that this final decision by the Board should NOT be made
precedential.

Thank you for the opportunity to comment.

Respectfully,


Lora Haston

CONFIDENTIAL FAX

Department of Human Resources Legal Division

1515 "S" Street, North Building, Suite 400

Sacramento, CA 95811-7258

TELEPHONE: 324-0512 FAX: 323-4723

DATE: September 26, 2013

TO: Elizabeth Yelland
Senior Staff Attorney
CalPERS Legal OfficeFROM: Linda M. Kelly
Labor Relations Counsel
Phone: (916) 324-0512
Fax: (916) 323-4723

PHONE:

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RE: CalPERS Precedential Decision MemoNUMBER OF PAGES: 4 (including cover page)

MESSAGE: Please see the attached correspondence dated September 26, 2013.

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MEMORANDUM

Date: September 26, 2013

To: Elizabeth Yelland
Senior Staff Attorney
CalPERS Legal Office

From: Linda M. Kelly *L. Kelly*
Labor Relations Counsel
CalHR

Subject: Request for Public Comments re: Designation of Board Decision in the ROBERT VANDERGOOT Matter as Precedential

After review of the above referenced Decision and request for comments, CalHR makes the following response for consideration by the Board.

- 1) Does the decision contain a significant legal or policy determination of general application that is likely to recur? Yes.

The settlement that appears to have been involved in this case, wherein the State employer agency agrees to withdraw the discipline in exchange for a waiver of the employee's right to appeal the decision at the State Personnel Board, a voluntary resignation by the employee, and a promise not to return to employment with that particular agency, is relatively common. Both employer and employee have an interest in understanding how such settlements will impact an employee's right to apply for disability retirement.

- 2) Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made and how the law was applied? No.

Paragraph 13 of the Decision states that the "sole issue in this hearing is whether respondent may file an application for industrial disability retirement, or whether his application and eligibility for disability retirement is precluded by operation of *Haywood*." However, *Haywood* was terminated for cause while Vandergoot was not. The basis for Vandergoot's outright preclusion from filing an application, and from eligibility for disability retirement, when he was in fact not terminated for cause, is not sufficiently clear from the analysis and the application of the facts in the Decision.

Legal conclusions 3 and 4, on page 10 of the Decision, set forth the *Haywood* rule as "Where 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

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the employment relationship renders the employee ineligible for disability retirement. (cite)"
And, that
"... respondent's separation from employment was tantamount to a dismissal for purposes of
applying the *Haywood* criteria."

In making this conclusion, the Decision finds that Vandergoot's separation by resignation retains the same characterization as a dismissal for cause. However, the Decision is absent of any analysis of the distinct difference in rights and privileges retained by an employee who is dismissed for cause, as compared to an employee who resigns for personal reasons. For example, an employee who is dismissed for cause is deemed to be dismissed "from any and all positions which the employee may hold in the state civil service" (Gov. Code section 19583.1), and must request and obtain prior consent from the State Personnel Board in order to take any state civil service examination (California Code of Regulations, Title 2, section 211). Whereby an employee who resigns for personal reasons "...does not jeopardize any rights and privileges of the employee except those pertaining to the position from which he or she resigns" (Gov. Code section 199996.1).

Upon further examination it appears that the Decision that Vandergoot's separation from state service renders him wholly ineligible to apply for, or receive, disability retirement rests not on the fact that he resigned, nor on the fact that he resigned as part of a settlement of his disciplinary appeal, but rather based on the single provision in the settlement agreement that he not return to work for the agency he resigned from. It appears that it is not his separation that has rendered him ineligible, but his representation that he would not return to work for the same agency. The Decision supports this conclusion by the finding on page 8, that "Were respondent to receive a disability retirement allowance, he would have no employer who could require him to undergo a medical examination under Government Code section 21192." And that it is "no longer possible for him to be reinstated under Government Code section 21193. These necessary prerequisites for receiving a disability retirement allowance are simply not present in this case." However, the Decision does not present facts or analysis regarding that part of Gov. Code section 21192 that provides that "*The board...may require any recipient of a disability retirement allowance ...to undergo medical examination*" (Italics added), or explain in sufficient detail for parties to understand why under the present facts the board is precluded from requiring Vandergoot to undergo medical examination. Additionally, the Decision does not explain in sufficient detail for parties to understand the authority for the conclusion that his promise not to return to work for the specific hiring authority he resigned from - at some unknown time in the future - is a legal pre-requisite to his right to receive disability retirement at the time he is able to demonstrate that he has an otherwise qualifying disabling medical condition. For example, Government Code section 21193 provides that if a determination is made that a recipient is no longer incapacitated for duty "...his or her retirement allowance shall be canceled immediately, and he or she shall become a member of this system." The section goes on to say that "If the recipient...is so determined to be incapacitated for duty ...he shall be

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reinstated, *at his or her option*, to that position" (italics added). The section appears to provide for the circumstance wherein a recipient is no longer incapacitated, the former employer must take them back, if it is the recipient's option. However, if, at his or her option, the recipient is not willing to return to the former position, the disability retirement benefit is cancelled. The Decision does not explain the interpretation of the relevant statutes in sufficient detail for interested parties to understand the application of the law.

Moreover, the Decision does not appear to consider that the applicant's resignation does not restrict him in any way from working for other departments, as would a termination for cause. Consequently, the decision explains in sufficient detail why the resignation should be characterized as an unwillingness to work that contravenes the intent of the disability retirement statutes.

Finally, legal conclusion number 5, that Vandergoot's disability claim had not yet "matured," prior to his separation is equally unclear. The Decision finds that "a CalPERS determination of eligibility does not antedate respondent's separation from employment" (page 9). However, it is not clear from the statement of facts in the Decision whether or not CalPERS made any evaluation of Vandergoot's medical condition as it existed prior to his separation. Moreover, the Decision concludes that this was not a case where there was "undisputed evidence that respondent was eligible for a CalPERS disability retirement" and that "the medical evidence here is not unequivocal," (page 9). However, the facts do not describe the evaluation of medical evidence in any detail sufficient enough to assist interested parties in understanding what may or may not be important in presenting this position in future cases.

Although the decision, upon careful scrutiny, appears to be supported based on the specific facts of the case, there are some critical areas relative to the state civil service disciplinary scheme where the Decision may create confusion or uncertainty regarding the application of the relevant law.