ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)

ATTACHMENT C

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•• Also admitted in Nevada
••• Also admitted in Texas
•••• Also admitted in New York and Alaska
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November 4, 2016

VIA U.S. MAIL - EXPRESS MAIL

Ms. Cheree Swedensky
Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

Re: Linda C. Martinez (Department of Social Services)
CalPERS/Agency No. 15-0918; OAH No. 2016-031210

Dear Ms. Swedensky:

We are attorneys for the Service Employees International Union, Local 1000 ("SEIU Local 1000"), which is the exclusive representative of Ms. Linda C. Martinez. Enclosed for your information and records is a courtesy copy of Respondent Linda C. Martinez's Written Argument Against Adoption of the Proposed Decision.

Also enclosed is Respondent's Post Hearing Brief in the event this document is not readily accessible to the Board.

Sincerely,

Kerianne R. Steele

KRS:sm
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Enclosures
cc: Ms. Austa Wakily

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

LINDA MARTINEZ, Respondent, v. DEPARTMENT OF SOCIAL SERVICES Respondent.	Agency Case No. 2015-0918 / OAH No. 2016-031210 **MARTINEZ'S ARGUMENT *AGAINST* ADOPTION OF PROPOSED DECISION** Hearing Date: July 27, 2016 Time: 9:00 a.m.

Linda C. Martinez ("Martinez"), through her representative the Service Employees International Union, Local 1000 ("SEIU"), hereby requests that the Board of Administration ("Board") for the California Public Employees' Retirement System ("CalPERS") reject the Administrative Law Judge's ("ALJ") Proposed Decision. We ask the Board to review the entirety of the post-hearing brief that we submitted to the ALJ. We incorporate by reference into this document all arguments and evidence presented in our post-hearing brief. We urge the Board to take this opportunity to overrule its precedential decision *In the Matter of the Application for Industrial Disability Retirement of ROBERT VANDERGOOT ("Vandergoot")* and to disavow the wrongly-decided Third District Court of Appeals decisions *Haywood v. American River Fire Protection District ("Haywood")* (1999) 67 Cal.App.4th 1292 and *Smith v. City of Napa ("Smith")* (2004) 120 Cal.App. 194. Those decisions misconstrue and misapply the California Public Employees' Retirement Law ("PERL") and result in the harsh forfeiture of public employees' disability retirement rights, in contravention of the California Constitution and principles of equity. Alternately, the Board should distinguish Martinez's case from the *Haywood*, *Smith*, and *Vandergoot* cases on the grounds that the California Department of Social Services

("DSS") contractually promised in a Settlement Agreement to withdraw the Notice of Adverse Action for termination, permit Martinez to resign in lieu of termination, and cooperate with the disability retirement application that DSS was aware Martinez intended to imminently file. Martinez's disability pension rights cannot lawfully be forfeited given that she expressly reserved her right in the Settlement Agreement to pursue disability retirement and her employer pledged to support that application. Martinez's case should be further distinguished from the *Haywood*, *Smith*, and *Vandergoot* decisions on the grounds that, in exchange for Martinez promising to resign and not to reapply or be reemployed with the DSS, the DSS received consideration of substantial value, including but not limited to Martinez's withdrawal of a pending State Personnel Board ("SPB") appeal and a Public Employment Relations Board ("PERB") unfair practice complaint, in which Martinez alleged that the DSS retaliated and discriminated against her for engaging in protected concerted activity under the Dills Act (Government Code § 3512 et seq.). The DSS avoided the expense and uncertainty of litigation by resolving in one single Settlement Agreement not only an SPB appeal but also a PERB complaint. State of California ("State") agencies, their employees, and the labor unions that represent employees will be discouraged from settling disputes if, despite the parties' express contractual stipulations, the Board prohibits employees from pursuing disability retirement on the basis of the *Haywood/Smith/Vandergoot* precedents.

Martinez began working for the State on or about December 15, 1985, when she was only eighteen (18) years old. (Transcript ("Tr.") 61.) Beginning in approximately January 2009, Martinez participated in protected concerted activity under the Dills Act in a variety of ways. (See Exh. 6, p. 1.) Soon after participating in protected concerted activity, the DSS began to retaliate and discriminate against Martinez. SEIU filed an unfair practice charge with the PERB on or about April 30, 2013. (See Exh. 6.) On or about January 8, 2014, the DSS issued Martinez a Notice of Adverse Action terminating her employment. This action was in retaliation for Martinez's protected concerted activity under the Dills Act. (See Exh. 8.) SEIU filed an amended unfair practice charge, which added this new adverse action as further evidence of the DSS's violations of the Dills Act. (Id.) PERB issued an amended unfair practice complaint, which

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included the additional allegation that Martinez was terminated in retaliation for protected concerted activity under the Dills Act. (See Exh. 8.) In addition to Martinez challenging the Notice of Adverse Action at PERB with the assistance of SEIU, Martinez also timely appealed from the Notice of Adverse Action with the SPB. (See Exh. 10.) The SPB issued an order staying the SPB appeal hearing during the pendency of the above-referenced PERB proceeding, given that Martinez raised in her SPB appeal the affirmative defense of discrimination/retaliation on account of Union activity and PERB was going to adjudicate that same claim in the unfair practice proceeding. (See Exh. 11.)

On September 22, 2014, after several days of hearing, the parties engaged in arms-length settlement discussions at a PERB regional office. The DSS initiated the settlement efforts. (Tr. 79.) A Settlement Agreement was fully-executed at PERB's offices that day, September 22, 2014. (See Exh. 12.) The DSS representatives who engaged in settlement discussions were Mark Magee, Labor Relations Specialist for the DSS, and Hannah Yu, Labor Relations Counsel for CalHR. (Id., p. 5; Tr. 25, 40.) Magee and Yu were both aware that Martinez suffered from significant medical conditions causing her to take leave from work, and that she intended to apply for disability retirement with CalPERS. Evidence of this knowledge is found in the Settlement Agreement itself – specifically in Paragraphs 4 and 5 – in which the DSS acknowledges that Martinez is on an "unpaid medical leave of absence" from September 1-30, 2014, and the DSS "agrees to cooperate with any application for disability retirement filed by Martinez within the next six months." (Id., p. 2.) Additionally, the DSS agreed to allow Martinez to preserve the pending "FMLA complaint filed by Martinez with the Department of Labor." (See Exh. 12, p. 3; see also Exhs. C, D.) Numerous other DSS representatives were aware of Martinez's medical conditions, and more specifically of her intention to file for disability retirement. (Tr. 80, 82-84.) She had repeatedly informed her supervisors and managers of this for the past six (6) or so years. (Id.).

On September 22, 2014, the DSS committed contractually in the Settlement Agreement to withdraw the Notice of Adverse Action relating to Martinez's termination, as well as an earlier Corrective Memorandum, and remove such documents from Martinez's Official Personnel File.

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(See Exh. 12, pp. 1-2.) The DSS further agreed to inform the SPB that the Notice of Adverse Action had been withdrawn. (Id., p. 1.) By operation of the Settlement Agreement, the two disciplinary actions were treated as having never occurred. (Tr. 49-51.) Pursuant to Paragraph 7 of the Settlement Agreement, Martinez resigned her employment effective September 30, 2014. (Id., p. 2.) Martinez promised not to return to the DSS. (Id.) Magee and Yu told Martinez that this was boilerplate language that is in all State settlement agreements. (Tr. 102.) She did not waive her right to apply for or to work for the State however. (See Exh. 12, pp. 1-2.) In fact, after signing the Settlement Agreement, beginning on or about October 1, 2015, Martinez worked for approximately two (2) months for the California Department of Rehabilitation as a Program Technician II. (See Exh. 1.)

Magee and Yu contacted a CalPERS representative named Yolanda on September 22, 2014, in the midst of the parties' settlement discussions, to ask her how to best structure the Settlement Agreement so that Martinez's disability retirement application would be timely. (Tr. 57-58, 87, 96.) Paragraphs 3 and 4 of the Settlement Agreement, which provided for retroactive periods of leave of absence from work, were specifically designed to ensure that Martinez would be able to file for disability retirement within 120 days of ending State service. (Tr. 52-54, 99-100.) In the Settlement Agreement, Martinez did not waive her right to apply for disability retirement. (Tr. 86, 88, 106; see also Exh. 12.) The DSS committed contractually in the Settlement Agreement to cooperate with her disability application so long as it was filed within six (6) months of the signing of the Settlement Agreement. (See Exh. 12, p. 2.) Magee testified that this meant the DSS "would cooperate with any actions required by the Department." (Tr. 55.)

The DSS received significant consideration in exchange for Martinez resigning from her employment and agreeing to withdraw the SPB appeal and the PERB unfair practice charge. The DSS avoided the risk and uncertainty of litigation before two tribunals (the PERB and the SPB). Both administrative agencies have the remedial power to order an employee reinstated with backpay and interest.

Martinez first filed a disability retirement application on or about November 17, 2014. (See Exh. 3.) Martinez later submitted supplemental information to CalPERS upon request. Kevin

Fine, an individual who identified himself as a Manager in the CalPERS disability unit, told Martinez over the phone that she was medically eligible for disability retirement but that he had to deny the application for technical reasons only. (Tr. 104.) On or about June 22, 2015, CalPERS issued Martinez a notice that it cancelled her application on the ground that she was terminated for cause and the discharge was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. (See Exh. 4, p. 1, citing *Haywood* and *Smith*.) Martinez, through her SEIU representative, filed a notice of appeal from that determination on or about July 14, 2015. (See Exh. 5.) After a hearing, on September 13, 2016, the OAH ALJ ruled that the decision made by CalPERS to cancel Martinez's November 17, 2014 application for disability retirement was correct. She relied on *Haywood*, *Smith*, and *Vandergoot* as the basis for her ruling.

Those three decisions are grounded in an incorrect interpretation of PERL. PERL, Government Code § 21150 et seq., provides employees three rights: (1) freedom from unilateral medical separation; (2) payment by CalPERS of a disability retirement allowance at an actuarially reduced rate, and (3) reinstatement to employment with the State should their medical condition subside. (Government Code §§ 21150, 21153 and 21192-93.) These three substantive rights of employees are interrelated, but they are not interdependent. Nothing in the statute requires an employee to be eligible for reinstatement with the employer as a condition precedent to receiving a monthly disability retirement allowance. When evaluating an individual's qualification for disability retirement, the Board is not authorized to consider whether the individual is eligible for reinstatement to her former agency. The Board's authority is limited to determining (1) whether the application was timely, (2) whether the employee has the minimum service required for eligibility, and (3) whether the individual is medically incapacitated for the performance of duty. (Government Code § 21154.) The right to a disability allowance and the right of reinstatement need not go hand-in-hand. Government Code section 21193 states that if the Board determines, pursuant to a medical examination conducted by a Board-appointed physician or surgeon, that the individual is no longer so incapacitated for duty in the position held when retired for disability or in a position in the same classification, the individual's "*disability retirement allowance shall be*

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cancelled immediately, and he or she shall become a member of this system." (Government Code section 21193, emphasis supplied.) If the individual has prospectively waived her right to reinstatement, by promising she will never again apply for or accept any employment position with her prior State agency, the Board will not compel reinstatement and will nonetheless cancel her disability allowance immediately. (Id.) The *Haywood* and *Smith* decisions incorrectly interpret provisions of the PERL, rely on a provision of the PERL not relevant to State employees, and ignore the fundamental public policy that pension laws are intended to benefit and not penalize an employee.

It is time for this Board to overrule its *Vandergoot* decision, which relies entirely on *Haywood* and *Smith*. The following statement in *Vandergoot* is patently incorrect – "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 § 21192." (*Vandergoot*, p. 8.) The portion of the statute authorizing an employer to subject an individual receiving a disability allowance to a medical examination to determine whether her incapacity persists is inapplicable to the State. Only the Board can compel the individual to be medically examined under Government Code § 21192. The *Vandergoot* decision is also legally flawed because no termination action has actually occurred when the State agency and the employee (such as Vandergoot or Martinez) settle a pending SPB appeal by permitting the employee to resign his or her employment in lieu of termination. There is no actual dismissal for cause. If affirmed, the *Vandergoot* decision will discourage parties from settling pending SPB appeals or other legal proceedings, as the employee will have a greater chance of being entitled to disability retirement if she prevails in an SPB or PERB case than if she signs a State agency's typical waiver of the right to reemployment. The *Vandergoot* decision must therefore be overruled.

Dated: November 4, 2016

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: Kerianne R. Steele
Attorneys for SEIU, the exclusive representative of Respondent LINDA MARTINEZ

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On November 4, 2016, I served the following documents in the manner described below:

RESPONDENT'S ARGUMENT AGAINST ADOPTION OF PROPOSED DECISION

☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from smizuhara@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Ms. Austa Wakily
California Public Employees Retirement System
CalPERS Legal Office
400 Q Street
Sacramento, CA 95814
austa.wakily@calpers.ca.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 4, 2016, at Alameda, California.

Stephanie Mizuhara

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Attorneys for SEIU Local 1000, the exclusive representative of Respondent LINDA MARTINEZ

BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

LINDA MARTINEZ, Respondent, v. DEPARTMENT OF SOCIAL SERVICES, Respondent.	AGENCY CASE NO. 2015-0918 / OAH NO. 2016-031210 **POST-HEARING BRIEF** Date: July 27, 2016 Time: 9:00 a.m.

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I. INTRODUCTION

On behalf of its member, Linda C. Martinez ("Martinez"), the Service Employees International Union, Local 1000 ("SEIU Local 1000"), which is the exclusive representative of Martinez, hereby files this Post-Hearing Brief.

We urge the California Public Employees' Retirement System Board of Administration ("Board") to take this opportunity to overrule its precedential decision *In the Matter of the Application for Industrial Disability Retirement of ROBERT VANDERGOOT ("Vandergoot")* and to disavow the wrongly-decided Third District Court of Appeals decisions *Haywood v. American River Fire Protection District ("Haywood")* (1999) 67 Cal.App.4th 1292 and *Smith v. City of Napa ("Smith")* (2004) 120 Cal.App. 194. Those decisions misconstrue and misapply the California Public Employees' Retirement Law ("PERL") and result in the harsh forfeiture of public employees' disability retirement rights, in contravention of the California Constitution and principles of equity.

Alternately, the Board should distinguish Martinez's case from the *Haywood*, *Smith*, and *Vandergoot* cases on the grounds that the California Department of Social Services ("DSS") contractually promised in a Settlement Agreement to withdraw the Notice of Adverse Action for termination, permit Martinez to resign in lieu of termination, and cooperate with the disability retirement application that DSS was aware Martinez intended to imminently file. Martinez's disability pension rights cannot lawfully be forfeited given that she expressly reserved her right in the Settlement Agreement to pursue disability retirement and her employer pledged to support that application. Martinez's case should be further distinguished from the *Haywood*, *Smith*, and *Vandergoot* decisions on the grounds that, in exchange for Martinez promising to resign and not to reapply or be reemployed with the DSS, the DSS received consideration of substantial value, including but not limited to Martinez's withdrawal of a pending State Personnel Board appeal and a Public Employment Relations Board unfair practice complaint, in which Martinez alleged that the DSS retaliated and discriminated against her for engaging in protected concerted activity under the Dills Act (Government Code section 3512 et seq.). The DSS avoided the expense and uncertainty of litigation by resolving in one single Settlement Agreement not only an SPB appeal

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but also a PERB complaint. State of California ("State") agencies, their employees, and the labor unions that represent employees will be discouraged from settling disputes if, despite the parties' express contractual stipulations, the Board prohibits employees from pursuing disability retirement on the basis of the *Haywood/Smith/Vandergoot* precedents.

II. SUMMARY OF FACTS

On or about December 31, 1985, when she was only eighteen (18) years old, Martinez began working for the State as a Psychiatric Technician Trainee Candidate for the California Department of Mental Health at Agnew State Hospital. (Exhibit 8, Notice of Adverse Action, [1] p. 2, which is Exhibit C to the Amended Unfair Practice Charge; Transcript ("Tr.") 61, in which Martinez testifies to a start date of December 15, 1985.) She sustained a number of injuries on the job, caused by the assaultive client population she worked with. (Tr. 62-63.) Martinez later worked for the Department of Transportation. (Tr. 64.) On or about October 1, 2001, Martinez transferred to the DSS and began to work as a Disability Evaluation Analyst. (Id.) She already possessed injuries at the time she began her employment with the DSS. (Tr. 66.) Martinez was promoted to the Disability Evaluation Analyst III position on or about June 4, 2007. (Exhibit 8, Notice of Adverse Action, p. 2, which is Exhibit C to the Amended Unfair Practice Charge.) Martinez was demoted from that position back to Disability Evaluation Analyst, effective August 22, 2012, pursuant to a settlement agreement. (Id. and Exhibit 6, Unfair Practice Charge, Statement of the Charge, p. 1.)

Martinez was a member of State Bargaining Unit 1 (Professional, Administrative, Financial and Staff Services), which is represented by SEIU Local 1000. Beginning in approximately January 2009, Martinez participated in protected concerted activity under the Dills Act, by serving as a member of SEIU Local 1000's Disability Determination Services Division Statewide Campaign Committee. (See Exhibit 6, Unfair Practice Charge, Statement of the Charge, p. 1.) She further engaged in protected concerted activity by becoming an SEIU Local

[1] We agreed to offer the Notice of Adverse Action into evidence despite the DSS promising in a Settlement Agreement dated September 22, 2014 to withdraw it and remove it from Martinez's Official Personnel File, (see Exhibit 12, Settlement Agreement, p. 1), as this document is inexplicably contained in Martinez's CalPERS file and CalPERS already impermissibly reviewed this document when evaluating Martinez's disability retirement application.

1000 job steward in or around April 2010. (Id.) In June 2011, she was elected to the position of Secretary/Treasurer of the Union's regional District Labor Council 744. (Id.)

Soon after participating in protected concerted activity, the DSS began to retaliate and discriminate against Martinez in a variety of ways. The DSS issued her a Notice of Adverse Action for dismissal, which was subsequently appealed and settled. (Id.) Through the settlement, Martinez agreed to be demoted to the Disability Evaluation Analyst classification. (Id.) In December 2012, the DSS issued Martinez a Counseling Memorandum, which was in retaliation for Martinez's protected concerted activity of speaking out and threatening to file grievances on behalf of co-workers. (Id., pp. 2-3.)

SEIU Local 1000 filed an unfair practice charge with the PERB on or about April 30, 2013. (See Exhibit 6, Unfair Practice Charge, filed April 30, 2013.) The DSS filed a position statement with PERB, denying the material allegations of the charge. (See Exhibit A, DSS Position Statement, dated June 13, 2013.)

Martinez also applied for Family Medical Leave Act leave for her own serious medical condition on a number of occasions. The DSS granted three (3) such requests in 2013. (Tr. 73; see also Exhibit C.) On July 2, 2013, the DSS denied one of Martinez's FMLA requests. (Exhibit D.) Martinez was concerned that the DSS did not comply with the law with respect to calculating hours for FMLA purposes, and by enforcing call in requirements to report FMLA-related absences. Martinez made three (3) complaints to the Department of Labor ("DOL") regarding such DSS's violations. (Tr. 74; see also Tr. 43.) The DOL investigated the matter. (Tr. 37.)

On or about March 25, 2014, PERB issued a complaint alleging that Martinez engaged in protected activity and that the DSS issued Martinez discipline in retaliation for such activity, in violation of various provisions of the Dills Act. (See Exhibit 7, PERB Complaint, dated March 25, 2014.)

On or about January 8, 2014, the DSS issued Martinez a Notice of Adverse Action terminating her employment, again on account of Martinez's protected concerted activity under the Dills Act. (See Exhibit 8, Amended Unfair Practice Charge, Exhibit C thereof: Notice of

Adverse Action, dated January 8, 2014.) SEIU Local 1000 filed an amended unfair practice charge, which added this new adverse action as further evidence of the DSS's violations of the Dills Act. (See Exhibit 8, First Amended Unfair Practice Charge, filed March 28, 2014.) Again the DSS denied the material allegations in the charge. (See Exhibit B, Position Statement in Response to Amended Charge.)

PERB issued an amended unfair practice complaint, which included the additional allegation that Martinez was terminated in retaliation for protected concerted activity under the Dills Act. (See Exhibit 8, Amended Unfair Practice Complaint, dated June 4, 2014.)

The parties were unable to settle the dispute at the PERB Informal Conference, and PERB set the matter for three (3) days of Formal Hearing before PERB Administrative Law Judge Alicia Clement.

In addition to Martinez challenging the Notice of Adverse Action at PERB with the assistance of SEIU Local 1000, Martinez also timely appealed from the Notice of Adverse Action with the SPB. (See Exhibit 10, SPB Appeal, dated January 24, 2014.)

The SPB issued an order staying the SPB appeal hearing during the pendency of the above-referenced PERB proceeding, given that Martinez raised in her SPB appeal the affirmative defense of discrimination/retaliation on account of Union activity and PERB was going to adjudicate that same claim in the unfair practice proceeding. (See Exhibit 11, Order for Abeyance, dated July 24, 2014.)

The PERB Formal Hearing occurred on August 12-14, 2014. The parties did not conclude the hearing in three (3) days, and SEIU Local 1000 still intended to present rebuttal testimony on a subsequent hearing date. Judge Clement set the matter for a fourth day of Formal Hearing, for September 22, 2014.

The parties reconvened at the PERB San Francisco Regional Office for a fourth day of hearing on September 22, 2014. Instead of concluding the Formal Hearing, the parties engaged in arms-length settlement discussions. The DSS initiated the settlement efforts. (Tr. 79.) After an extensive back-and-forth, which included the DSS representatives calling a CalPERS representative to ascertain the pension-related consequences of the contemplated Settlement

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Agreement, the parties entered into a formal Settlement Agreement. The Settlement Agreement was fully-executed at PERB's offices that day, September 22, 2014. (See Exhibit 12, Settlement Agreement.)

The DSS representatives who engaged in settlement discussions were Mark Magee, Labor Relations Specialist for the DSS, and Hannah Yu, Labor Relations Counsel for CalHR. (Id., p. 5; Tr. 25, 40.) Magee and Yu were both aware that Martinez suffered from significant medical conditions causing her to take leave from work, and that she intended to apply for disability retirement with CalPERS. Evidence of this knowledge is found in the Settlement Agreement itself – specifically in Paragraphs 4 and 5 – in which the DSS acknowledges that Martinez is on an "unpaid medical leave of absence" from September 1-30, 2014, and the DSS "agrees to cooperate with any application for disability retirement filed by Martinez within the next six months." (Id., p. 2.) Additionally, the DSS agreed to allow Martinez to preserve the pending "FMLA complaint filed by Martinez with the Department of Labor." (See Exhibit 12, p. 3; see also Exhibits C and D, which is Family Medical Leave Act-related correspondence the DSS issued to Martinez in 2013.)

Numerous other DSS representatives were aware of Martinez's medical conditions, and more specifically of her intention to file for disability retirement. (Tr. 80, 82-84.) She had repeatedly informed her supervisors and managers of this for the past six (6) or so years. (Id.)

On September 22, 2014, the DSS committed contractually in the Settlement Agreement to withdraw the Notice of Adverse Action relating to Martinez's termination, as well as an earlier Corrective Memorandum, and remove such documents from Martinez's Official Personnel File. (See Exhibit 12, Settlement Agreement, pp. 1-2.) The DSS further agreed to inform the SPB that the Notice of Adverse Action had been withdrawn. (Id., p. 1.) By operation of the Settlement Agreement, the two disciplinary actions were treated as having never occurred. (Tr. 49-51.)

Pursuant to Paragraph 7 of the Settlement Agreement, Martinez resigned her employment effective September 30, 2014. (Id., p. 2.) Martinez promised not to return to the DSS. (Id.) Magee and Yu told Martinez that this was boilerplate language that is in all State settlement agreements. (Tr. 102.) She did not waive her right to apply for or to work for the State however.

(See Exhibit 12, Settlement Agreement, pp. 1-2.) In fact, after signing the Settlement Agreement, beginning on or about October 1, 2015, Martinez worked for approximately two (2) months for the California Department of Rehabilitation as a Program Technician II. (See Exhibit 1, CalPERS Statement of Issues.)

Magee and Yu contacted a CalPERS representative named Yolanda on September 22, 2014, in the midst of the parties' settlement discussions, to ask her how to best structure the Settlement Agreement so that Martinez's disability retirement application would be timely. (Tr. 57-58, 87, 96.) Paragraphs 3 and 4 of the Settlement Agreement, which provided for retroactive periods of leave of absence from work, were specifically designed to ensure that Martinez would be able to file for disability retirement within 120 days of ending State service. (Tr. 52-54, 99-100.)

In the Settlement Agreement, Martinez did not waive her right to apply for disability retirement. (Tr. 86, 88, 106; see also Exhibit 12.) Nor did the DSS ask for such a waiver. To the contrary, the DSS committed contractually in the Settlement Agreement to cooperate with her disability application so long as it was filed within six (6) months of the signing of the Settlement Agreement. (See Exhibit 12, Settlement Agreement, p. 2.) Magee interpreted this to mean that the DSS "would cooperate with any actions required by the Department." (Tr. 55.)

No one who participated in the settlement discussions expected CalPERS to deny Martinez's disability retirement application on the grounds that Martinez was terminated for cause and ineligible to return to employment with the DSS.

The DSS received significant consideration in exchange for Martinez resigning from her employment and agreeing to withdraw the SPB appeal and the PERB unfair practice charge. The DSS avoided the risk and uncertainty of litigation before two tribunals (the PERB and the SPB). Both administrative agencies have the remedial power to order an employee reinstated with backpay and interest.

Martinez first filed a disability retirement application on or about November 17, 2014 (not January 21, 2015, as counsel for CalPERS seems to contend in the Statement of Issues). (See Exhibit 3, Disability Retirement Election Application, file stamp-dated November 17, 2014.)

Martinez later submitted supplemental information to CalPERS upon request. Kevin Fine, an individual who identified himself as a Manager in the CalPERS disability unit, told Martinez over the phone that she was medically eligible for disability retirement but that he had to deny the application for technical reasons only. (Tr. 104.)

On or about June 22, 2015, CalPERS issued Martinez a notice that it cancelled her application on the ground that she was terminated for cause and the discharge was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. (See Exhibit 4, p. 1, citing *Haywood*, *supra*, 67 Cal.App.4th 1292 and *Smith*, *supra*, 120 Cal.App.4th 194.)

Martinez, through her SEIU Local 1000 representative, filed a notice of appeal from that determination on or about July 14, 2015. (See Exhibit 5.) This matter was set for hearing on July 27, 2016 before an Administrative Law Judge of the Office of Administrative Hearings.

III. LEGAL ARGUMENT

A. PERL, GOVERNMENT CODE SECTION 21150 ET SEQ., PROVIDES EMPLOYEES THREE RIGHTS: (1) FREEDOM FROM UNILATERAL MEDICAL SEPARATION; (2) PAYMENT BY CALPERS OF A DISABILITY RETIREMENT ALLOWANCE AT AN ACTUARIALLY REDUCED RATE, AND (3) REINSTATEMENT TO EMPLOYMENT WITH THE STATE SHOULD THEIR MEDICAL CONDITION SUBSIDE

The following segment of this brief provides an overview of the purpose of the disability retirement provisions of the PERL.

1. The employee has a right not to be medically separated by the employer

The disability retirement provisions of the PERL, Government Code section 21150 et seq., prohibit the State from unilaterally medically separating an employee who the State believes is disabled. (Government Code section 21153.) Instead, the State "shall apply" for disability retirement of any member it believes is disabled, unless the member waives the right to retire for disability retirement. (Government Code section 21153 ("Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless

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the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731."); see also Government Code section 21152(a) ("Application to the board for retirement of a member for disability may be made by "(a) The head of the office or department in which the member is or was last employed, if the member is a state member..."; see Government Code section 20021, defining "Board" as "the Board of Administration of the Public Employees' Retirement System.") The State employer can never be sure whether an employee is "otherwise eligible to retire for disability," as that term is used in 21153, given that CalPERS is the entity that determines an applicant's eligibility. Therefore, practically speaking, Government Code section 21153 serves as an absolute prohibition on the right of the State to unilaterally medically separate an employee.

2. <u>The employee has a right to a monthly retirement allowance</u>

If a State employee has a disabling injury or illness that prevents her from performing her usual job duties with her current employer, she may be eligible for disability or industrial disability retirement. A State First Tier member must have at least five (5) years of service credit to be eligible. (Government Code section 21150(a) ("A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age...").)

If her disability or industrial disability retirement application is approved, she will receive a reduced monthly retirement payment for the rest of her life until she recovers from her injury or illness (or until she is eligible for service retirement). (See Government Code section 21150 et seq., Article 5 (Disability Retirement Benefits).) An actuarially reduced benefit factor is applied to the disabled employee, which results in a reduced monthly retirement allowance.

The disability retirement benefit is particularly important for employees, like Martinez, who are incapacitated for the performance of duty, but are too young to be eligible for service retirement. To be eligible for service retirement, the employee must be at least age fifty (50).

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3. The employee has a right to reinstatement to her former position or to a position in the same classification

If the CalPERS Board of Administration ("Board") determines that an individual who is receiving disability retirement is no longer incapacitated for duty in the position she held when retired for disability or in a position in the same classification, her disability retirement allowance will be cancelled immediately and she "shall be reinstated" to the State position she held when retired for disability, or in a position in the same class, at her option. (Government Code section 21193.)

The Board is able to determine whether the individual is no longer incapacitated by compelling that individual to submit to an examination by a physician or surgeon, who the Board appoints. (Government Code section 21192.) The Board may order such an examination *sua sponte* or if the individual applies for reinstatement. (Government Code section 21192.) The responsibility of the Board-appointed physician or surgeon is to evaluate whether the individual is still incapacitated, physically or mentally, for duty in the state agency where she was employed and in the position held by her when retired for disability or in a position in the same classification. (Id.) The term "still incapacitated" suggests the scope of the Board's evaluation is limited to determining whether the conditions for which disability retirement was granted continue to exist, not whether new physical, mental or emotional conditions exist which might adversely affect the exercise of her duties. (*California Department of Justice v. Board of Administration of California Public Employees' Retirement System* (2015) 242 Cal.App.4th 133, 141.)

The State department from which the individual retired is not permitted to order the individual to submit to such an examination. If the individual receiving the disability allowance retired from State employment, only the CalPERS Board may order the examination. The passage in Government Code section 21192 that refers to the "governing body of the employer from whose employment the person was retired" having the ability to order this medical examination does not apply to the State or its employees; rather, it applies only to school districts or other contracting agencies such as cities, counties or special districts. (Government Code

section 21192 ("The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination...").) The employers in *Haywood, supra*, 67 Cal.App.4th 1292 (a special district called the American River Fire Protection District, which contracts with CalPERS) and *Smith, supra*, 120 Cal.App.4th 194 (the City of Napa, which contracts with CalPERS) possess the statutory ability to require a recipient of disability retirement allowance to submit to a medical examination to identify the individual's continued eligibility for that allowance. (*Haywood, supra*, 67 Cal.App.4th at 1305, citing Government Code section 21192.) In contrast, a State agency possesses no such right. (Government Code section 21192.)

In the case of a State employee, if the Board-appointed physician or surgeon determines that the employee is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification, the State must reinstate the individual to such positions with no conditions.[2] (Government Code section 21193.) In *California Department of Justice, supra*, 242 Cal.App.4th 133, the Second District Court of Appeal has described Government Code sections 21192 and 21193 as creating a right on the part of the employee to "reinstatement without conditions," and a duty on the part of the employer to make a "mandatory reemployment offer." (*California Department of Justice, supra*, 242 Cal.App.4th at 142-43.)

The employee possesses the right of reinstatement, and she can elect to waive that right by declining an offer of reinstatement or by accepting another position. (Government Code section 21192) ("If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, *at his or her option*, to that position. However, in that case, acceptance of any other position *shall immediately terminate any right to reinstatement.*"

[2] The statute also contemplates a voluntary reinstatement scenario that is not relevant here. (Government Code section 21193 ("If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty...in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate the employee...").)

Emphasis supplied.) As described later in this brief, it is logical that the employee – the holder of the privilege of reinstatement – can also waive the right of reinstatement either by being terminated for cause and not pursuing or prevailing in an SPB appeal or other legal proceeding, or by expressing waiving the right in a settlement agreement. As is true with regard to all substantive aspects of the PERL, the right of reinstatement is designed to benefit employees, not the State.

B. THE THREE SUBSTANTIVE RIGHTS OF EMPLOYEES PROVIDED FOR IN PERL, DESCRIBED ABOVE, ARE INTERRELATED BUT NOT INTERDEPENDENT

The three substantive rights of employees described above – (1) freedom from unilateral medical separation by the State; (2) payment by CalPERS of a disability retirement allowance at an actuarially-reduced rate, and (3) reinstatement to their employment with the state should their medical condition subside – are interrelated, but they are not interdependent. Below, we explain how this is so, addressing each statutory right in turn.

First, the freedom from unilateral medical separation, while related to the employee's rights to a monthly disability retirement allowance and reinstatement from disability retirement, exists independently of the other two rights. In short, the employer must not unilaterally medically separate the employee, and instead must apply for disability retirement on the employee's behalf. That prohibition exists regardless of whether CalPERS will ultimately deem the individual qualified for disability retirement, or whether CalPERS will ultimately deem the individual entitled to reinstatement from disability retirement.

Second, nothing in the statute requires an employee to be eligible for reinstatement with the employer as a condition precedent to receiving a monthly disability retirement allowance. The statutory sections pertaining to disability retirement, disability retirement benefits, and reinstatement from retirement are located in three difference Articles of the PERL, and they do not cross-reference one another. (Compare Government Code section 21400 et seq. (Article 5. Disability Retirement Benefits), Government Code section 21150 et seq. (Article 6. Disability Retirement) and Government Code section 21190 et seq. (Article 7. Reinstatement from Retirement).)

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When evaluating an individual's qualification for disability retirement, the Board is not authorized to consider whether the individual is eligible for reinstatement to her former agency. The Board's authority is limited to determining (1) whether the application was timely, (2) whether the employee has the minimum service required for eligibility, and (3) whether the individual is medically incapacitated for the performance of duty. The employee's application is timely if it is made "(a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of state service, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion." (Government Code section 21154.) The Board determines whether the individual achieved the requisite level of service credit by reviewing the individual's CalPERS service credit report. (Government Code section 21150.) The Board determines whether the individual is medically incapacitated for duty by reviewing the medical records the individual has submitted with her application and/or ordering the individual to submit to a medical examination. (Government Code section 21154.) If the medical examination and other available information show to the satisfaction of the Board that the individual in State service is incapacitated physically and mentally for the performance of her duties and is eligible to retire for disability, the board shall immediately retire her for disability (unless she is entitled to service retirement, in which case she may be entitled instead to that higher benefit). (Government Code section 21156(a)(1).) It is clear from the statutory context that the phrase "and is eligible to retire for disability" means only that the member has accrued the minimum required service credit described in Government Code section 21150. The PERL defines "disability" or "incapacity for performance of duty" as a basis for retirement as "disability of permanent or extended and uncertain duration, as determined by the board,...on the basis of competent medical opinion." (Government Code section 20026; see also *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876 (construing that term to mean the substantial inability of the applicant to perform his usual duties).) In two separate places in the

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PERL, the Legislature stated that the Board is restricted to basing its eligibility determination upon "competent medical opinion." (Government Code sections 20026 and 21156(a)(2).)

Further, the Board may not use disability retirement as a substitute for the disciplinary process. (Id.) That sentence in the statute suggests that the Board shall not look at an employee's disciplinary record, or any other personnel-related documents such as a Settlement Agreement, to determine the applicant's eligibility for disability retirement. All that is relevant for the Board's determination is the individual's medical fitness for the performance of his or her duties. It is appropriate that the Board may require an applicant to submit a job duty statement/job description and a completed Physical Requirements of Position/Occupational Title form, given that those documents directly relate to the question of the applicant's medical fitness to perform the duties of the *last* position she held. (A Guide to Completing Your CalPERS Disability Retirement Election Application, p. 23, emphasis added.) The applicant need not prove to CalPERS that the State agency would permit her to return to that last position held, should she elect to accept it.

Third, nothing in the statute requires the employee to be perpetually eligible for reinstatement to employment with her prior State agency in order to qualify to receive disability retirement benefits. It is clear from the statute that an employee need not be employed with the State at the time she applies for disability retirement. (Government Code section 21154.) An application is still deemed timely if it is filed within four (4) months after the discontinuance of the State service of the member or while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. (Id., subsections (c) and (d).) Government Code section 21154, which expressly permits a *former* State employee to file a disability retirement application, certainly does not disqualify a terminated employee (or an employee who settled a termination action) from applying for or receiving disability retirement. CalPERS commonly requests that an applicant for disability retirement or industrial disability retirement furnish a job duty statement/job description and completed Physical Requirements of Position/Occupational Title form, reflecting the applicant's *last* position, to determine whether she is incapacitated physically or mentally to perform the duties of that position. (See Exhibit E, A Guide to Completing Your CalPERS Disability

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Retirement Election Application, p. 23.) The Guide refers to the applicant's *last* position, because it is common for an applicant to no longer hold the position at the time she applies.

The right to a disability allowance and the right of reinstatement need not go hand-in-hand. Government Code section 21193 states that if the Board determines, pursuant to a medical examination conducted by a Board-appointed physician or surgeon, that the individual is no longer so incapacitated for duty in the position held when retired for disability or in a position in the same classification, the individual's "*disability retirement allowance shall be cancelled immediately*, and he or she shall become a member of this system." (Government Code section 21193, emphasis supplied.) However, Government Code section 21193 does not require the employee to reinstate to her prior employment. If the individual has waived her right to reinstatement either by declining the opportunity, or accepting another position, (Government Code section 21193), the Board will not compel reinstatement and will nonetheless cancel her disability allowance immediately. (Id.) The same result would occur where, as here, an employee has prospectively waived her right to reinstatement by promising "she will never again apply for or accept any employment position with" her prior State agency. (Quoting Exhibit 12, Settlement Agreement, pp. 2-3, paragraph 12.)

In summary, an individual's ability to reinstate from disability retirement to a position with her prior State agency is not a condition precedent to receiving a disability allowance.

C. THE HAYWOOD AND SMITH DECISIONS WERE WRONGLY-DECIDED AND MUST BE OVERRULED

As evidenced by the CalPERS notice of cancellation of Martinez's disability application, (Exhibit 4), CalPERS has promulgated a rule (through its Board's precedential decision *Vandergoot*) adopting the legally-flawed court precedent *Haywood* and *Smith*. Those court decisions incorrectly interpret provisions of the PERL, rely on a provision of the PERL not relevant to State employees, and ignore the fundamental public policy that pension laws are intended to benefit and not penalize an employee.

We urge the Administrative Law Judge and Board to overturn *Vandergoot* and disavow *Haywood* and *Smith*.

forfeiture of a matured right to a pension absent express legislative direction to that effect. [Citations to *Haywood.*] Thus, if a plaintiff were able to prove that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot preempt the right to receive a disability pension for the duration of the disability. [Citation to *Haywood.*] Conversely, the 'right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures...' [Citation to *Haywood.*]" (*Id.*, at 206.)

As a result of the foregoing rules, the *Smith* court concluded that the key issue in the case is whether Smith's disability retirement matured before his effective date of termination. (*Id.*, at 206.) The Court concluded that a "vested right matures when there is an unconditional right to immediate payment." The Court then also concluded that a duty to provide a disability payment only arises once CalPERS has determined that the employee is no longer capable of performing his duties. In other words, a right to a pension payment is considered "matured" once CalPERS approves the disability retirement application. Therefore, the Court reasoned that if a plaintiff were able to prove that CalPERS determined the plaintiff was no longer capable of performing his duties before the date of the event giving creating cause to dismiss, then dismissal cannot preempt the right to receive a disability pension for the duration of the disability. Based upon this rule, the Court determined that Smith's disability retirement claim was correctly denied, because Smith was terminated before CalPERS made a determination about his abilities to perform his job. (*Id.*)

Nevertheless, the *Smith* court noted, "there may be facts under which a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause." (*Id.*, at 206-207.) For example, equity might require a different result if there were undisputed evidence that a plaintiff was eligible for a disability retirement, such that a favorable decision on his claim would have been a foregone conclusion, such as a loss of limb case. (*Id.*, at 207.) The Court concluded that principles of equity did not mandate a different outcome in Smith's case, as his medical evidence was equivocal. (*Id.*)

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2. An employee is not disqualified for disability retirement if she is terminated for disciplinary reasons

The relevant provisions in the PERL – Government Code section 21400 et seq. (Article 5. Disability Retirement Benefits), Government Code section 21150 et seq. (Article 6. Disability Retirement) and Government Code section 21190 et seq. (Article 7. Reinstatement from Retirement) – do not say anything about ineligibility of an individual for disability retirement if she has been terminated from employment. The Third District Court of Appeal's committed clear error when it ruled that that the phrase "eligible to retire for disability" that appears in Government Code section 21154 means that the person must have been an active employee who would be able to return to his job if he overcame his disability. (*Haywood*, *supra*, 67 Cal.App.4th at 1307.) The Third District Court of Appeal further perpetuated its earlier error when it reaffirmed the *Haywood* holding in its later *Smith* decision. (*Smith*, *supra*, 120 Cal.App.4th at 913-14.)

There is no statutory basis for the *Haywood* and *Smith* decisions. In *Haywood*, the Third District Court of Appeal stated that there is an "obvious distinction" in public employment retirement laws between an employee who has become medically *unable* to perform his usual duties and one who has become *unwilling* to do so. (*Haywood*, *supra*, 67 Cal.App. 4th at 1296. Emphasis in original.) Yet, the Court of Appeal did not provide a statutory basis for this supposedly "obvious distinction." The *Haywood* Court did not recognize that the rights to a disability retirement allowance and reinstatement from a disability retirement are independent of one another. It ignored the fact that an employee may receive a disability retirement allowance, and if the Board determines that the employee is no longer incapacitated for duty in the position held when retired for disability or in a position in the same classification, the Board may immediately cut-off the disability retirement allowance, even if the employee does not reinstate her employment. A more logical, legally supportable conclusion is the following: if the employee has been terminated for cause from her last position, and she has not succeeded in reversing that adverse action through an appeal or other proceeding or she has signed a settlement agreement expressly waiving her right to return to that position or agency, her right to reinstatement under

Government Code section 21193 shall be forfeited. Such unchallenged or final disciplinary action or such express waiver of the right to reinstatement shall not, however, disqualify her from receiving an actuarially-reduced retirement allowance under the PERL's disability retirement provisions.

If the *Haywood* Court would have applied the logical, legally supportable approach set forth immediately above, its secondary concern that an employer's disciplinary authority is undermined if a terminated employee is granted disability retirement would be addressed (or would be moot). Contrary to the *Haywood* Court's assertion, under the PERL, the public employer is free to permanently end the employment relationship by way of a valid termination action, so long as the termination action is not motivated "because of" the employee's disability, (Government Code section 21153), and so long as that action is not reversed by the SPB, PERB, or other tribunal, or through a settlement agreement.

Our proffered interpretation of PERL is harmonious with other provisions applying to State employment, such as Government Code section 19583.1, which states that dismissal of an employee from State service shall result in the automatic removal of the employee's name from any and all employment lists on which it may appear. (Government Code section 19583.1.) An unchallenged or otherwise final termination action will waive the employee's right to reinstatement under Government Code section 21193 (and remove her from a re-employment list, so to speak) yet will not waive her right to a disability allowance under Government Code section 21150 et seq.

The *Smith* decision suffers from an additional logical and legal defect. The Third District Court of Appeal acknowledged in that decision that equity mandates consideration of mitigating factors, such as whether the employee would have been entitled to disability retirement prior to being terminated. (*Smith, supra*, 120 Cal.App.4th at 206-07.) Yet the Court was only willing to apply the principles of equity to the narrow circumstance of there being undisputed evidence that the plaintiff was eligible for disability retirement such that a favorable decision on his claim would have been a foregone conclusion. (*Id.*, at 207.) The sole equitable exception that the *Smith* Court recognized makes no sense in the context of the PERL. A person can apply for disability

retirement up to four (4) months after discontinuing service, and even later if her physical or mental incapacity persists after the date of discontinuance of state service up to the time of her application. (Government Code section 21154.) CalPERS may not have received a disability retirement application, or may not have adjudicated it yet, prior to the employee's termination date.

The *Smith* Court should not have viewed notions of equity so narrowly. Rather, it should have acknowledged other extenuating circumstances that excuse the disability retirement applicant from the harsh consequences of the *Haywood* holding – such as the circumstance of an employee agreeing in a settlement agreement to waive the right to reinstatement but expressly or impliedly preserving her right to pursue disability retirement.

D. THE BOARD SHOULD NOT HAVE EXTENDED THE HAYWOOD AND SMITH DECISIONS TO THE STATE EMPLOYMENT CONTEXT, AND CERTAINLY NOT TO CASES INVOLVING SETTLEMENT OF A PENDING DISCIPLINARY APPEAL

The *Haywood* and *Smith* decisions are problematic, in both a legal and public policy sense, and the CalPERS Board exacerbated the problem by extending those holdings to the State employment setting and settlement context.

1. Summary of the *Vandergoot* decision

In *Vandergoot*, Precedential Decision 13-01, the Board approved the proposed decision of an Administrative Law Judge of the Office of Administrative Hearings. (*Vandergoot*, Precedential Decision No. 13-01, p. 1.) The Board adopted the proposed decision as a precedential decision, effective October 16, 2013. (*Id.*)

In *Vandergoot*, the State employee, Vandergoot, was issued a Notice of Adverse Action terminating his employment with the California Department of Forestry and Fire Protection. (*Id.*, at p. 2 of proposed decision.) Vandergoot challenged the Notice of Adverse Action with the SPB. He also filed an application for industrial disability retirement. By operation of a settlement agreement, Vandergoot's termination was converted into a resignation. Vandergoot agreed in the settlement agreement not to reapply for or accept employment with the California Department of Forestry and Fire Protection again. (*Id.*, at p. 4.)

In the proposed decision, the Administrative Law Judge extended the holdings of *Haywood* and *Smith* to the State employment context. As described above, the *Haywood* and *Smith* decisions are legally erroneous. Additionally, the portion of the statute authorizing an employer to subject an individual receiving a disability allowance to a medical examination to determine whether her incapacity persists is inapplicable to the State. Only the Board can compel the individual to be medically examined under Government Code section 21192. The following statement in *Vandergoot* is patently incorrect – "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." (*Vandergoot*, proposed decision p. 8.)

Perhaps most importantly, the *Vandergoot* decision is legally flawed because no termination action has actually occurred when the State agency and the employee (such as Vandergoot or Martinez) settle a pending SPB appeal by permitting the employee to resign his or her employment in lieu of termination. The Administrative Law Judge applied the *Haywood* and *Smith* holdings to Vandergoot despite acknowledging "the absence of an actual dismissal for cause." (*Id.*, at p. 6 of proposed decision.) The *Vandergoot* decision will discourage parties from settling pending SPB appeals or other legal proceedings, as the employee will have a greater chance of being entitled to disability retirement if she prevails in an SPB or PERB case than if she signs a State agency's typical waiver of the right to reemployment.

2. <u>At a minimum, the *Vandergoot* holding may only be applied prospectively to employees hired on or after October 16, 2013 (the effective date of the precedential decision)</u>

The *Haywood*, *Smith*, and *Vandergoot* decisions may not be applied to employees who were employed with the State prior to the date the CalPERS Board deemed the *Vandergoot* decision precedential (October 16, 2013). To apply the harsh "*Haywood*" penalty to employees hired on or before October 16, 2013 would infringe upon their vested retirement rights.

Public employees have a right to the payment of salary that has been earned. (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853 ("[a]lthough there may be no right to tenure, public employment gives rise to certain obligations which are protected by the Contract Clause of the Constitution, including the right to the payment of salary which has been earned.") Pension

benefits are a form of deferred compensation. Pensions may not be denied to an employee once vested and accrued. (*Id.*; see also *Miller v. State of California* (1977) 18 Cal.3d 808, 815.)

An employee's contractual right[3] to earn pension benefits on the terms offered is vested on the first day of employment. (*California League of City Employee Associations v. Palos Verdes Library District* (1978) 87 Cal.App.3d 135, 139; *Miller*, *supra*, 18 Cal.3d at 817.) Said otherwise, upon acceptance of public employment, the employee acquires a vested right to a pension on terms substantially equivalent to those offered by the employer as of the first day of her employment, or as of the time the promise was made or improved upon while she was employed. (*Miller*, *supra*, 18 Cal.3d at 817; see also *Carman v. Alvord* (1982) 31 Cal.3d 318, 325; *Legislature v. Eu* (1991) 54 Cal.3d 492, 528-529.)

A benefit cannot be considered "vested" if the employee had no reasonable expectation that the benefit could continue. (See *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 352 (stating that the city will not be obligated to continue a pension benefit if the pension documents, or ordinance or statutory scheme clearly and explicitly limit the city's liability to the pension fund).) For example, if a change in contribution is implicit in the operation of the public employer's system, and is expressly authorized by the system, no vested right is created or impaired when the public employer effects such a change. (*International Association of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 303.)

Even where a benefit is "vested," the employee, of course, must fulfill her obligations and meet all conditions necessary to mature the pension. The fact that a pension right is vested will not prevent its loss if the employee's employment terminates before completion of the period of service designated in the pension plan. (*Kern*, *supra*, 29 Cal.2d at 844.)

Under Government Code section 21150, a State Tier I employee must be credited with at least five (5) years of service credit before becoming eligible for disability retirement. (Government Code 21150.) Martinez worked for the State for many decades, and thus possesses a vested disability pension right. CalPERS shall grant her disability retirement application so

[3] Even unilaterally created employer policies are regarded as "contracts" under this analysis. (See e.g., *Goddard v. South Bay Union High School District* (1978) 79 Cal.App.3d 98, 105.)

long as she files a timely application and is deemed medically incapacitated as defined in the PERL.

The language of a pension plan is subject to the implied disclaimer that the governing body may make modifications and changes in the system. (*Kern, supra*, 29 Cal.2d at 855.) The employee does not have a right to any fixed or definite benefits, but only to a substantial and reasonable pension. (*Id.*) The California Supreme Court has held that there "is no inconsistency [] in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered." (*Id.*)

Prior to an employee retiring, her vested contractual pension rights may be modified for the limited purpose of keeping the pension system flexible to permit adjustments in accord with changing conditions and at the same time to maintain integrity of the system. (*Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 184.) There are strict limitations on the conditions which may modify the pension system in effect during employment. (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 864.) Such modifications to pension benefits must be "reasonable." It is for the courts to determine, upon the facts of each case, what constitutes a reasonable and therefore permissible change. (*Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131.) To qualify as "reasonable," the alterations of the employees' pension rights must 1) bear some material relation to the theory of the pension system and its successful operation, *and* 2) changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. (*Wallace, supra*, 42 Cal.2d at 185.)

As for the first element of this test, vague claims of financial insecurity are insufficient. Changes made to the pension benefit on that basis alone do not have "some material relation to the theory of the pension system and its successful operation." (See *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 455 ("[d]efendants' only plea in this respect appears to be that if the amendments had not been made 'the costs to the City and its taxpayers would have reached such staggering proportions that, in all probability, the system would have ceased to exist." This plea, based on speculation alone is without merit. Rising costs alone will not excuse the city from meeting its contractual obligations, the consideration for which has already been received by

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it..."); see also *Allen, supra*, 45 Cal.2d at 133 (court rejected city's excuse that the changes made the pension system more equitable for persons employed prior to a certain date and for those employed after a certain date, and so would ameliorate "personal problems" between the two groups.)

Now to the second element of the test. Before employee pension rights can be detrimentally affected, commensurate benefits must be given to the employee to prevent unconstitutional impairment of contractual obligations between the public employer and the employee.[4] For example, an increase in an employee's contribution to a pension fund from two (2) percent to ten (10) percent of salary without comparable, offsetting benefits is unreasonable. (*Allen, supra*, 45 Cal.2d at 132-133.) See also *Association of Blue Collar Workers et al. v. Ted Wills et al.* (1986) 187 Cal.App.3d 780 (holding that city's action of requiring employees to fully fund a system that had been partially funded since its inception by levying contributions for past services rendered by the employee was an impairment of a vested pension right without any corresponding benefit. The court rejected the city's claim that its action was necessary to preserve the "fiscal integrity" of the system.)

For an example of a court upholding the change in the pension benefit under the above-stated test see *Houghton v. City of Long Beach* (1958) 164 Cal.App.2d 298. In *Houghton*, the California Court of Appeal found that a revamping of an existing system so as to eliminate shortages in the available fund, by substituting a general obligation of the city for a "mere" two percent of the general levy, has direct relation to the integrity of the system and keeping it flexible to permit adjustments in accord with changing conditions. This is so because the "imposition of a member's contribution of two per cent of his salary toward a *solvent fund, in substitution for an insolvent one*, is a 'disadvantage' which is 'manifestly accompanied by comparable new advantages." (*Houghton, supra*, 164 Cal.App.2d at 306, emphasis supplied.)

[4] The commensurate benefit must be given to the employee who suffers the detriment, not to some other employee. Benefits subsequently obtained by other employees will not be considered an "offset" for detriment incurred by the employee whose pension rights have accrued. (*Abbott, supra*, 50 Cal.2d at 453.)

Where the employee's contribution rate is a fixed element of the pension system, the rate may not be increased unless the employee receives comparable new advantages for the increased contribution. (*Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d 695 *citing to Wisley v. City of San Diego* (1961) 188 Cal.App.2d 482, 486-487.) Indeed, an increase in the employee's contribution rate operates prospectively only. Yet, even a prospective change may be struck down by a court if the employer does not provide the employee any comparable new advantage to offset the disadvantage. (*Wisley, supra*, 188 Cal.App.2d at 703.)

The above-described principles pertaining to vested rights of public employees have been repeatedly affirmed by courts in recent years. (See *Retired Employees Association of Orange County v. County of Orange* (2011) 52 Cal.4th 1171; see also *International Brotherhood of Electrical Workers, Local 1245 v. City of Redding* (2012) 210 Cal.App.4th 1114; see also *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619.)

The CalPERS Board cannot demonstrate that Martinez or other State employees received comparable new advantages in exchange for the CalPERS Board applying the punitive "*Haywood*" rule to employees already employed as of October 16, 2013. The fact that CalPERS may experience some cost savings as a consequence of applying the *Haywood* rule, and that such cost savings may make the CalPERS pension plan more solvent in the long-run, is not a justification for impairing State employees' disability retirement rights.

E. THE BOARD SHOULD APPLY PRINCIPLES OF EQUITY AND DETERMINE THAT MARTINEZ'S DISABILTY RETIREMENT APPLICATION IS NOT BARRED BY HAYWOOD/SMITH/VANDERGOOT

For the many reasons described above, the *Haywood*, *Smith* and *Vandergoot* decisions cannot be applied to Martinez. Applying notions of equity (that even the *Smith* Court acknowledged to some degree), CalPERS must consider Martinez's disability retirement application on the merits of a medical examination or other medical documentation. Martinez was issued a Counseling Memorandum and Notice of Adverse Action for termination. SEIU Local 1000 alleged that the disciplinary actions constituted retaliation and discrimination on account of Martinez's protected concerted activity under the Dills Act. Twice, SEIU Local 1000

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stated a prima facie case of retaliation and discrimination, causing PERB to issue an original and later an amended unfair practice complaint. By entering into the settlement, the DSS received the valuable consideration of withdrawal of the PERB complaint and the SPB appeal, and Martinez's waiver of reemployment rights with the agency. In exchange for that material consideration, the DSS committed to cooperating with the disability retirement application that the DSS knew Martinez would imminently file, the basis of which would be her severe and persistent medical conditions.

Applying principles of equity to the foregoing facts, CalPERS cannot be permitted to cancel Martinez's application.

F. THE BOARD VIOLATED THE ADMINISTRATIVE PROCEDURES ACT WHEN IT ADOPTED, THROUGH THE PRECEDENTIAL VANDERGOOT DECISION, THE RULE THAT AN EMPLOYEE TERMINATED IS BARRED FROM RECEIVING DISABILITY RETIREMENT

By adopting the Third District Court of Appeal's holding of *Haywood* in the precedential decision *Vandergoot*, the Board engaged in underground rulemaking in violation of the Administrative Procedure Act ("APA"). It is beyond dispute that the Board is subject to the rulemaking requirements (e.g., public notice and opportunity to comment) of the APA's Chapter 3.5 (Government Code sections 11340-11351) and must follow those requirements if it wants to adopt a regulation of general application. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568-577 (Department of Labor Standards Enforcement's policy for determining whether Industrial Welfare Commission's wage orders applied to maritime employers was void for failure to follow APA rulemaking requirements).

It is well settled that the purpose of the APA is to provide for meaningful public participation in the process by which state agencies adopt administrative regulations, and to create an administrative record which assures effective judicial review. (*Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 908-909.) In order to carry out these dual objectives, the APA (1) establishes "basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations" which give all interested parties a *fair and equal* opportunity to present statements and arguments at the time and place specified in the notice and calls upon the

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agency to consider all relevant matter presented to it; and (2) provides that any interested person may obtain a judicial declaration as to the validity of any regulation by bringing a superior court action for declaratory relief. (*California Optometric Assn. v. Lackner* (1976) 60 Cal.App.3d 500, 506; see also Government Code sections 11346.3(a), 11346.4(a), 11346.8(a) and 11346.9(a)(3).)

By devising a rule that terminated employees are ineligible for disability retirement, the Board violated its mandatory duties to be scrupulously fair and even-handed in providing opportunities for meaningful public participation and comment in the APA rulemaking process, and in considering all comments submitted in writing or in a public hearing on the proposal.

Indeed Government Code section 11425.60 permits an administrative agency to deem a decision precedential if certain factors are met. Although the Board appears to have followed the procedural requirements of Government Code section 11425.60 before declaring *Vandergoot* precedential, it should have instead engaged in the more transparent process of formal rule-making. Even if its chosen avenue of adopting a precedential decision were permissible, the Board still violated the APA by failing to reveal to the public that the *Vandgergoot* decision did not include a clear, correct or complete analysis of the PERL. The Board was required to disclose to the public that *Vandergoot* constituted a new rule that had never before acknowledged by a California court, and that it was not grounded in any statute the Board is charged with administering.

In summary, the Board should not impose the prohibitions embodied in *Haywood/Smith/Vandergoot* unless it follows the formal rulemaking procedures set forth in the APA.

IV. CONCLUSION

We urge the Board to overrule its prior precedential decision *Vandergoot*. The underground regulation the Board adopted through *Vandergoot* must be rescinded.

We urge the Board to distinguish the present matter from the Third District Court of Appeal decisions *Haywood* and *Smith*. As explained in this brief, those cases were wrongly-decided and should be overturned. Additionally, the facts of those cases are distinguishable in that the employees were not State employees, the employees were disciplined for cause, lost their

appeals challenging the disciplinary actions, did not enter into a settlement that conferred material benefits upon the employer, and did not enter into a settlement that expressly reserved the right to apply for disability retirement and that mandated the employer to cooperate with such application.

If the Board considers itself bound by the *Haywood*, *Smith*, and *Vandergoot* precedents, then alternately, the Board should order the DSS to retroactively excise from the Settlement Agreement the provision barring Martinez from reemployment with the DSS, and retroactively expunge and seal all termination-related documents.

We urge the Board to remand this matter to CalPERS's benefits department to make a determination under Government Code section 21156 of Martinez's medical eligibility for disability retirement. CalPERS should not have cancelled Martinez's application.

Alternately, we respectfully request that the Administrative Law Judge set an additional day of hearing to allow Martinez time to present proof that the DSS's dismissal of her was "preemptive of an otherwise valid claim for disability retirement." (*Haywood*, *supra*, 67 Cal.App.4th at 1307.)

Dated: August 26, 2016

Respectfully Submitted

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On August 26, 2016, I served the following documents in the manner described below:

POST HEARING BRIEF

☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from smizuhara@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Ms. Awesta Wakily
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 26, 2016, at Alameda, California.

Stephanie Mizuhara

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