

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Gabriel Santos (Respondent) was employed by Respondent Department of Forestry and Fire Protection (Respondent Cal Fire) as an Assistant Chief. By virtue of his employment, Respondent was a safety member of CalPERS.

Respondent Cal Fire issued a Notice of Adverse Action (NOAA) dated April 11, 2016, dismissing Respondent from his position as an Assistant Chief effective April 18, 2016. The reasons for his termination were inexcusable neglect of duty, insubordination, dishonesty, willful disobedience, misuse of state property and other personal law violations. Respondent requested a *Skelly* hearing. Respondent's termination was upheld at the *Skelly* hearing. Respondent then appealed the termination before the State Personnel Board (SPB).

On June 28, 2016 Respondent signed an application for industrial disability retirement, which was received by CalPERS on June 30, 2016. Respondent claimed disability on the basis of internal and psychological conditions.

On September 8, 2016, Respondent entered into Stipulated Settlement Agreement with Respondent Cal Fire. The Stipulated Settlement Agreement stated that Respondent is not allowed to seek or accept employment with Respondent Cal Fire at any time, in any capacity. Respondent Cal Fire agreed to withdraw the NOAA, effective April 18, 2016 and remove the NOAA and supporting documents from Respondent's Official Personnel File.

Based on the termination documents and the Stipulated Settlement Agreement, CalPERS determined that Respondent was ineligible for industrial disability retirement pursuant to *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); and In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot (*Vandergoot*) dated February 19, 2013, and made precedential by the CalPERS Board of Administration on October 16, 2013.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on August 31, 2017. Respondent was represented by counsel.

CalPERS argued that Respondent's termination was for cause, and that he therefore cannot receive disability benefits under existing case law, regardless of whether he is otherwise disabled from performing his usual and customary duties. CalPERS also argued that even under the voluntary resignation, Respondent could not return to work for Respondent Cal Fire, and therefore is barred from obtaining disability retirement under applicable case law.

Respondent argued that Haywood and its progeny did not apply to him and that his termination was a result of his medical condition because his supervisors were aware of his medical conditions prior to issuance of the NOAA.

The ALJ disagreed with Respondent and held that *Haywood* and its progeny are applicable in this case. The ALJ noted that if a member is terminated for cause, the member is barred from obtaining disability retirement under *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); and the Precedential Decision *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (*Vandergoot*). In *Haywood*, the Court of Appeal held that if an employee has been terminated for cause, then there has been a complete severance of the employer-employee relationship, which eliminates a required condition for disability retirement – the potential reinstatement of the employee if there is physical recovery to the point that the employee is no longer disabled (*Haywood, supra* at p. 1297). *Smith* and *Vandergoot* follow the *Haywood* reasoning, and make it clear that if Respondent was terminated for cause, then the member may not apply for disability retirement.

The ALJ found that the “salient facts are the same [as those in *Haywood* and its progeny] – [Respondent] completely severed his employer-employee relationship with Cal Fire by voluntarily resigning and waiving any reinstatement rights. . .” In *Vandergoot* the Court found that if a member facing termination for cause resigns from service as part of a resolution of the termination case, he/she is barred from disability retirement. In *Vandergoot*, the ALJ concluded that the employment relationship had been severed by a settlement, and the employee could not be required to submit a medical exam pursuant to Government Code section 21192, and could not be reinstated under Government Code section 21193, two statutes relied upon by the *Haywood* court.

After considering the facts of the case and the decisions of *Haywood*, *Smith* and *Vandergoot*, the ALJ denied Respondent’s appeal. The ALJ found that Respondent severed his relationship with his employer effective April 18, 2016. The ALJ held that “the relationship was completely severed for reasons unrelated to a disabling medical condition; the complete severance of that relationship was not preemptive of a valid claim for disability retirement. . .” The ALJ also held that “it is wholly irrelevant whether the employment was terminated because the member was fired for cause or voluntarily resigned and waived his right to reinstatement. (*In re Vandergoot, supra*, CalPERS Precedential Bd. Dec. No. 13-01, at pp. 7-8.) Under either scenario, the termination constitutes ‘a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement – the potential reinstatement of his employment relationship with [Cal Fire] if it ultimately is determined that he is no longer disabled.’ (*Haywood v. American River Fire Protection Dist., supra*, 67 Cal.App.4th at p. 1306.)

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

December 20, 2017

A handwritten signature in blue ink, appearing to read 'Preet Kaur', is written over a horizontal line.

PREET KAUR  
Senior Attorney