

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Eusebio Montejó (Respondent) was employed by California Department of Corrections and Rehabilitation, California Medical Facility (Respondent CDCR) as a Physician and Surgeon. By virtue of his employment, Respondent was a state safety member of CalPERS.

On October 14, 2020, CDCR served on Respondent a Notice of Adverse Action (NOAA), with a penalty of an official reprimand. The causes for discipline were based on allegations that Respondent failed to follow lawful orders and directives of his supervisor and failed to follow the managerial chain of command. The Letter of Reprimand (LOR) referenced prior progressive discipline reprimands issued to Respondent on March 6, 2018, and May 29, 2019. On October 28, 2020, the NOAA findings were upheld following a Skelly hearing. On June 18, 2021, the State Personnel Board (SPB) sustained the imposition of the NOAA.

On October 14, 2020, Respondent signed an application for industrial disability retirement (IDR) which was received by CalPERS on October 15, 2020. Respondent claimed disability on the basis of orthopedic, psychological, internal, cardiovascular and obstructive sleep apnea conditions. Respondent claimed that he was unaware that he would be served with a NOAA on the same day he filed his IDR application.

As of July 1, 2020, Respondent was placed on a medical leave of absence as a reasonable accommodation. On February 3, 2021, Respondent began working full-time as a physician for a Texas medical corporation that provides medical care at various clinics in Texas. On April 24, 2021, Respondent CDCR informed Respondent that he could not continue his leave of absence because leave cannot be granted to a state employee who obtains other employment or does not intend to return to state service.

Beginning November 29, 2021, Respondent CDCR found that Respondent was absent without leave for five or more consecutive working days. On December 21, 2021, he was served with a Notice of Automatic Resignation by Absence Without Leave (AWOL). After a *Coleman* hearing, the Notice of AWOL Resignation was sustained. Respondent did not appeal the AWOL resignation to CalHR. Accordingly, Respondent was AWOL separated and considered to have resigned at the close of business on November 28, 2021.

Based on the Notice of Automatic Resignation by AWOL, 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* dated February 19, 2013, and made precedential by the CalPERS Board of Administration on October 16, 2013.

The *Haywood* court found that when an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination of the employment relationship renders the employee ineligible for disability retirement. The ineligibility arises from the fact that the discharge is a complete severance of the employer-employee relationship. A disability retirement is only a “temporary separation” from public service, and a complete severance would create a legal anomaly – a “temporary separation” that can never be reversed. Therefore, the courts have found disability retirement and a “discharge for cause” to be legally incompatible.

The *Smith* court explained that to be preemptive of an otherwise valid claim, the right to a disability retirement must have matured before the employee was terminated. To be mature, there must have been an unconditional right to immediate payment at the time of termination unless, under principles of equity, the claim was delayed through no fault of the terminated employee or there was undisputed evidence of qualification for a disability retirement.

In *Vandergoot*, the Board agreed that “a necessary requisite for disability retirement is the potential reinstatement of the employment relationship” with the employer if it is ultimately determined by CalPERS that the employee is no longer disabled. The Board held that an employee’s resignation was tantamount to a dismissal when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and agreed to waive all rights to return to his former employer.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on October 31 and November 1, 2022. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent’s questions and clarified how to obtain further information on the process.

CalPERS called Corina Meloche, an Employee Relations Representative for California Correctional Health Care Services to testify at the hearing. Ms. Meloche explained that Respondent was permanently separated by AWOL resignation and had no automatic reinstatement rights. CalPERS also called Kelly Mack, a Return to Work Coordinator for Respondent CDCR who testified that Respondent’s separation was not the ultimate result of a disabling medical condition and that the State did not terminate Respondent to preempt an application for disability retirement. The disciplinary documents were all admitted as direct evidence through the testimony of the witnesses.

Respondent testified on his own behalf. Although Respondent had failed to appeal his separation before CalHR, he nonetheless contended his separation was the ultimate result of a disabling condition because he was temporarily off work for his right ankle injury prior to separation. Respondent also asserted his AWOL separation was

preemptive of his valid claim for disability because he had other medical conditions that had not been properly evaluated or accepted by workers comp, and because he felt these conditions were not reasonably accommodated or satisfactorily considered by Respondent CDCR before he was directed to return to work. Finally, he asserted his right to disability had matured when he filed his application in October 2020, more than a year before he had been permanently separated.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent's AWOL separation rendered him ineligible for disability retirement as it constituted a complete severance of the employer-employee relationship, and Respondent has no right to reinstatement. Respondent failed to present sufficient evidence to establish that his stated work limitations or conditions were factors in his separation from employment. He was discharged for failing to report to work and perform duties he was medically cleared to perform. Respondent failed to establish any of the *Haywood* exceptions applied.

The ALJ concluded CalPERS correctly canceled Respondent's application for industrial disability retirement based on the operation of *Haywood*, *Smith*, and *Vandergoot*. Respondent's AWOL resignation severed his employment relationship with Respondent CDCR and precluded his application for industrial disability retirement.

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

January 17, 2023

CRISTINA ANDRADE
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