

**ATTACHMENT B**

**Staff Argument**

## STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Michael P. Lillie (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated September 5, 2024. For reasons discussed below, staff argues that the Board should deny the Petition and uphold its decision.

On December 11, 2017, California Department of Corrections and Rehabilitation (CDCR) served a Notice of Adverse Action (NOAA) on Respondent for his dismissal. Respondent was dismissed from CDCR, effective December 31, 2017. On February 5, 2019, the State Personnel Board (SPB) upheld Respondent's dismissal.

On April 4, 2019, Respondent appealed his dismissal by filing a Petition for Writ of Administrative Mandate in Superior Court. On November 28, 2022, Respondent entered into a Settlement Agreement with CDCR, whereby CDCR agreed to pay Respondent a cash payment, and Respondent agreed to dismiss all claims against CDCR. Respondent's dismissal became final on November 28, 2022.

CalPERS received Respondent's application for service pending industrial disability retirement (SR pending IDR) on December 19, 2022. Respondent claimed disability on the basis of spine damage, nerve problems in both hands, and arthritis in his right hand. The application claimed that the disability began on June 29, 2002.

Respondent retired for service effective December 1, 2022, and started receiving his SR benefits in January 2023.

Based on the NOAA, CalPERS determined that Respondent was ineligible for IDR 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*); *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; *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*); and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip MacFarland* (*MacFarland*) dated October 7, 2015, and made precedential by the CalPERS Board of Administration on June 22, 2016.

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 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. In *Martinez*, the appellate court held that *Vandergoot* is a reasonable extension of *Haywood* and *Smith*.

In *MacFarland*, the Board determined that the character of the disciplinary action does not change because a resignation was submitted prior to the effective date of the NOAA. The Board held that a resignation preceding the effective date of the NOAA bars a member from applying for IDR on the basis of *Haywood* or *Smith*.

On April 25, 2023, CalPERS informed Respondent that his application for IDR had been cancelled based on *Haywood* and its progeny. Subsequently, Respondent inquired whether he could receive retiree health benefits. On February 1, 2024, CalPERS informed Respondent that he was ineligible for retiree health benefits because he retired more than 120 days after his permanent separation from employment with CDCR.

Respondent appealed both determinations 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 1, 2024. Respondent represented himself at the hearing. CDCR did not appear at the hearing, and the matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

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, answered Respondent’s questions, and clarified how to obtain further information on the process.

Respondent testified that he believed he was eligible for IDR before the NOAA was served. After injuring his back in June 2002, he underwent surgeries on his spine and hands. He believed those conditions rendered him unable to work as a Special Agent-In-Charge for CDCR. He also testified that his employment attorneys never advised him that he could lose his IDR and health benefits by entering into the Settlement Agreement. He did discuss SR and IDR with a CalPERS employee sometime in November 2022, which was around the time he settled his lawsuit. Respondent never asked the CalPERS employee about any effect of the Settlement Agreement, nor did the CalPERS employee promise that he was eligible for IDR.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent had the burden of proof to show he was eligible to receive IDR and retiree health benefits. The ALJ found that Respondent had been dismissed for cause, the NOAA was never rescinded, and the NOAA was therefore now final. On its face, the NOAA terminates the employment relationship between Respondent and CDCR. The ALJ found no exception to *Haywood* exists: the dismissal was not the ultimate result of a disabling condition; was not preemptive of an otherwise valid claim for disability retirement; and Respondent did not have a matured right to disability retirement before his dismissal.

The ALJ similarly denied Respondent's claim for retiree health benefits. Respondent retired for service effective December 1, 2022, more than 120 days after separating from CDCR on December 31, 2017. The passage of time alone would dictate that Respondent does not qualify for health benefits. The ALJ further explained that Government Code section 20160 (the Mistake Statute) does not avail Respondent. The earliest Respondent could retire for service would have been August 30, 2018, when he turned 50. Because it was impossible for Respondent to retire within 120 days of his separation date given his age at separation, he could not be eligible for retiree health benefits. Since Government Code section 20160 states that the correction cannot provide Respondent with a right not otherwise available to him, Respondent could not use the Mistake Statute to obtain retiree health benefits.

In the Proposed Decision, the ALJ concluded that Respondent is not eligible to apply for IDR benefits because his eligibility is precluded by the operation of *Haywood* and its progeny. The ALJ also concluded that Respondent is not eligible for retiree health benefits.

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. In the Proposed Decision, the ALJ specifically addressed the argument raised in Respondent's Petition for Reconsideration regarding Government Code section 20160 and concluded that Respondent did not meet all the requirements of the statute. The Proposed Decision that was adopted by the Board at the November 20, 2024, meeting was well reasoned and based on the credible evidence presented at hearing. Therefore, for all the above reasons, staff argues that the Board should deny the Petition for Reconsideration.

January 13, 2025

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