

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED**

Jacob DiPiero (Respondent) was employed by the City of Campbell (City) as a Police Officer. By virtue of this employment, Respondent was a local safety member of CalPERS.

In March 2021, Respondent sought medical treatment for lower back pain and was placed on temporary total disability in April 2021. Respondent returned to modified duty in October 2021. In June 2022, the City and Respondent received a Qualified Medical Examiner (QME) report from Christian Foglar, M.D., about Respondent's lower back condition. Dr. Foglar opined that Respondent's lower back weakness and mobility limitations as of mid-2022 made him incapable of performing a police officer's usual duties, and that reasonable medical treatment was unlikely to restore such capability. He recommended Respondent's "medical discharge from the police force." Based on the QME report, the City placed Respondent on medical leave in late June 2022.

In September 2022, the City submitted an employer originated application for disability retirement on Respondent's behalf. The City submitted two identical applications. The first one, dated September 7, 2022, was signed by the City's Human Resources manager, Jenny Le-Christensen. The second application, dated September 17, 2022, bore the signature of the City's then-City Manager, Brian Loventhal. The evidence did not establish that the City Council ever considered or authorized either application, or that any City law delegated authority from the City Council to the City Manager to certify City employees' incapacity for duty.

By letter dated September 26, 2022, CalPERS informed Respondent and the City that it received the employer originated application for disability retirement. The letter instructed the City not to "begin your medical determination process until you receive notification that the member's application has been accepted." It stated further that Respondent had "the option to waive [his] right to retire on disability," which he did by failing "to cooperate with the application process."

Respondent did not want to retire in September 2022 and, therefore, did not cooperate with the application process. As a result, by letter dated January 12, 2023, CalPERS notified Respondent and the City that the employer originated application for disability retirement was cancelled. On December 12, 2022, officers from the Morgan Hill Police Department responded to a call for service at Respondent's home. They arrested him on suspicion of having committed a battery on his wife.

The City learned of the arrest and placed Respondent on administrative leave, effective December 13, 2022, until further notice. Following Respondent's arrest, the City conducted an Internal Affairs (IA) investigation. The investigation substantiated several types of misconduct by Respondent. The misconduct identified in the IA report occurred between September 18, 2022, through his arrest on December 12, 2022. The

misconduct substantiated in the IA investigation did not have any relationship to Respondent's back condition. Further, the IA report includes sections for "Captain's Review" and "Chief's Review." The "Captain's Review" section concurs with the investigation findings; the "Chief's Review" section is blank.

On January 18, 2023, while employed by the City but on leave for both medical and administrative reasons, Respondent signed an application for industrial disability retirement based on his orthopedic condition (Herniated disc between S1-L5 & L5-L4). CalPERS received the application on January 30, 2023. A representative from the City signed and returned a document to CalPERS in February 2023 stating that Respondent had an adverse action pending against him.

Upon request, the City provided CalPERS with a copy of the IA report in November 2023. Based on the substantiated misconduct identified in the IA report, CalPERS determined that Respondent was ineligible for industrial disability retirement. CalPERS' determination was based on the Public Employees' Retirement Law, Government Code section 20000, *et seq.*, and *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156, as well as the CalPERS Precedential Decisions In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot (2013) CalPERS Precedential Dec. No. 13-01 and In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip MacFarland (2016) CalPERS Precedential Dec. No. 16-01.

The *Haywood* court found that termination of the employment relationship renders the employee ineligible for disability retirement where the termination is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. The ineligibility arises from the fact that a termination results in 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 that disability retirement and complete severance are 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 employment relationship ended. To be mature, there must have been an unconditional right to immediate payment before severance of the employment relationship unless, under principles of equity, the right to immediate payment was delayed through no fault of the employee or there was undisputed evidence of qualification for a disability retirement.

The *Martinez* court affirmed the holdings in *Haywood* and *Smith* and refused to overturn more than twenty years of legal precedent. The *Martinez* court also affirmed the *Vandergoot* Precedential Decision as a logical application of the *Haywood* and *Smith* cases. In *Vandergoot*, the Board held 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 concluded that an employee's resignation was tantamount to a dismissal when the employee resigned pursuant to a settlement agreement entered in to resolve a dismissal action and agreed to waive all rights to return to his former employer. Both *Martinez* and *Vandergoot* involved employees who agreed to resign following a settlement of a Notice of Adverse Action terminating their employment. The employees in *Martinez* and *Vandergoot* waived any right to reinstatement as part of a settlement agreement and, as such, completely severed their employment relationship with their employer rendering them ineligible for disability retirement.

CalPERS informed Respondent and the City of its determination to cancel the application and their right to appeal the determination by letter dated June 26, 2024. 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 14, 2025. Respondents were represented by counsel at the hearing. Respondent testified on his own behalf that he did not want to retire for disability in September 2022. He testified that at that time, he still resisted the idea that he was permanently unable to do the professional and leisure physical activities that he previously had enjoyed. He also had scheduled lumbar spine surgery in November 2022, and, despite Dr. Foglar's opinion, held out hope that this surgery would ultimately enable him to return to work. For these reasons, Respondent did not submit any application to CalPERS for industrial disability retirement in conjunction with the employer originated application submitted in September 2022.

In late 2024, Respondent received written notice that the City intended to terminate his employment. This notice offered Respondent the opportunity for a "Skelly" hearing, which he requested. The *Skelly* hearing occurred, but no final decision was issued.

At the OAH hearing, Respondent and the City argued that Respondent remained eligible for industrial disability retirement, because his employment relationship was not yet terminated. They also argued that Respondent's right to disability retirement matured prior to the misconduct alleged in the IA report.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied in part and granted in part Respondent's appeal. The ALJ found that Respondent's employment relationship was not terminated when he applied for industrial disability retirement in January 2023. As of the date of the hearing, Respondent's employment status was not resolved. The ALJ, therefore, granted Respondent's appeal and found that his employment relationship was not severed.

The ALJ denied Respondent's appeal as to his eligibility for industrial disability retirement. The ALJ found that when Respondent applied for industrial disability retirement in January 2023, his right to such retirement had not yet matured. Instead, and before he applied to retire, the City had initiated an IA investigation that might have resulted and that might yet result in termination of his employment. The ALJ held that

Respondent did not establish that he was eligible for industrial disability retirement. The ALJ concluded that, after the City has determined whether it will terminate his employment, and if so for what cause, CalPERS may reevaluate Respondent's eligibility to retire for industrial disability.

Pursuant to Government Code section 11517, subdivision (c)(2)(C), the Board is authorized to "make technical or other minor changes in the proposed decision." To avoid ambiguity, staff recommends that the words "Both DiPiero and the City timely appealed" on page 2, paragraph 5 of the Proposed Decision be changed to "DiPiero timely appealed."

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

January 20, 2026

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AUSTA WAKILY  
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