

ATTACHMENT C

RESPONDENT'S ARGUMENT

Attachment C

FAX COVER SHEET

TO	
COMPANY	
FAX NUMBER	19167953972
FROM	Oviedo Law Group Inc
DATE	2022-03-30 21:17:54 GMT
RE	In Re Aaron M. Perez OAH Case No. 2021080058

COVER MESSAGE

To: Cheree Swedensky, Assistant to the Board.

Cindy D. Watkins



Legal Secretary
Oviedo Law Group, Inc.
401 Clovis Ave., Ste. 208
Clovis, CA 93612
Phone: 559.226.6200
Fax: 559.432.5543
Cindy.Watkins@oviedolawgroup.com



Martindale-Hubbell
CLIENT CHAMPION
PLATINUM / 2020

1 Ovidio Oviedo, Jr., SBN # 210311
Bradley Stevens, SBN #203893
2 OVIEDO LAW GROUP, INC.
401 Clovis Ave., Suite 208
3 Clovis, CA 93611
Telephone: (559) 226-6200
4 Facsimile: (559) 432-5543

5 Attorneys for: Aaron M. Perez

6 **BEFORE THE BOARD OF ADMINISTRATION**
7 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

8
9 In the matter of the Amended Statement of
10 Issues Against:
11 Aaron M. Perez,
12 Respondent

} Agency Case No. 2021-0248
OAH Case No. 2021080058

Respondent's Written Argument

13
14
15
16
17
18 Now comes Respondent, Aaron M. Perez, to object to the Proposed Decision of ALJ Jennifer
19 M. Russell, in the above titled matter. Specifically, Respondent Aaron M. Perez objects to the
20 conclusion that Perez is ineligible to apply for an industrial disability retirement.

21 **FACTUAL HISTORY**

22 Perez work for Department of State Hospitals - Atascadero, commencing June 4, 2001.
23 After June 4, 2001 Perez worked a variety of positions culminating in promotion to Unit
24 Supervisor on October 1, 2018. Between June 4, 2001 and October 1, 2018 Perez served two brief
25 appointments at Salinas Valley State Prison, once as a Medical Technical Assistant, and once as a
26 Unit Supervisor. Each appointment at SVSP was followed by a reurn to DSH-A where Perez was
27 employed until November 6, 2020.

28 On June 30, 2020, Perez filed a Disability Retirement Election Application citing "Severe

1 Anxiety Depression, PTSD, Insomnia, Fatigue, lack of motivation, nightmares, physical reaction
2 to places, loud sounds, and other things associated with assaults, Intrusive memories, nightmares
3 that don't fade but have only increased in intensity. Decreased in daily activities. Have continued
4 to hide in my home as a safe place." The disabilities are the result of witnessing and being the
5 object of violent attacks at DSH-A. Perez testified at hearing that as a result of the experiences
6 during his DSH-A employment he has significantly retreated to seek a sense of safety and requires
7 the care of a psychotherapist.

8 On October 19, 2020, DSH-A served Perez with Notice of Adverse Action of dismissal,
9 effective November 6, 2020. Following Perez' timely appeal of the NOAA, Perez attended a State
10 Personnel Board non-evidentiary Pre-Hearing Settlement Conference that resulted in the following
11 material provisions of a settlement which was later ratified as a SPB decision:

- 12 1. Appellant (Perez) hereby voluntarily resigns from his position as a Unit
13 Supervisor with Respondent (DSH-A), effective close of business
14 November 6, 2020, **for personal reasons.** (Emphasis added.)
- 15 2. **Respondent accepts Appellant's resignation effective close of business**
16 **November 6, 2020.** (Emphasis added.)
- 17 3. Appellant agrees if he applies for or seeks employment with Respondent in the
18 future, that he will attach to any application a copy of this Stipulation for
19 Settlement. Should Appellant fail to attach this Stipulation for Settlement to his
20 employment application, and subsequently obtain employment with Respondent,
21 Appellant agrees that Respondent may summarily dismiss Appellant, and Appellant
22 hereby waives any right to appeal that dismissal in any forum whatsoever.
- 23 4. Appellant agrees to and hereby voluntarily withdraws, with prejudice, Appellant's
24 appeal from the Notice of Adverse Action (NOAA), effective November 6, 2020,
25 SPB Case No. 20-1453. Appellant agrees not to appeal the NOAA at any time or in
26 any forum in the future.
- 27 5. **Respondent agrees to withdraw the NOAA, effective November 6, 2020.**
28 **Respondent agrees to remove the NOAA, its attachments, any documents**
related to the NOAA, and any related Notice of Personnel Action (NOPA)
from Appellant's official personnel file (OPF). Respondent agrees it will not
place a copy of this Stipulation for Settlement or the SPB's Decision approving
the settlement into Appellant's OPF. (Emphasis added.)
6. Appellant understands and acknowledges that this Stipulation for Settlement will be
kept in a confidential file in the Respondent's Human Resources office indefinitely.

1 In a March 9, 2021 letter to CalPERS, Perez clarified that as a result of the legal effect of
2 the resignation for personal reasons, he was renewing his application for Disability Retirement. At
3 hearing, Perez maintained that by operation of the language of the Stipulation for Settlement, there
4 is no preclusion from his potential re-employment with DSH-A, therefore as a threshold matter,
5 the pre-mature rejection of his Disability Retirement Election Application was error by the

1 CalPERS. For the following reasons, the application should be examined.

2 **ARGUMENT**

3 Counsel for CalPERS, and the Administrative Law Judge Russell rely on a quartet of
4 decisions, *Haywood v. American River Fire Protection* (1998) 67 Cal.App.4th 1292, (Haywood);
5 *Smith v. City of Napa* (2004) Cal.App.4th 194 (Smith); *In the Matter of the Application of*
6 *Vandergoot*, CalPERS Precedential Dec. No. 12-01 (Vandergoot); and *Martinez v. Public*
7 *Employers' Retirement* (2019) 33 Cal.App. 5th 1156 (Martinez); for the proposition that Perez'
8 "resignation for personal reasons" severs the potential reinstatement of employment" with the
9 same preclusive effect as a dismissal or a contractual promise not to seek re-employment.

10 In *Haywood*, the applicant had been terminated from his employment prior to filing for
11 disability retirement. *Haywood v. American River Fire Protection* (supra) 67 Cal.App.4th 1292, at
12 p. 1295. The *Haywood* court was cited accurately by ALJ Russell as highlighting the prohibitive
13 effect the "termination for cause" had on Haywood's disability retirement application. (Proposed
14 Decision [P.D.] at p. 10, ¶ 5 and 6.) Both the *Haywood Court* ALJ Russell also point out that the
15 California Government Code sections 21192 and 21193 anticipate the **potential reinstatement** of
16 an employment relationship as a prerequisite to the applicability of disability retirement laws.
17 (Emphasis added.) P.D. at p. 9, ¶2; citing *Haywood v. American River Fire Protection* (supra) 67
18 Cal.App.4th 1292, at p. 1305.

19 The stark distinction between Perez and Haywood, is as a result of the DSH-A decision to
20 withdraw Perez' NOAA, Perez has not been "terminated for cause." As a result of the
21 "resignation for personal reasons" language in the Stipulation for Settlement, Perez is still subject
22 to potential re-employment if determined to have recovered from his disabling condition,
23 specifically permissive reinstatement. If Perez' disability is mitigated or abated to allow for re-
24 employment, and Perez were to decline, the disability allowance severance provision of
25 Government Code Section 21193 would be available to the DSH-A and CalPERS. Simply stated,
26 *Haywood* is factually distinguishable from Perez because Perez was not terminated for cause.

27 Similarly, reliance on *Smith*, to disqualify Perez is also a misplaced trust. AS in *Haywood*,
28 the applicant in *Smith v. City of Napa* (2004) Cal.App.4th 194 was also terminated for cause, filing

1 the request for disability retirement on the same day the dismissal became effective. *Id.* At p. 198.
2 The dismissal of the applicant in *Smith* was affirmed while the disability retirement application
3 was still pending review. *Ibid.* While ALJ Russell was correct in pointing out the *Smith* court
4 held the dismissal defeated applicant's right to a disability retirement, she failed to bridge the
5 factual disparity between Smith's dismissal and Perez' resignation for personal reasons. For this
6 reason, *Smith* does not preclude Perez' application for disability retirement because the potential
7 for re-employment exists for the DSH-A by virtue of permissive reinstatement.

8 ALJ Russell next advanced the principle of the CalPERS Precedential Decision *In the*
9 *Matter of the Application for disability Retirement of Vandergoot*, CalPERS Precedential Dec. No.
10 12-01. As pointed out by ALJ Russell, Vandergoot was dismissed and subsequently entered a
11 Stipulation and Settlement agreeing to both resign, and a contractual promise not to seek re-
12 employment. P.D. at p. 12, ¶11. Specifically, the disqualifying language in *Vandergoot* is as
13 follows:

14 **[Respondent) agrees he will not seek, transfer to, apply for or**
15 **accept any employment in any capacity with [Department] at**
16 **any time in the future.** If [respondent] returns to employment with
17 [Department] in violation of the terms of this Stipulation for
18 Settlement, [Department] may dismiss [respondent] at such time as
19 is convenient to [Department] and [respondent] waives any right of
20 appeal of said dismissal in any form. *In the Matter of the*
21 *Application for disability Retirement of Vandergoot*, CalPERS
22 Precedential Dec. No. 12-01, at pg. 4, ¶12. (Emphasis added.)


19 While similar to Perez' case in that there was a stipulation for settlement with a voluntary
20 resignation, from the perspective of the potential re-employment *Vandergoot* and Perez are
21 distinguishable. While *Haywood* and *Smith* rely on the employment precluding effect of the
22 finality of their dismissals from service, the CalPERS Board relied on the contractual preclusion of
23 Vandergoot's promise not to seek or accept employment as emphasized in the paragraph above.
24 Just as there is no such dismissal in Perez's case, there is equally no preclusive contractual
25 promise not to seek or accept employment with DSH-A by Perez. Just as *Haywood* and *Smith* are
26 distinguishable as to the potential reinstatement of Perez, so is *Vandergoot*. As ALJ Russell points
27 out, on pg. 12, ¶12, the resignation in Vandergoot is tantamount to a dismissal in terms of
28 reinstatement, the ALJ neglects to point out the distinction that Perez is legally and contractually

1 eligible to be re-employed if the circumstances arise.

2 Lastly, attention is turned to *Martinez v. Public Employer's Retirement* (2019) 33
3 Cal.App.5th 1156. *Martinez* is significantly analogous to *Vandergoot*, as pointed out in the
4 introductory paragraph discussing the decision. *P.D.* at p. 12, ¶12, he resigned via settlement with
5 a promise not to seek re-employment. In this case of Perez, there is no equal promissory language
6 agreeing not to seek re-employment. ALJ Russell errs in her analysis that there is no affirmative
7 provision for re-employment by Perez, when the necessary analysis is merely whether there exists
8 the "potential for re-employment" of Perez by DSH-A. What is omitted from the analysis is the
9 fact that by virtue of the resignation for personal reasons language, exclusive of a promise not to
10 seek or accept re-employment, Perez can be permissively reinstated by DSH-A for the purposes of
11 California Government Code Sections 21192 and 21193 as discussed in *Haywood*.

12 **CONCLUSION**

13 As discussed above, the "eligibility to even apply for benefits" threshold issue is
14 conditioned on the "potential for re-employment" as discussed in *Haywood*, and progeny. While
15 *Haywood* and *Smith* were legally precluded from re-employment due to the dismissals that were
16 finalized, Perez resigned for personal reasons. Perez is thus eligible for permissive re-
17 employment, at the option of DSH-A. *Vandergoot* and *Martinez*, by virtue of their contractual
18 settlement language also were contractually prohibited from re-employment, while there is no such
19 disqualifying language attached to Perez. Because of these distinctions, Perez' application for
20 disability retirement should be accepted and evaluated on it's merits.

21
22 By: 
23 Bradley Stevens
24 Attorney at Law for Respondent
25 Aaron Perez
26
27
28

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF FRESNO

3 I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to
4 the within entitled action; my business address is 401 Clovis Ave., Suite 208, Clovis, California
5 93612.

6 On March 30, 2022, I served the within **RESPONDENT'S WRITTEN ARGUMENT** on the
7 interested parties in said action, as listed below:

8 ATTORNEY:

PARTY

9 Charles Glauberman***
10 Email:
Charles.Glauberman@calpers.ca.gov

Respondent CAL Pers Representative

11 Cheree Swedensky**
12 CalPERS Executive Office
13 P.O. Box 942701
Sacramento, CA 94229-2701
Fax: (916) 795-3972

Assistant to the Board

14 VIA FACSIMILE**

15 VIA E-MAIL***

16 BY MAIL - I am readily familiar with the firm's practice of collection and processing
17 of documents for mailing. Under that practice, it would be deposited with the United
18 States Postal Service on that same day with postage thereon fully prepaid at Fresno,
19 California, in the ordinary course of business. I am aware on motion of the party
served, service is presumed invalid if postal cancellation date of postage meter date is
more than one day after date of deposit for mailing in affidavit.

20 BY PERSONAL SERVICE - I caused such envelope to be delivered by hand to the
21 offices of the addressee.

22 I declare under penalty of perjury under the laws of the State of California, that the foregoing
23 is true and correct and if sworn as a witness I can competently testify to the foregoing of my own
24 knowledge.

25 Executed on March 30, 2022, at Clovis, California.

26 
27 _____
28 CYNTHIA D. WATKINS