

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Randy N. Monroe (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated September 14, 2023. For reasons discussed below, staff argues the Board should deny the Petition for Reconsideration and uphold its decision.

Respondent was employed as a Parole Agent I by Paroles and Community Services Division, California Department of Corrections and Rehabilitation (Respondent CDCR). By virtue of his employment, Respondent was a state safety member of CalPERS.

On August 2, 2021, Respondent CDCR's Office of Internal Affairs (OIA) notified Respondent that he would be interviewed concerning an investigation into allegations of misconduct against Respondent. On August 10, 2021, Respondent contacted CalPERS to inquire about disability retirement.

On August 31, 2021, OIA interviewed Respondent. On January 25, 2022, OIA completed interviews of various witnesses including Respondent.

On March 1, 2022, prior to the conclusion of the internal affairs investigation, Respondent filed an application for service pending industrial disability retirement. Respondent requested a service retirement date of March 1, 2022, and he has been receiving service retirement benefits since then.

Respondent CDCR served Respondent with a Notice of Adverse Action (NOAA) on March 23, 2022, dismissing Respondent from his position effective April 1, 2022, due to inexcusable neglect of duty, dishonesty, willful disobedience, misuse of state property, and other failure of good behavior. According to the NOAA, Respondent engaged in overfamiliar behavior with a family member of a parolee and was dishonest to Respondent CDCR regarding his relationship with that family member.

Prior to the effective date of the dismissal, a *Skelly* hearing¹ was held, and the determination to dismiss Respondent was upheld. Thereafter, Respondent appealed the NOAA with the State Personnel Board (SPB).

On April 8, 2022, Respondent CDCR notified Respondent that it recently learned that he retired from CDCR effective March 1, 2022. Upon review of the circumstances at the time of Respondent's retirement, Respondent CDCR determined his retirement was "under unfavorable circumstances," and he was considered dishonorably retired. Subsequently, Respondent CDCR informed CalPERS that Respondent "resigned in lieu of termination."

¹ A *Skelly* hearing is an administrative procedure, in which an employee has the opportunity to respond to the charges upon which the proposed discipline is based.

On May 24, 2022, Respondent CDCR rescinded its NOAA and withdrew the appeal that was pending before SPB. Without an adverse action pending, SPB dismissed Respondent's appeal. Respondent CDCR's withdrawal was premised on the basis that the employer-employee relationship was permanently severed on the effective date of Respondent's service retirement. Respondent's service retirement was akin to a resignation, thereby rendering any appeal moot.

Based on the NOAA and the dismissal of Respondent's SPB appeal, 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*); *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*); *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01 (*Vandergoot*) and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip MacFarland* (2016) CalPERS Precedential Bd. Dec. No. 16-01 (*MacFarland*).

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.

In *Martinez*, the Court of Appeals held that *Vandergoot* is a reasonable extension of *Haywood and Smith*, and moreover is entitled to substantial weight due to the agency's area of expertise. The Court stated:

The Legislature and the Board have decided that resignation effects a “permanent separation” from state service. [Citations.] Which is exactly what Martinez did when she agreed to leave state service and “never again apply for or accept any employment” with DSS. Notwithstanding the theoretical possibility of reinstatement, Martinez was not going to return to her former job. From this perspective, *Vandergoot* is eminently logical: resignation in these circumstances does indeed appear to be “tantamount to a dismissal for purposes of applying the *Haywood* criteria. (*Martinez, supra*, 33 Cal.App.5th at p. 1176)

In *MacFarland*, the Board held that when an employee retires just before a termination for cause becomes effective, the employee is ineligible for a disability retirement unless the employee qualifies for one of the exceptions carved out in *Haywood* or *Smith*. The Board found that the character of the disciplinary action does not change because a resignation was submitted prior to the effective date of the NOAA. Thus, a resignation preceding the effective date of the NOAA bars a member from applying for industrial disability retirement on the basis of *Haywood* or *Smith*.

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 16, 2023. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing.

Respondent testified at the hearing that he was on medical leave prior to his termination and left employment due to his medical condition, not due to termination. Respondent did not call any witnesses to testify on his behalf.

CalPERS presented evidence including the testimony of CDCR Parole Agent II Supervisor (“Supervisor”) who assists preparing NOAAs issued by Respondent CDCR. The Supervisor testified that Respondent was found dishonest regarding his history of his intimate relationship with the parolee’s relative. The NOAA was served on Respondent on March 23, 2022. The *Skelly* hearing was completed on March 30, 2022, and the result was to uphold Respondent’s termination. Respondent CDCR did not discover Respondent had retired until April 8, 2022. The Supervisor explained that usually when employees retire, they turn in their state issued equipment (ammo, baton, pepper spray, weapon, etc.), but Respondent did not return any state issued equipment so Respondent CDCR was unaware of his retirement. Once Respondent CDCR became aware of his retirement, it issued a letter that informed Respondent he retired “under unfavorable circumstances.” The Supervisor confirmed that Respondent did not have return rights to Respondent CDCR because if he were to attempt to return to his prior job, CDCR would resurrect the NOAA and he would be dismissed.

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 service retired pending disability retirement during an active investigation concerning his misconduct. He filed his application for service retirement 22 days before the NOAA was served

upon him that ordered his dismissal.” The ALJ found that fact “certainly constitutes a service retirement under unfavorable circumstances.” The ALJ noted that although Respondent CDCR “ultimately rescinded the NOAA and SPB dismissed his appeal, it is clear from the *MacFarland* decision that *Haywood* applies even when an appeal of an adverse action is withdrawn. Put another way, the rescission of the NOAA and dismissal of the appeal has no effect on the fact that Respondent still severed his employment relationship with CDCR under unfavorable circumstances.” The ALJ held that Respondent’s employment relationship with Respondent CDCR has been severed and Respondent has no return rights with Respondent CDCR. Even if Respondent were to attempt to return to his position at Respondent CDCR, the NOAA would be re-effectuated by being served again upon him and he would be dismissed. “Return rights are a requirement under *Haywood*, *Smith*, and *Vandergoot*, and because [R]espondent resigned under unfavorable circumstances, he has no return rights.”

In the Proposed Decision, the ALJ concludes that Respondent may not apply for industrial disability retirement benefits, and his eligibility for industrial disability is precluded by operation of *Haywood* and its progeny.

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. All the arguments presented in Respondent’s Petition for Reconsideration were considered and rejected by the ALJ. The Proposed Decision that was adopted by the Board at the November 15, 2023, meeting was well reasoned and based on the credible evidence presented at hearing.

Staff recommends the Board deny Respondent’s Petition for Reconsideration.

January 16, 2024

PREET KAUR
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