

ATTACHMENT B

Staff Argument

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Lincoln D. Johnson (Respondent) was employed by California City Correctional Facility, California Department of Corrections and Rehabilitation (Respondent CDCR). As of early 2019, he worked as a Supervisor of Correctional Education Programs. By virtue of his employment, Respondent was a state safety member of CalPERS.

On July 17, 2019, Respondent was served with a Notice of Adverse Action (NOAA). On September 25, 2019, Respondent entered into a Stipulation and Agreement with Respondent CDCR in lieu of dismissal from employment. Pursuant to the Agreement, Respondent received a three-month suspension and a demotion to Teacher (High School – General Education). The Agreement was approved by the State Personnel Board on October 3, 2019.

In May 2020, Respondent CDCR served Respondent with a “Letter of Instruction - Insubordination” for failing to report to work in person, and an “Employee Counseling Record” for sending emails stating he was at work when he was not in his classroom and had not signed in.

In late August 2020, Respondent was placed on medical leave due to a right leg condition. While he was on leave, Respondent CDCR started a review of Respondent’s alleged failure to perform his job duties and responsibilities. After finding evidence to support the allegations, Respondent CDCR began an investigation of Respondent for a possible adverse employment action. Respondent CDCR did not notify Respondent of the investigation.

In November 2020, Respondent had his right leg amputated above the knee. He returned from medical leave on April 19, 2021. Two days later, Respondent CDCR submitted an employer-originated disability retirement (DR) application due to the amputation. On the application, Respondent CDCR answered “Yes” to the question, “Is the employee being investigated for or has he been convicted of a work related felony?” Respondent CDCR answered “No” to questions asking if Respondent had an adverse action pending against him, was terminated for cause, resigned in lieu of termination, or agreed to waive his reinstatement rights.

On June 1, 2021, Respondent submitted a DR application, due to amputation of his right leg. On July 28, 2021, Respondent submitted his resignation to Respondent CDCR “in preparation for my disability retirement.” His effective day of retirement was July 30, 2021. On August 4, 2021, Respondent CDCR served Respondent with a Confirmation of Resignation, noting that the resignation was “under unfavorable circumstances.”

On September 27, 2021, CalPERS canceled Respondent's DR application, because CalPERS could not determine if Respondent was eligible for DR. CalPERS had requested additional documentation of Respondent's separation from employment, and Respondent CDCR stated it could not provide any additional information due to an ongoing investigation involving Respondent's employment status. CalPERS informed Respondent that any future request for DR would require a new application.

On January 12, 2022, Respondent CDCR served Respondent with an "Investigative Closure Letter," stating that all allegations of misconduct against him were sustained. Because Respondent had already resigned, Respondent CDCR did not take any adverse employment action against him based on the findings of the investigation.

On March 16, 2022, Respondent signed an application for industrial disability retirement (IDR) claiming disability on the basis of an orthopedic condition (right leg amputation). CalPERS again asked Respondent CDCR for more information regarding Respondent's alleged misconduct. This time, Respondent CDCR provided the requested information to CalPERS and stated that "if Johnson was still employed by CDCR at the time of completion [of the investigation], he would have been served a dismissal."

Based on the NOAA, Confirmation of Resignation, and post-resignation Investigative Closure Letter, 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*); *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* made precedential by the CalPERS Board of Administration on October 16, 2013 (*Vandergoot*); *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip MacFarland* (2016); and *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*).

On July 14, 2022, CalPERS notified Respondent of its determination.

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 *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 industrial disability retirement on the basis of *Haywood* or *Smith*.

The *Martinez* court affirmed the holding in *Haywood* and refused to overturn more than twenty years of legal precedent. The *Martinez* court also affirmed *Vandergoot* as a logical extension of *Haywood*. Both *Martinez* and *Vandergoot* involved employees who agreed to resign following a settlement of NOAA terminating their employment, and who waived any right to reinstatement as part of a settlement agreement.

On August 10, 2022, Respondent appealed CalPERS’ 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 December 18, 2023. 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, answered Respondent’s questions, and clarified how to obtain further information on the process.

Respondent testified on his own behalf that he resigned due to his disability, not to avoid being fired. His leg amputation made it difficult for him to ambulate, and that became immediately apparent upon his return to work from medical leave. Respondent testified that he had no idea he was being investigated for alleged misconduct when he resigned. Respondent did not call any witnesses to testify on his behalf.

CalPERS presented staff testimony to establish that CalPERS canceled Respondent’s IDR application because his employment ended for reasons other than a disability. Because Respondent resigned under unfavorable circumstances and while under investigation for misconduct, and because there was no evidence the investigation arose from Respondent’s claimed disability, Respondent was ineligible to submit an IDR application. CalPERS also presented testimony from Respondent CDCR, to show that Respondent would have been fired due to the findings of the investigation had he not

resigned. CalPERS submitted evidence from Respondent's employment history at Respondent CDCR including the July 2019 NOAA, a letter from Respondent CDCR's Warden stating his dismissal was "under unfavorable circumstances," the September 2019 Stipulation and Release, and various counseling memos and letters of instruction.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent's appeal. The ALJ reviewed the applicable case law and found that Respondent separated from employment with no termination for cause proceedings pending against him and without notice that he was under investigation for possible termination. These facts distinguish Respondent's case from the holdings of *Haywood* and its progeny. The ALJ found that it was too "speculative" to say that Respondent would have been fired for cause had he not resigned, largely because Respondent CDCR never filed a NOAA for Respondent's dismissal. The ALJ reasoned that Respondent was not fired, he did not resign to resolve ongoing termination for cause proceedings, he did not agree never to return to work at Respondent CDCR, there was no NOAA for dismissal pending against him when he resigned and no notice that he was under investigation for a possible adverse employment action.

In the Proposed Decision, the ALJ concludes that Respondent is entitled to have his industrial disability retirement application considered on the merits.

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

April 16, 2024

MEHRON ASSADI
Staff Attorney