

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Sean F. Gotts (Respondent) was employed by Respondent California Highway Patrol (Respondent CHP) as a CHP Officer. By virtue of his employment, Respondent was a state safety member of CalPERS.

Respondent injured his neck and back on December 3, 2018, while attempting to arrest a fleeing suspect. He waited nine months to receive a surgical consultation and completed neck surgery more than one year after his injury.

Prior to the surgery, Respondent claims his neck and back pain were unbearable, often preventing him from sleeping. To alleviate the pain and help him sleep, Respondent began using legally purchased marijuana. Respondent tested positive for marijuana during a routine drug screen. The positive drug test was relayed to his employer, Respondent CHP.

Respondent CHP issued Respondent a Notice of Adverse Action (NOAA) on May 28, 2020, with an effective date of termination of June 22, 2020. The cause of termination was due to Respondent's marijuana use, which expressly violated Respondent CHP policy.

Respondent submitted his application for service pending industrial disability retirement on June 6, 2021, with a requested retirement date of June 20, 2020.<sup>1</sup> Respondent claimed disability on the basis of "Injuries to Cervical, Thoracic, and Lumbr [sic]. Nerve Damage, Neuropathy and Sciatica Pain" conditions. Respondent was approved for service retirement and has been receiving his service benefits since then.

On June 9, 2021, Respondent CHP confirmed Respondent's service retirement by letter. The letter also informed Respondent that he retired in the face of termination proceedings, and those circumstances would be noted in his personnel file.

Based on the NOAA and other documents, 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* 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*

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<sup>1</sup> Respondent's application for industrial disability retirement requested a retirement date of June 20, 2020. MyCalPERS shows Respondent's retirement date as June 20, 2020. Respondent CHP's letter confirming Respondent's retirement in the face of termination shows a retirement date of June 19, 2020.

*MacFarland* dated November 20, 2015, and made precedential by the CalPERS Board of Administration on June 15, 2016 (*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.

The Court of Appeal upheld the principles from *Vandergoot* in *Martinez*, in which a state employee settled a termination for cause by entering into a settlement agreement through which she resigned from state service. In the settlement agreement, the employee agreed that she would neither apply for employment, nor accept employment, with the agency from which she was resigning. Following her resignation through the settlement agreement, the employee applied for a disability retirement with CalPERS. CalPERS rejected the application and cited to *Haywood* and *Smith* in support of the application’s rejection. The Court of Appeal ruled that the settlement agreement was tantamount to a dismissal for the purposes of the disability retirement application, completely severing the employment relationship and precluding the employee’s possible reinstatement to her former employer.

In *MacFarland*, the Court held that the character of the disciplinary action does not change because a resignation was submitted prior to the effective date of the Notice of Adverse Action. The Board held that a resignation preceding the effective date of the Notice of Adverse Action 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 July 23, 2021. Respondent represented himself at the hearing. Respondent CHP did not appear at the hearing. The ALJ found that the matter could proceed as a default against Respondent CHP, 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. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

Respondent testified on his own behalf. Respondent explained that his injury occurred eighteen months prior to the NOAA and that his surgery was delayed through no fault of his own. Respondent testified that he self-medicated with marijuana to handle his worsening pain due to the delay in medical care. Respondent felt that the NOAA was a direct result of his injury and delays in treatment.

Evidence including the NOAA, the June 9, 2021 letter from Respondent CHP, and the testimony of Respondent were admitted into evidence.

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 was injured in 2018, prior to the conduct for which the NOAA was terminating Respondent. And even though Respondent retired prior to the effective date of the NOAA, Respondent CHP would have pursued the termination had he not retired. The ALJ found that CalPERS properly rejected the application based on the holdings in *Haywood*, *Smith*, *Vandergoot*, *Martinez*, and *MacFarland*.

In the Proposed Decision, the ALJ concludes that Respondent's retirement in the face of termination completely severed his employment relationship with Respondent CHP. The severance of the employment relationship precludes Respondent's application for an industrial disability retirement. Accordingly, the ALJ denied the appeal.

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

November 17, 2021

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