

ATTACHMENT B

STAFF'S ARGUMENT

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

David Moore (Respondent) was employed by the City of Fontana (City) as a Police Corporal. By virtue of this employment, Respondent became a local safety member of CalPERS subject to Government Code sections 21154 and 21156.

The City's Police Department (Department) served Respondent with a Notice of Proposed Termination on January 26, 2017. The Notice alleged that Respondent violated Department policies and City rules and regulations by falsifying on an official document that he was still married to his ex-wife when, in fact, he had been divorced from her for over six months. Respondent allegedly falsified the document to obtain City-subsidized health insurance for his ex-wife.

On January 27, 2017, Respondent requested a *Skelly* meeting, pursuant to *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, to contest the Proposed Termination. The *Skelly* meeting occurred on February 2, 2017.

On February 28, 2017, the Department served Respondent with a Notice of Proposed Termination. The Notice informed Respondent that after the *Skelly* meeting, the Department was still proposing to terminate him from his position based on the previously stated allegations.

In March, the City notified Respondent that it upheld the Department's recommendation to terminate him, effective March 27, 2017. The City transmitted a Personnel Action Form to CalPERS the following day, reflecting that Respondent was terminated effective March 27, 2017.

On June 14, 2018, Respondent sued the City for wrongful termination (wrongful termination suit), alleging discrimination, harassment, and retaliation. (Superior Court, County of San Bernardino, Case no. CIVDS1610471.)

Approximately four years later, on February 14, 2022, Respondent retired for service effective February 19, 2022. A few months later, on June 13, 2022, CalPERS received Respondent's application for industrial disability retirement (IDR), based on his orthopedic (cervical spine, knee, and shoulder) and hypertension conditions. In the application, Respondent requested IDR retroactive to March 27, 2017.

By letter dated April 11, 2023, CalPERS advised Respondent that he was not eligible to retire for disability retirement because he did not have the requisite employer-employee relationship with the City. CalPERS cited *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; *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot*

(2013) CalPERS Precedential Decision No. 13-01; and *In the Matter of Accepting the Application for Industrial Disability Retirement of Philip MacFarland* (2016) CalPERS Precedential Decision No. 16-01 as support for its determination.

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 disability retirement and a complete severance of the employment relationship 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 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 (NOAA) 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.

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. In *MacFarland*, the Board held that a resignation preceding the effective date of the Notice of Adverse Action bars a member from applying for IDR on the basis of *Haywood* or *Smith*.

Respondent appealed CalPERS’ determination and requested an administrative hearing. The matter was set for hearing but continued several times because of Respondent’s pending wrongful termination suit.

In February 2024, Respondent and the City settled the wrongful termination suit. The settlement did not reverse his termination, and Respondent was not reinstated to his position as Police Corporal with the City.

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.

The hearing in this matter was held on August 22, 2024. Respondent appeared and represented himself at the hearing. The City was represented by counsel at the hearing.

At the hearing, Respondent testified that his termination from the City was without cause. According to Respondent, he is a whistleblower, but the Department fabricated events to retaliate against him. However, Respondent did not dispute that he settled the wrongful termination suit with the City. Respondent asserted he asked the City to reinstate him to his job during settlement negotiations, but the City refused to do so.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that the City terminated Respondent from his position effective March 27, 2017. Although Respondent insisted his termination was wrongful, he admitted he settled the wrongful termination suit with no right of reinstatement. Thus, as in *Vandergoot*, Respondent's settlement with the City with no right of reinstatement to his position constitutes a complete severance of the employer-employee relationship. Under *Haywood*, Respondent's potential for reinstatement if it is ultimately determined that he no longer is disabled, a necessary requisite for disability retirement, is lacking.

The ALJ further found no evidence that the City severed Respondent's employment because of a disabling medical condition or to prevent him from filing a valid IDR application. Respondent did not apply for IDR until June 13, 2022, more than five years after the City terminated him. Respondent had no unconditional right to immediate payment of a disability retirement at the time he was terminated. Therefore, under *Smith*, Respondent's right to a disability retirement was not mature at the time of his dismissal, and the termination for cause by the City extinguished that right, rendering him ineligible to apply for IDR.

The ALJ concluded that Respondent is ineligible to apply for IDR.

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 changing the reference from "McFarland" to "MacFarland" in paragraph 4 on page 6 and paragraph 8 on page 7.

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

November 20, 2024

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