

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Eusebio Montejo (Respondent) petitions the Board of Administration (Board) to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated November 18, 2022. For reasons discussed below, staff argues the Board should deny the Petition for Reconsideration (Petition) and uphold its decision.

Respondent was employed by the California Department of Corrections and Rehabilitation, California Medical Facility (Respondent CDCR) as a Physician and Surgeon. By virtue of his employment, Respondent was a state safety member of CalPERS.

Respondent has a long history of progressive discipline while working at Respondent CDCR. Some of the discipline included Letters of Reprimand served on him in 2018 and 2019, and a Notice of Adverse Action (NOAA) served on him October 14, 2020, alleging that Respondent failed to follow lawful orders of his supervisor and failed to follow the managerial chain of command. The October 2020 NOAA was upheld following a *Skelly* hearing, and the State Personnel Board sustained the NOAA.

On October 14, 2020, Respondent signed an application for industrial disability retirement (IDR) on the basis of orthopedic, psychological, internal, cardiovascular and obstructive sleep apnea conditions. Respondent claimed that he was unaware that he would be served with a NOAA on the same day he filed his IDR application.

On February 3, 2021, Respondent began working full-time as a physician for a Texas medical corporation that provides medical care at various clinics in Texas. Respondent CDCR informed Respondent that he could not continue his leave of absence because leave cannot be granted to a state employee who obtains other employment or does not intend to return to state service.

Respondent CDCR found that Respondent had been absent without leave for five or more consecutive working days on November 29, 2021. On December 21, 2021, he was served with a Notice of Automatic Resignation by Absence Without Leave (AWOL). After a *Coleman* hearing, the Notice of AWOL Resignation was sustained. Respondent did not appeal the AWOL Resignation to CalHR. Accordingly, Respondent was AWOL separated and considered to have resigned as of November 28, 2021.

Based on the AWOL Resignation, CalPERS determined that Respondent was ineligible for IDR 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* (*Vandergoot*), Precedential Bd. Dec. No. 13-01; and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland* (*McFarland*), Precedential Bd. Dec. No. 16-01. Respondent appealed.

A hearing on Respondent's appeal was held on October 31 and November 1, 2022. The resulting Proposed Decision was adopted by the Board on January 17, 2023.

On February 1, 2023, Respondent submitted a Petition, in which he again argues exceptions to the *Haywood* doctrine. Respondent's arguments were previously addressed and denied in the Proposed Decision. Respondent again claims his separation was the ultimate result of a disabling condition (he was *temporarily* off work for a right ankle injury prior to his separation). Respondent claims his AWOL separation was preemptive of a valid claim for disability retirement because other medical conditions were not evaluated or accepted by workers' compensation, and because his claimed conditions were not reasonably accommodated or satisfactorily considered by Respondent CDCR before he was directed to return to work. Finally, he asserted his right to disability retirement had matured when he filed his application in October 2020, more than a year before he had been permanently separated.

Respondent's arguments are not new. At hearing, the Administrative Law Judge (ALJ) found that Respondent's AWOL separation rendered him ineligible for disability retirement as there was a complete severance of the employer-employee relationship, and Respondent has no right to reinstatement. The ALJ also found that Respondent did not establish his claimed work restrictions were factors in his separation from employment. The ALJ correctly found that Respondent was discharged for failing to report to work and perform duties he was medically cleared to perform. Respondent failed to establish any of the *Haywood* exceptions applied to the facts of his case at hearing, and he has failed to establish any in his Petition as well.

Respondent offers a one-page Qualified Medical Examiner Supplemental Report submitted in conjunction with his workers' compensation case as new evidence not available at the hearing. The Report is irrelevant to making a *Haywood* determination. Receipt of any type of disability in a workers' compensation proceeding does not establish qualification for IDR in a CalPERS case because the standards of disability are different. Workers' compensation appeals concern whether an employee suffered any job-related injury, and whether that injury resulted in some permanent residual loss. Retirement boards on the other hand, focus on whether an employee has suffered an injury or disease of such magnitude and nature that he is incapacitated from substantially performing his job duties.

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the January 17, 2023, meeting was well-reasoned and based on the credible evidence presented at the hearing. Staff recommends the Board deny Respondent's Petition.

March 15, 2023

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