

ATTACHMENT B

STAFF'S ARGUMENT

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

Julia E. Gomez (Respondent) was employed by California Department of Social Services (Respondent CDSS) as a Disability Evaluation Analyst III. By virtue of her employment, Respondent was a state miscellaneous member of CalPERS.

On September 22, 2020, Respondent CDSS served Respondent with a Notice of Adverse Action (NOAA) for a five percent salary reduction for four months, effective October 5, 2020, based on her insubordination and other workplace violations. Respondent appealed the NOAA with the State Personnel Board (SPB). On February 8, 2021, SPB's Administrative Law Judge (ALJ) issued a Proposed Decision sustaining Respondent CDSS' imposition of a four-month five percent salary reduction on Respondent. On March 4, 2021, SPB adopted the findings of fact, determination of issues, and Proposed Decision as its Decision.

On October 19, 2021, Respondent CDSS served Respondent with a second NOAA for dismissal from her position, effective on October 28, 2021. The basis of this NOAA was insubordination, discourteous treatment of the public or other employees, willful disobedience and other failure of good behavior either during or outside of duty hours which was of such a nature that it caused discredit to the appointing authority or the person's employment.

Respondent appealed the NOAA with the SPB, but later withdrew her appeal. On December 17, 2021, SPB notified Respondent and Respondent CDSS that due to Respondent's withdrawal, SPB had closed the appeal and vacated all pending hearings.

On January 25, 2022, CalPERS received Respondent's Service Pending Disability Retirement (DR) application. Respondent claimed disability based on orthopedic and psychological conditions. Respondent retired for service on November 1, 2021, and has been receiving her service retirement allowance since that time.

On May 16, 2022, CalPERS determined that Respondent was ineligible for DR and canceled her DR application 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.

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.

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 extension of the *Haywood* and *Smith* cases. Both *Martinez* and *Vandergoot* involved employees who agreed to resign following a settlement of a NOAA terminating their employment. The employees in *Martinez* and *Vandergoot* waived any right to reinstatement as part of a settlement agreement. 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.

In *MacFarland*, the court found that the character of the disciplinary action does not change because the member submitted a resignation prior to the effective date of the NOAA.

Respondent appealed this determination and exercised her right to a hearing before an ALJ with the Office of Administrative Hearings (OAH). A hearing was held on January 26, 2023. Respondent represented herself at the hearing. Respondent CDSS did not appear at the hearing, and a default was taken as to Respondent CDSS.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her 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.

At hearing, Respondent testified that her purpose for the appeal was to dispute her unjust termination by Respondent CDSS and to show that Respondent CDSS was “against her” due to her whistleblower complaints. She testified her job requires memory, concentration, and constant use of her fingers and hands. She testified that

her claimed disabling conditions were caused by workplace harassment and impeded her ability to properly perform her job duties. She testified that she informed her supervisor in 2010 and also two months before her termination of her intent to apply for disability retirement. Respondent did not introduce any evidence to substantiate her assertions.

CalPERS evidence at hearing consisted of the two NOAAs, SPB Decision, and SPB's closure letter.

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 did not meet her burden of proof of establishing her termination was the result of a disabling medical condition or preemptive of an otherwise valid claim for disability retirement. The ALJ found that Respondent did not establish she had a diagnosed medical condition or that any medical condition interfered with her ability to perform her job duties. The ALJ found the evidence presented at hearing established Respondent's termination was due to her insubordinate conduct and was not related to her work performance or in anticipation of a disability retirement. The ALJ concluded that Respondent is not eligible to apply for disability retirement.

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 replacing "respondent CDSS" with "CalPERS" in paragraph 4, under the Factual Findings section, on page 3 of the Proposed Decision.

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

April 18, 2023

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Attorney