

ATTACHMENT B

STAFF'S ARGUMENT

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

Patricia Moss (Respondent) was employed by the Department of Food and Agriculture, 22nd District Agricultural Association - Del Mar Fairgrounds (Respondent 22nd DAA) as a Security Guard. By virtue of her employment, Respondent was a state miscellaneous member of CalPERS.

In 2017, Respondent was placed on a medical leave of absence due to a foot injury. On February 22, 2020, Respondent 22nd DAA received a medical report, stating Respondent had reached maximum medical improvement. Based on this report, Respondent 22nd DAA believed there could have been an accommodation or other work available for Respondent. On December 18, 2020, Respondent 22nd DAA sent Respondent an options letter asking her to reengage in the interactive process. In response to this request, on January 22, 2021, Respondent indicated she wanted to apply for disability retirement (DR) instead. Respondent 22nd DAA offered to submit a DR application on Respondent's behalf, but Respondent expressed in writing that she did not want 22nd DAA to apply on her behalf.

On February 12, 2021, Respondent 22nd DAA placed Respondent on an approved leave of absence until November 25, 2021. Respondent was notified that her failure to return or contact the personnel office by November 26, 2021, may result in an Absence Without Leave (AWOL) separation. On April 26, 2021, Respondent 22nd DAA confirmed that the interactive process had been completed and Respondent had elected to apply for DR. Respondent 22nd DAA again offered to assist Respondent with her DR application. Respondent 22nd DAA contacted Respondent again on May 11, 2021, and May 19, 2021, about her intention to apply for DR, but received no response.

On July 13, July 29, August 26, and November 10, 2021, Respondent 22nd DAA attempted to reengage Respondent in the interactive process. Despite the numerous attempts made by Respondent 22nd DAA, Respondent failed to reengage and failed to apply for DR. On November 26, 2021, Respondent did not return to work.

On December 10, 2021, Respondent 22nd DAA informed Respondent that because she failed to return to work and failed to submit medical documentation to extend her leave, Respondent 22nd DAA intended to invoke AWOL status on December 20, 2021. Respondent requested a *Skelly* hearing. Respondent did not appear at the *Skelly* hearing, and on January 3, 2021, the *Skelly* officer sustained the AWOL dismissal. Respondent was permanently separated from her employment with Respondent 22nd DAA due to AWOL, effective November 25, 2021.

On December 22, 2021, Respondent submitted her first DR application, which was canceled because it was not notarized or signed by an authorized representative of CalPERS.

On January 5, 2022, Respondent submitted her second DR application, which was canceled because it was incomplete. CalPERS informed Respondent of the missing documentation, but Respondent never supplied the required information.

On February 23, 2022, Respondent filed her third and final DR application. Respondent claimed the same disabling orthopedic condition on each of her DR applications: (left foot, neck, shoulder, upper back, lower back). CalPERS canceled this application due to the rulings of *Haywood* and its progeny.

Based on the Notice of Personnel Action – Report of Separation, CalPERS determined that Respondent was ineligible for 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* (*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 the Accepting the Application for Industrial Disability Retirement of Phillip MacFarland* (*MacFarland*) dated October 7, 2015, and made precedential by the CalPERS Board of Administration on June 22, 2016.

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 *Martinez*, the court held that *Vandergoot* is a reasonable extension of *Haywood* and *Smith*.

In *MacFarland*, 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 her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on March 25, 2024. Respondent represented herself at the hearing. Respondent 22nd DAA did not appear at the hearing.

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, answered Respondent's questions, and clarified how to obtain further information on the process.

CalPERS called Melinda Carmichael, Chief Administrative Officer, and former Human Resources Director for Respondent 22nd DAA to testify at the hearing. Ms. Carmichael explained that Respondent was permanently separated by AWOL resignation and had no automatic reinstatement rights. Ms. Carmichael also testified that Respondent's separation was not the ultimate result of a disabling medical condition and that Respondent 22nd DAA did not terminate Respondent to preempt a DR application. Numerous attempts were made to engage Respondent in the reasonable accommodation interactive process and to assist her with her DR application. The documents demonstrating these attempts were all admitted as direct evidence.

Respondent testified on her own behalf. Respondent argued she submitted a timely DR application and was eligible for disability because her workers' compensation doctor determined that she was "disabled to work". Because the doctor's determination was made prior to her being considered AWOL separated, Respondent asserted she did not return to work because she was not cleared to return by her doctor.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent's AWOL separation rendered her ineligible for DR because she has no reinstatement rights as of November 25, 2021. The ALJ also found it was Respondent, not Respondent 22nd DAA, who caused the delay in submitting her DR application.

In the Proposed Decision, the ALJ concludes that Respondent is not eligible to apply for DR benefits because her eligibility is precluded by the operation of *Haywood* and its progeny.

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 correcting the spelling error of "against" with

“again” in the quote on page 9, paragraph 22, of the Proposed Decision. Staff also recommends adding the word “Respondent” after “Here, at the beginning of the last sentence on page 24, paragraph 17.

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

June 12, 2024

CRISTINA ANDRADE
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