

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Patricia R. Moss (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated April 25, 2024. For reasons discussed below, staff argues the Board should deny the Petition for Reconsideration and uphold its decision.

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 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.

A hearing on Respondent's appeal was held on March 25, 2024. The Proposed Decision was adopted by the board on June 12, 2024.

On June 21, 2024, Respondent submitted a Petition for Reconsideration, in which she again argues she submitted a timely DR application and was eligible for disability retirement 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. Respondent also claims her employer was obligated to file an application on her behalf and had caused the delay in filing her DR application.

Respondent's arguments are not new. At the hearing, the ALJ found that Respondent's AWOL separation rendered her ineligible for DR because she has no reinstatement rights as of November 25, 2021. Respondent declined her employer's offer to submit an application on her behalf. The ALJ found Respondent caused her own dismissal, resulting after multiple written warnings, her own inaction to submit a timely application, her refusal to engage in the interactive process, and her failure to request continued leave.

Respondent argues that conclusions made by a Qualified Medical Examiner provide uncontroverted evidence of disability. This information is irrelevant to making a *Haywood* determination. Receipt of any type of disability in a workers' compensation proceeding does not establish qualification for industrial disability retirement 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 June 12, 2024, meeting was well reasoned and based on the credible evidence presented at hearing.

Staff recommends that the Board deny the Petition for Reconsideration and uphold its decision.

July 17, 2024

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