

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Tiffany M. Wagner (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated June 3, 2024. For reasons discussed below, staff argues the Board should deny the Petition and uphold its decision.

Respondent was last employed by County of Plumas (Respondent County) as a Correctional Officer II in the Sheriff's Office. By virtue of this employment, Respondent is a local safety member of CalPERS.

In July 2018, Respondent made a complaint of sexual harassment against a supervising sergeant. That sergeant resigned shortly after the complaint was filed.

Respondent County placed Respondent on administrative leave on August 3, 2018, pending an investigation into alleged misconduct by Respondent. Respondent County referred the matter to the District Attorney's Office for a criminal investigation. On September 11, 2018, the District Attorney notified the Sheriff's Office that the alleged conduct by Respondent was not criminal, and no charges would be filed.

On September 25, 2018, and again on December 18, 2018, a sheriff's sergeant notified Respondent that she was the subject of an administrative investigation relating to alleged violations of department policy. On June 7, 2019, the same sheriff's sergeant issued his Administrative Investigation Report, detailing the findings of his investigation.

On July 15, 2019, the undersheriff issued a Notice of Intent to Discipline, recommending Respondent's termination from employment.

Following a pre-disciplinary hearing on October 9, 2019, the sheriff issued a Notice of Discipline: Termination of Employment, effective immediately. Respondent was notified of her right to appeal the termination. Nine days later, on October 18, 2019, Respondent County counsel provided Respondent with information regarding the appeal process and her appeal rights. Respondent did not appeal her termination through Respondent County's appeal process.

Respondent applied for industrial disability retirement on December 5, 2019. She listed her last day on the payroll as October 7, 2019, and her retirement date as "N/A." She identified her disabilities as: major depression and PTSD. She asserted the injuries began in April 2018 and were continuous.

On February 27, 2020, Respondent filed a complaint in the United States District Court, Eastern District of California, alleging 12 causes of action: sexual harassment, discrimination, retaliation, failure to prevent discrimination, civil rights violations,

violations of the public safety officer's procedural bill of rights, and conspiracy to interfere with civil rights. Respondent sought compensatory, general and punitive damages attorney's fees and costs, interest, and other relief as the court deemed proper. She did not seek reinstatement to her former employment.

By letter dated August 12, 2020, CalPERS advised Respondent that she was not eligible to retire for disability from her position as Correctional Officer II with Respondent County because she did not have the requisite employer-employee relationship. 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 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.

Respondent appealed CalPERS' determination and requested an administrative hearing. On January 20, 2021, CalPERS filed the Statement of Issues. The matter was set for hearing and continued several times because Respondent's federal litigation against Respondent County was not final.

On July 20, 2023, following a six-day trial, the District Court issued its Findings of Fact and Conclusions of Law (Decision) in Respondent's favor. The Decision found that Respondent proved both her former supervisor and Respondent County were liable for creating a hostile work environment in violation of the California Fair Employment and Housing Act (FEHA), and Respondent County was liable for terminating her employment based in part on a retaliatory motive in violation of FEHA.

On January 9, 2024, the District Court issued its final Order, which granted, in part, Respondent's motion for fees, costs, injunctive relief, and other relief, including an order for Respondent County to remove the record of termination from Respondent's personnel record within 30 days.

Respondent's appeal of CalPERS' determination proceeded to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on March 21, 2024. Respondent and Respondent County were both represented by counsel at the hearing.

Debra Lucero, the County Administration Officer (CAO) and Acting Human Resources Director for Respondent County testified about her duties and involvement in this matter. Ms. Lucero testified the word "termination" was removed from Respondent's personnel record, but Respondent's separation was not reversed, nor was she reemployed. Respondent's employment records reflect her separation on October 9, 2019, at which point she was no longer a county employee.

Ms. Lucero explained the distinction between "termination" and "separation," but testified that even though the word "termination" was removed from Respondent's personnel records, her employment status has not changed. Respondent County did not restore her employment, nor is she entitled to benefits as an employee. Ms. Lucero testified that the district Court Decision and Order did not change Respondent's employment status.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that the District Court Decision and Order ordered backpay and future pay but did not order reinstatement. Respondent did not seek to be reinstated. Because Respondent's employment with Respondent County remains severed, she is not eligible to apply for disability retirement. Ms. Lucero's testimony regarding Respondent's current employment status and failure to request reinstatement to her prior position was unrefuted. While Respondent's personnel file

now shows that she was not terminated, she is still no longer a county employee. The ALJ explained simply having the word “termination” removed from her personnel file did not reinstate her or make her a county employee.

The ALJ further held that the evidence did not establish that Respondent’s right to disability retirement matured before she was separated from service, nor did CalPERS determine she was no longer capable of performing her duties before she was separated from service. There was no showing that Respondent had an impending ruling on a claim for disability retirement that was delayed until after she was separated, nor was there “undisputed evidence” she was eligible for a disability retirement. As such, none of the exceptions set forth in the case law apply.

The ALJ concluded that Respondent’s employment relationship with Respondent County ended on October 9, 2019. Absent that employment relationship, Respondent is ineligible to apply for industrial disability retirement.

The Proposed Decision was adopted by the Board on July 17, 2024. Respondent submitted a Petition for Reconsideration on August 14, 2024, restating the same arguments she made at the hearing and in Respondent’s Argument against adoption of the Proposed Decision.

Pursuant to *Haywood*, a complete severance of the employment relationship renders a member ineligible for disability retirement unless the facts of the case fall within a recognized exception. In the Petition for Reconsideration, Respondent concedes that her employment relationship with Respondent County was severed as of October 2019 and that she does not have the potential to reinstate to her position. However, she argues that she is entitled to disability retirement because she applied within four months of terminating her employment relationship.

Respondent’s arguments are not new, and she has presented no new evidence that would alter the analysis of the ALJ. Her separation from Respondent County is final and her argument regarding the timing of her application has no merit because the *Haywood* court specifically rejected “a construction of [the PERL] that would establish eligibility for disability retirement whenever a timely application is submitted.” Respondent has no right to reinstate to Respondent County, a prerequisite for an application for disability retirement. The ALJ was correct as a matter of law in determining that Respondent’s separation precludes her from applying for disability retirement, and the Board appropriately adopted the Proposed Decision as its own.

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 July 17, 2024 meeting was well reasoned and based on the credible evidence presented at the hearing. Therefore, the Petition for Reconsideration should be denied.

For all the above reasons, staff argues that the Board should deny the Petition for Reconsideration and uphold its decision.

September 18, 2024

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