

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues Against:

JASON J. BEMOWSKI, Respondent

and

CITY OF CHINO, Respondent.

Agency Case No. 2022-0354

OAH No. 2020070063.1

PROPOSED DECISION ON REMAND

Ji-Lan Zang, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, initially heard this matter by videoconference on July 26, 2021. Dustin Ingraham, Staff Attorney, represented Keith Riddle (complainant), Chief, Disability and Survivor Benefits Division, Board of Administration (Board), California Public Employees' Retirement System (CalPERS). Abraham L. Niman, Attorney at Law, represented Jason J. Bemowski (respondent), who was present during the initial hearing. Respondent City of Chino (City) did not appear at the initial hearing.

On August 26, 2021, the ALJ issued a proposed decision. The Board considered the proposed decision, and on January 7, 2022, remanded the matter to the ALJ for the taking of additional evidence on the following issues: (1) whether the Member's

inability to reinstate into his former job precludes CalPERS' Staff from awarding an industrial disability retirement regardless of the date that the Member submitted his Application and (2) whether it is appropriate to apply judicial precedent decided under the Judges' Retirement Law to eligibility determinations under the Public Employees' Retirement Law without citation to proper legal authority.

The remanded matter came on regularly for hearing by videoconference on October 25, 2022. ALJ Ji-Lan Zang presided over the remand hearing. Charles H. Glauberman, Senior Attorney, appeared and represented CalPERS. Stephen J. Horvath, Attorney at Law, appeared and represented respondent, who was present during the hearing. Alfonso Estrada, Attorney at Law, represented the City.

The parties presented testimony and documentary evidence. The record remained open for parties to submit simultaneous closing briefs by November 21, 2022, and reply briefs by December 12, 2022. All briefs were timely submitted. CalPERS' closing and reply briefs were marked for identification as Exhibits 5 and 6, respectively; respondent's closing brief was marked for identification as Exhibits R-2 and R-3, respectively; and the City's closing and reply briefs were marked for identification as Exhibits X and Y, respectively. The record closed and the matter was submitted for decision on December 12, 2022.

FACTUAL FINDINGS

Jurisdiction and Issue

1. Complainant filed the Statement of Issues in his official capacity.

///

2. Pursuant to the Statement of Issues, the issue in this case is whether respondent is eligible to apply for Industrial Disability Retirement (IDR) based on an orthopedic (bilateral shoulders, back) condition, or whether his eligibility for IDR is precluded by operation of *Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292 (*Haywood*) and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*).

Respondent's Termination of Employment and Application for IDR

3. CalPERS is the state agency responsible for the administration of the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq.

4. The City is a local agency that contracts with CalPERS for retirement benefits for its eligible employees. The City is subject to the provisions of the PERL.

5. Respondent was employed by the City as a Police Officer, effective December 24, 2001. By virtue of his employment, respondent became a local safety member of CalPERS subject to Government Code sections 21154 and 21156.

6. In January 2019, the Roseville Police Department initiated a criminal investigation of respondent based on an allegation that on December 23, 2018, respondent engaged a minor to perform acts of prostitution. After a two-month investigation, on March 7, 2019, respondent was arrested and booked at San Bernadino County Central Jail for violations of Penal Code sections 261.5, subdivision (a), unlawful sexual intercourse with a minor, and 647, subdivision (b), prostitution.

///

///

7. Prior to his arrest on March 7, 2019, the City served respondent with a Notice of Relief from Duty. This Notice stated, in relevant part:

You are immediately relieved from duty as a City employee and pending the results of an investigation for acts, or failures to act, which may be grounds for disciplinary action. The relieving of an employee from duty is not a disciplinary action. You will be on a Leave of Absence, with pay, for purposes of salary, benefits and service time, until further notice.

(Ex. 1, p. A76.)

8. On March 11, 2019, the City issued a memorandum advising respondent that he was the subject of a personnel complaint. This memorandum notified respondent: “[T]he investigation being conducted concerning allegations that you have engaged in conduct that, if found true, could violate sections of the Chino Police Department Operations Manual.....” (Ex. 1, p. A78.) Respondent acknowledged receipt of this memorandum on March 13, 2019.

9. On March 11, 2019, respondent filed a workers’ compensation claim against the City, asserting that he had suffered dislocated shoulders and lower back pain since October 2002. (Ex. 1, p. A82.)

10. On April 3, 2019, respondent signed and filed an IDR application, which was received by CalPERS on the same date. (Ex. 1, pp. A45-57.) In his IDR application, respondent claimed disability based on left and right shoulder dislocations/back injury, and he noted Arrowhead Orthopedics was his treating physician. (*Id.* at p. A46.)

11. On September 17, 2019, the City's Chief of Police issued a Notice of Intent to Discipline (Notice of Intent), advising respondent of the City's intent to terminate his employment. The Notice of Intent stated eight separate alleged grounds for discipline, six of which were sustained. The sustained grounds included violations of Chino Police Department Manual policies regarding conduct, performance, and discriminatory conduct. The Notice of Intent cited respondent's alleged commission of criminal sex acts with a minor on December 23, 2018, and respondent's alleged inappropriate communications with other Chino Police Department personnel as acts in support of the proposed termination. (Ex. 1, pp. A84-89.)

12. On October 1, 2019, the City's Chief of Police issued a Notice of Discipline, which stated, in part:

On September 17, 2019, I issued you a Notice of Intent to Discipline wherein I informed you of my intent to terminate you from your position. You received this notice on September 17, 2019. The Notice of Intent contained the specific grounds and bases for the issuance of this level of discipline. Additionally, the Notice provided you with information on how to exercise your procedural rights pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. At your request, the *Skelly* meeting was scheduled for October 1, 2019. On September 30, 2019, your attorney, Mr. Goldwasser informed me via email that you would not be appearing for the prescheduled October 1, 2019 *Skelly* meeting. As a result, you have waived your right to appeal at the *Skelly* level. Therefore, please consider this notice of

the Department's decision to sustain the termination,
effective today October 1, 2019.

(Ex. 1, p. A91.)

13. In an affidavit dated September 14, 2020, Nancy Franklin, police sergeant at the Chino Police Department, Professional Standards Unit, stated that respondent was permanently separated from the City effective October 1, 2019. (Ex. 1, p. A73.) Sergeant Franklin further declared that the City's decision to terminate respondent was based entirely on the Notice of Intent and its supporting facts. She reiterated that the City "did not terminate [respondent] as a result of any alleged disabling medical condition, or to prevent or preempt [respondent] from filing a claim for disability retirement." (*Ibid.*)

14. In a letter dated December 4, 2019, CalPERS notified respondent and the City of its determination to cancel respondent's April 3, 2019 IDR application. (Ex. 1, pp. A59-60.) CalPERS asserted that respondent's IDR application is barred by operation of law based on *Haywood, supra*, 67 Cal.App.4th 1292, *Smith, supra*, 120 Cal.App.4th 194, *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Decision 13-01 (*Vandergoot*), and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland* (2016) CalPERS Precedential Decision 16-01 (*MacFarland*). (*Ibid.*)

Respondent's Evidence from the July 26, 2021 Hearing

15. Respondent began his employment as a police officer for the City in January 2001. He started his career as a cadet and moved up the ranks to sergeant. Respondent claimed that he sustained injuries to his left and right shoulders in 2002 during training. He reported that in 2015, his left shoulder was injured again when he

dislocated the shoulder during a foot chase. Respondent testified that he also suffers from back injuries. According to respondent, he spoke with the City's Human Resources (HR) department about these injuries and attempted to apply for IDR on March 8, 2019. However, based on his conversations with the City's HR department, he mistakenly believed only the City could initiate the IDR process for him. Sometime in April 2019, respondent realized that he could apply for IDR on his own, and he submitted his IDR application to CalPERS on April 3, 2019.

16. Respondent presented a treating physician's report from Arrowhead Orthopedics, showing he was evaluated as a patient on May 9 and June 12, 2019, for left shoulder instability, right shoulder rotator tendinitis, and low back pain. (Ex. C.) This report indicates that the date of respondent's injury was March 7, 2018.

17. Respondent emphasized that on March 7, 2019, he was placed on administrative leave, which is not a disciplinary action. During his administrative leave, respondent received his pay and benefits, and he also made contributions towards his CalPERS benefits. Respondent testified that he did not receive the Notice of Intent until September 17, 2019, more than five months after he submitted his IDR application to CalPERS on April 3, 2019. Respondent's employment with the City was terminated on October 1, 2019, but he has appealed the termination.

City's Evidence from the Remand Hearing

18. At the remand hearing, Brian Cauble, Lieutenant at the Office of Professional Standards, testified on behalf of the City. According to Lieutenant Cauble, after the City issued the March 11, 2019 memorandum advising respondent that he was the subject of a personnel complaint, the Chino Police Department attempted numerous times to schedule an administrative interview with respondent to no avail.

The record shows the City issued a memorandum to respondent on March 18, 2019, suggesting four dates in April 2019 for an administrative interview regarding the allegations against him. (Ex. C.) From March 19 to March 27, 2019, Sergeant Franklin communicated with respondent's attorney to schedule an interview on April 10, 2019. However, on the day before the interview, April 9, 2019, respondent's attorney abruptly notified Sergeant Franklin that respondent had applied for IDR and would not be able to participate in the interview. (Ex. E, p. C8.) On April 9, 2019, Lieutenant Cauble emailed respondent, with a copy to his attorney, that an administrative order had been issued requiring respondent to appear at the scheduled interview on April 10, 2019. (Ex. F.) Lieutenant Cauble also gave respondent the option of conducting the interview at respondent's residence. (*Ibid.*) On the same day, respondent's attorney emailed Lieutenant Cauble and Sergeant Franklin to inform them that respondent did not intend to participate in the April 10, 2019 interview.

19. On April 22, 2019, Lieutenant Cauble informed respondent by a memorandum that the investigation of the personnel complaint against him was extended for 30 days. (Ex. H.) On June 4, 2019, Sergeant Franklin again requested that respondent schedule an administrative interview concerning the personnel complaint against him. (Ex. I.) She suggested three potential dates in June 2019 for the interview. (*Ibid.*) On June 7, 2019, respondent's attorney emailed Sergeant Franklin to notify her that respondent would not be able to participate in any interview due to his "physical and psychological conditions." (Ex. J, p. C15.)

20. As described above, on September 17, 2019, the City's Chief of Police issued the Notice of Intent, advising respondent of the City's intent to terminate his employment. (*Ante*, Factual Finding 11.) Respondent contested the termination, and the matter was sent to arbitration. The termination matter (ARB-20-0098) was heard by

Arbitrator Byron Berry on February 17, 2021. On May 7, 2021, Arbitrator Berry issued a decision sustaining the Chino Police Department's termination of respondent. (Ex. W, p. C72.) The decision included the following finding: "On March 2, 2021, [respondent] pleaded No Contest and was convicted of the violation of Penal Code section 261.5 (C)-F [Felony], Unlawful Sexual Intercourse with Minor: More Than 3 Years ([respondent] was more than 3 years older than the minor)." (*Ibid.*) This decision is now final.

21. Lieutenant Cauble explained that the Chino Police Department could not issue the Notice of intent until September 17, 2019, due to respondent's delay tactics and refusal to participate in an administrative interview. Lieutenant Cauble confirmed that respondent was terminated based on his misconduct, not in retaliation for his filing of a worker's compensation claim. Lieutenant Cauble also stated that respondent, as a convicted felon, is prohibited by law from serving as a peace officer.

Respondent's Evidence from the Remand Hearing

22. At the remand hearing, respondent submitted five paystubs from January 3, January 17, March 14, June 20, and October 2, 2019. (Ex. R-1.) These pay stubs show respondent made contributions to CalPERS during those pay periods.

23. During cross-examination, respondent admitted that he was convicted of a felony and that he could no longer serve as a peace officer due to that conviction. Respondent conceded that he did not participate in the administrative interview scheduled by the Chino Police Department, but he asserted he was under medical care and was unable to undergo any interview.

///

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) Here, respondent has the burden of proof because he is seeking retirement benefits.

Statutory Framework

2. Government Code section 21152 identifies the parties that may apply for disability benefits, stating, in pertinent part:

Application to the board for retirement of a member for disability may be made by:

[¶] . . . [¶]

(d) The member or any person in his or her behalf.

3. Government Code section 21154 sets forth the time frame required for applications, stating that an IDR application “[s]hall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion.....”

Extinguishment of Reinstatement Rights Renders Respondent Ineligibility for IDR

4. Respondent contends that *Haywood* and *Smith* do not apply in this case because he applied for IDR while he was a fully paid employee of the City and continued to pay his CalPERS contributions. (Ex. R-2, p. B8.) However, a review of the case law shows that the extinguishment of respondent's right to reinstatement renders him ineligible for IDR, regardless of the date that he submitted his IDR application.

5. In *Haywood*, a firefighter applied for disability retirement after he was terminated for cause following a series of increasingly serious disciplinary actions against him. (*Haywood, supra*, 67 Cal.App.4th at p. 1295.) *Smith* involved a firefighter who filed a backdated application for disability retirement on the effective date of the termination of his employment. (*Smith, supra*, 120 Cal.App.4th at p. 198.) The central holding in both *Haywood* and *Smith* is that the termination of a member's employment for cause renders the member ineligible for disability retirement. (*Haywood, supra*, 67 Cal.App.4th at pp. 1306-1307, *Smith, supra*, 120 Cal.App.4th at p. 208.)

6. CalPERS precedential decisions, *Vandergoot* and *MacFarland*, extend the holding in *Haywood* and *Smith* to situations where the employee resigns or retires before the effective date of the termination for cause. In *Vandergoot*, the Board found an employee's resignation was tantamount to a dismissal for cause when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and he agreed to waive all rights to return to his former employer. (*Vandergoot, supra*, CalPERS Precedential Decision 13-01 at p. 7, ¶ 18.) In *MacFarland*, the employee retired two days before his termination for cause became effective. He subsequently filed an application for disability retirement. CalPERS denied the

employee's disability retirement application, asserting that the employee had been terminated for cause. The Board upheld the denial, noting that the employer-employee relationship had been severed upon the service of a Notice of Adverse Action before the filing of the employee's disability retirement application.

(*MacFarland, supra*, CalPERS Precedential Decision 16-01 at p. 8, ¶ 29.)

7. Reading the *Haywood, Smith, Vandergoot*, and *MacFarland* line of cases together as a whole, the linchpin of eligibility for disability retirement is whether the member has the potential for reinstatement. If the member is unable to be reinstated by the employer to their position once the member is no longer disabled, then the member cannot be eligible for IDR. As the Court of Appeal in *Haywood* stated: "[A] firing for cause constitute[s] a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement—the potential reinstatement of [the employment relationship] if it ultimately is determined that he no longer is disabled." (*Haywood, supra*, 67 Cal.App.4th at pp. 1306-1307.)

8. The Court of Appeal in *Haywood* and *Smith*, however, created several exceptions to the rule that a lack of right to reinstatement renders a member ineligible for IDR. In *Haywood*, the Court of Appeal found that a terminated employee can still seek IDR if the discharge was either the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim for IDR. (*Haywood, supra*, 67 Cal.App.4th at p. 1307.) In *Smith*, the Court of Appeal posited two scenarios under which an employee's right to IDR may have matured and thus survive dismissal for cause. (*Smith, supra*, 120 Cal.App.4th at pp. 206-207.) First, if there was "an impending ruling on a claim for a disability pension that was delayed, through no fault of [the member's] own, until after [the member's] dismissal." (*Id.* at p. 207.) Second, if there were "undisputed evidence that the [member] was eligible for a CalPERS disability

retirement, such that a favorable decision on [the member's] claim would have been a foregone conclusion (as perhaps with a loss of limb)." (*Ibid.*)

9. Here, respondent has no right to reinstatement. He has sustained a felony conviction for unlawful sex with a minor. Based on that felony conviction, he is disqualified from being employed as a peace officer in California. (Gov. Code, § 1029, subd. (a)(4)(A).) Even in the absence of this conviction, respondent's reinstatement rights were extinguished because he was terminated by the City for cause. Moreover, none of the exceptions under *Haywood* and *Smith* applies. Sergeant Franklin's affidavit and Lieutenant Cauble's testimony established that respondent's termination was due to his misconduct, not the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim for IDR. There was no evidence that respondent had an impending claim for disability pension that was delayed through no fault of his own. There was also no evidence that respondent was so disabled that his eligibility for IDR would have been a foregone conclusion. Respondent purportedly suffers from left shoulder instability, right shoulder rotator tendinitis, and low back pain, injuries which are nowhere near the severity of the "loss of limb" example set forth by the Court of Appeal in *Smith*. (*Smith, supra*, 120 Cal.App.4th at p. 207.) Therefore, respondent is ineligible to apply for IDR because he has no right to reinstatement and no exception under *Haywood* and *Smith* applies.

Applicability of Judicial Precedent Under the Judges' Retirement Law

10. Judicial precedent exists under the Judges' Retirement Law for a suspended judge with pending criminal charges to apply for disability retirement. In *Willens v. Commission On Judicial Qualifications* (1973) 10 Cal.3d 451 (*Willens*), a judge ran unopposed in the primary for a new term on the San Joaquin County Superior Court starting in January 1971. (*Id.* at p. 453.) In June 1970, a grand jury

indicted the judge for bribery, which suspended him automatically from office with pay. (*Ibid.*) A write-in candidate defeated him in the November 1970 general election, and the judge filed for disability retirement on the same day before the end of his term. (*Ibid.*) The judge also provided evidence that he suffered physical and emotional disabilities at the time of his disability retirement application. (*Id.* at p. 455.) The Commission on Judicial Qualifications denied the judge's application based on his suspension from office. (*Id.* at p. 454.) However, the Supreme Court held that the judge's suspension from office did not include forfeiture of salary until his criminal conviction was final, and his salary included his disability benefits. (*Id.* at pp. 453, 456, 458–459.)

11. *Willens* is distinguishable from this case in several respects. Whereas the disability retirement of the judge in *Willens* is governed by the Judges' Retirement Law, respondent's IDR is governed by the PERL. The Court of Appeals noted in *Smith* that the holding in *Willens* "turns on [the] peculiarities of the office of judge." (*Smith, supra*, 120 Cal.App.4th at p. 204.) For example, the California Constitution authorizes an indicted judge to retain their office and salary until the criminal conviction is final. (Cal. Const., art. VI, § 18, subd. (a).) There is no similar protection for members in respondent's position.

12. Additionally, in *Willens*, "[t]here was substantial evidence that the judge had physical and emotional disabilities at the time of his application, dating back to 1969." (*Smith, supra*, 120 Cal.App.4th at p. 204.) Therefore, the judge in *Willens* fell into an exception outlined in *Smith*, in that he had a mature claim due to substantial medical evidence of his eligibility for disability retirement. (*Id.* at p. 207.) As discussed above, in this case, there is insufficient evidence of respondent's injuries such that his

eligibility for IDR would have been a foregone conclusion. (See *ante*, Legal Conclusion 9.)

13. Finally, unlike the judge in *Willens*, respondent's criminal charges are no longer pending but have resulted in a felony conviction. Under these circumstances, *Willens* is inapplicable, and respondent's appeal must be denied.

ORDER

The appeal of respondent Jason J. Bemowski is denied. Respondent is barred from applying for disability retirement by operation of *Haywood* and *Smith*.

DATE: **01/09/2023**

Ji-Lan Zang

JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings