

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the Appeal of Accepting the Application for  
Disability Retirement of:**

**JULIA E. GOMEZ,**

**Respondent,**

**and**

**CALIFORNIA DEPARTMENT OF SOCIAL SERVICES,**

**Respondent.**

**Agency Case No. 2022-0579**

**OAH No. 2022100712**

**PROPOSED DECISION**

Administrative Law Judge (ALJ) Chantal M. Sampogna, Office of Administrative Hearings, State of California, heard this matter by videoconference on January 26, 2023.

Helen L. Louie, Staff Attorney, appeared on behalf of complainant Keith Riddle, Chief of the Disability and Survivor Benefits Division of the Board of Administration, California Public Employees' Retirement System (CalPERS).

Respondent Julia E. Gomez appeared on her own behalf.

There was no appearance on behalf of respondent California Department of Social Services (CDSS).

Testimony and documents were received in evidence. The record was closed and the matter was submitted for decision on January 26, 2023.

## **SUMMARY**

On January 25, 2022, respondent Gomez signed an application for service pending disability retirement. On May 16, 2022, CalPERS denied the application because respondent CDSS terminated respondent Gomez for cause. Respondent Gomez did not establish her termination was the ultimate result of a disabling condition or that it was preemptive of an otherwise valid claim for disability retirement. Respondent Gomez's appeal is denied.

## **FACTUAL FINDINGS**

### **Jurisdiction**

1. Respondent Gomez was employed by respondent CDSS from September 12, 2005, to October 28, 2021. Her most recent position was as a Disability Evaluation Analyst (DEA) III. By virtue of this employment, respondent Gomez became a state

miscellaneous member of CalPERS subject to Government Code section 21154.  
(Statutory references are to the Government Code.)

2. Respondent Gomez retired for service effective November 1, 2021, and has been receiving her service retirement allowance since that date.

3. On January 25, 2022, respondent Gomez signed an application for service pending disability retirement, which was received by CalPERS on January 28, 2022. Respondent Gomez claimed disability on the basis of arthritis in her hands, fingers, ankles, knees, and neck, and based on depression and anxiety conditions.

4. On May 16, 2022, respondent CDSS informed respondent Gomez she was ineligible to apply for disability retirement and cancelled her application.

5. Respondent Gomez filed a timely appeal.

### **Respondent's Permanent Severance of Employment with Respondent CDSS**

6. On September 22, 2020, respondent CDSS served respondent Gomez with a Notice of Adverse Action (NOAA). The NOAA was issued to respondent Gomez based on her insubordination and other workplace violations and consisted of a five percent salary reduction for four months effective October 5, 2020, pursuant to section 19572.

7. Respondent Gomez appealed the September 22, 2020 NOAA with the State Personnel Board (SPB). On February 8, 2021, the SBP ALJ issued a Proposed Decision sustaining respondent CDSS' imposition of a five percent salary reduction for four months on respondent Gomez. The SPB ALJ found as follows:

1. Respondent Gomez did not prove that Respondent CDSS disciplined her in violation of Labor Code section 1105.2, subdivision (b).
2. Respondent Gomez' conduct constitutes legal cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty; (e) insubordination; (m) discourteous treatment of the public or other employees; (o) willful disobedience; (t) other failure of good behavior.
3. The penalty of a 5 percent salary reduction for 4 months is just and proper for Respondent Gomez's proven misconduct.

(Exh. 8, p. A76.)

8. In the SPB Proposed Decision the SPB ALJ described how respondent Gomez failed to meet her burden of proof. Respondent Gomez did not provide a sworn declaration or any documentary evidence establishing that she filed any complaints against respondent CDSS with the Office of Inspector General (OIG) or the Federal Bureau of Investigation (FBI). Nor did respondent Gomez "identify or attempt to describe any particular exhibit, attachment to the NOAA, or other documentary evidence that substantiates her claim" and thus failed to provide basic evidence necessary for establishing a prima facie case for her retaliation claim. (Exh. 8, p. A67.)

9. On March 4, 2021, the SPB adopted the findings of fact, determination of issues, and Proposed Decision of the SPB ALJ as its Decision in respondent Gomez's appeal.

10. On October 19, 2021, Respondent CDSS served respondent Gomez with a second NOAA, for dismissal from her position as a DEA III with respondent CDSS, effective close of business October 28, 2021. The NOAA was based on respondent Gomez's 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. (§ 19572, subds. (e), (m), (o), and (t).)

11. By letter dated October 29, 2021, respondent CDSS confirmed with respondent Gomez that she waived her rights to a Skelly hearing.

12. Respondent Gomez appealed the October 19, 2021 NOAA to the SPB. On December 17, 2021, the SPB notified respondent CDSS, respondent Gomez, and respondent Gomez's union representative, that based on respondent Gomez's withdrawal of her appeal of the October 19, 2021 NOAA, the SPB had closed the appeal on December 16, 2021 and vacated all pending hearings in the matter.

13. Based on Factual Findings 6 through 12, complainant established the allegations in the Statement of Issues that respondent Gomez was terminated for cause from her employment with respondent CDSS and is, therefore, not eligible to apply for disability retirement.

## **Respondent's Evidence**

### **EXHIBITS**

14. Respondent offered the following 13 exhibits, Exhibits A through M, into evidence: (A) respondent CDSS's Job Duties of a DEA III; (B) respondent CDSS's Workplace Violence Policy; (C) respondent CDSS's Unprofessional Conduct Policy; (D)

respondent CDSS's Discrimination Harassment and Retaliation Policy; (E) a copy of Government Code section 19572; (F) respondent CDSS's Internet and Email Usage Policy; (G) a Counseling Memorandum of Unprofessional Conduct issued by respondent CDSS to respondent Gomez on March 8, 2018; (H) respondent CDSS's Conflict of Interest, Separation of Duties, and Incompatible Activities Memorandum; (I) a September 8, 2021, email between respondent Gomez and the California Social Security Administration; (J) respondent CDSS's Glendale Branch Expectations; (K) a November 2009 email exchange between respondent Gomez and respondent CDSS's Glendale Branch Chief Pam Scheel; (L) an August 31, 2017 letter from respondent CDSS to respondent Gomez notifying her of the end of its investigation into the fraudulent activity respondent Gomez reported; and (M) a March 22, 2018 letter from respondent CDSS's Case Adjudication Bureau Chief notifying respondent Gomez of an upcoming investigation interview regarding respondent Gomez's conduct.

15. Complainant objected to the admission of respondent Gomez's exhibits based on relevancy and hearsay. The ALJ informed respondent Gomez that the ALJ did not have jurisdiction to reconsider whether there was cause for respondent Gomez's termination by respondent CDSS, and that she would take her request for admission of her documents under submission.

16. After consideration of respondent Gomez's exhibits, Complainant's objections to Exhibit A are overruled and respondent Gomez's Exhibit A, respondent CDSS's Job Duties of a DEA III, is admitted into evidence. Exhibits B through M did not contain information relevant to the question of whether respondent Gomez was eligible to apply for disability retirement, either directly or through the available exceptions to disability retirement applications. Accordingly, complainant's objections

to Exhibits B through M are sustained, and respondent Gomez's Exhibits B through M are excluded from evidence.

## **TESTIMONY**

17. Respondent Gomez's stated purpose for her appeal was to dispute what was, from her perspective, an unjust termination by respondent CDSS, and to show respondent CDSS was against her. She testified that during her employment with respondent CDSS she acquired long term disabilities including depression, anxiety, and arthritis presenting in her hands, fingers, ankles, knees, and neck. Respondent Gomez asserted her disabilities were caused by workplace harassment she endured because of whistleblower complaints she filed with the OIG and the FBI in 2019.

18. In her complaints, respondent Gomez alleged a doctor then employed by respondent CDSS engaged in fraud when reviewing and approving social security claims, and that respondent CDSS engaged in fraud when it processed and verified these claims. Respondent Gomez asserted that because of her complaints she endured workplace retaliation and strain on her relationships with coworkers and management. She testified her workplace became so stressful it destroyed her nervous system, causing her to have panic attacks and two episodes of facial paralysis, and caused her to have memory and attention loss. Respondent Gomez concluded her resulting disabilities impede her ability to properly perform her job duties, which require memory, concentration, and constant use of her fingers and hands, and have qualified her for workers compensation benefits.

19. Respondent Gomez testified that two months before her termination her supervisor informed her she would be reviewing respondent Gomez's cases due to respondent Gomez's recent errors, and respondent Gomez informed her supervisor



she may be applying for disability. Respondent Gomez added that she had also informed her supervisor in 2010 of her intent to apply for disability retirement.

20. Respondent Gomez acknowledged she did not file a disability retirement application until January 2022, two months after her termination for cause. She explained she delayed submitting her application because she was waiting for the OIG and FBI investigations to complete, but respondent CDSS then terminated her within one week of the completion of the investigation.

21. Based on her appeal of respondent CDSS's first NOAA and her ultimate withdrawal of her appeal of the second NOAA, respondent Gomez was familiar with the NOAA appeal process and that appealing the second NOAA was the proper procedure for appealing her termination by respondent CDSS. Similarly, respondent Gomez was aware that to establish facts she may allege at a hearing, such as her alleged disabilities or alleged preemptory termination, sworn declarations or documentary evidence may be necessary to substantiate her claims and meet her burden of proof. However, other than Exhibit A, the job duties of a DEA III, respondent Gomez's Exhibits B through M were focused on relitigating the justness of her termination by respondent CDSS and were excluded from evidence; respondent Gomez did not introduce evidence other than her testimony to establish any underlying disability, or any evidence of a preemptory termination.

22. Respondent Gomez did not present evidence substantiating her asserted medical diagnoses or when she was diagnosed, that respondent CDSS knew of said diagnoses or her intent to apply for disability retirement, or that she has qualified for workers compensation benefits. Respondent Gomez's testimony alone, without supportive or corroborating evidence or testimony of witnesses, was insufficient to establish the assertions and claims she made in her testimony by a preponderance of

the evidence. Rather, the evidence presented at hearing established by a preponderance of the evidence respondent Gomez's termination was due to her insubordinate conduct and was not related to work performance or in anticipation of a disability retirement application.

## **LEGAL CONCLUSIONS**

### **Authority**

1. This matter is governed by the Public Employees' Retirement Law (Retirement Law). (§ 20000 et seq.)

2. The management and control of CalPERS is vested in the Board. (§ 20120.) The Board must determine and may modify benefits for service and disability. (§ 20123.)

### **Standard and Burden of Proof**

3. Respondent bears the burden of proof, by a preponderance of the evidence, that all required elements for her claim for disability retirement are established. (*McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051, fn. 5; Evid. Code 500.)

4. The sole focus of the legal definition of "preponderance" in the phrase "preponderance of the evidence" is on the quality of the evidence. The quantity of evidence presented by each side is irrelevant; rather, the focus is on the convincing force of the evidence presented. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324–325.)

## **Eligibility for Disability Retirement**

### **APPLICATION**

5. Subject to exceptions not applicable to respondent's case, a member incapacitated for the performance of duty must be retired for disability pursuant to the Retirement Law if he or she is credited with five years of state service, regardless of age. (§ 21150, subd. (a).)

6. A member may apply to the Board for disability retirement. (§ 21152, subd. (d).)

7. The application can be made only (a) while the member is in state service; (b) while the member for whom contributions will be made under section 20997, is absent on military service; (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. (§ 21154.)

### **TERMINATION FOR CAUSE**

8. "Termination for cause and involuntary disability retirement are two distinct, incompatible means of removing an employee from a job. . . . The two means of removal cannot coexist because once an employee is terminated for cause, the employment relationship is severed and retirement benefits are no longer possible." (*Riverside Sheriffs' Assn. v. County of Riverside* (2009) 173 Cal.App.4th 1410, 1419, hereafter, *Riverside*.) To the contrary, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292,

1296, hereafter, *Haywood*.) The relationship between the employee and employer must therefore continue for an employee to recover disability retirement benefits. (*Riverside*, 173 Cal.App.4th at pp. 1419–1420.)

9. However, a member who has been terminated for cause but whose discharge was either the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim for disability retirement may apply for disability retirement. (*Haywood, supra*, 67 Cal.App.4th at p. 1297.) A third exception can exist where “a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause.” (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206, hereafter, *Napa*; *In the Matter of Accepting the Application for Industrial Disability Retirement of Philip D. MacFarland, Respondent, and California State Prison, Sacramento, California Department of Corrections and Rehabilitation, Respondent*, dated November 20, 2015, made Precedential by the Board effective June 22, 2016.)

10. Respondent Gomez does not meet the exceptions provided by *Haywood* or *Napa*. The quality of respondent Gomez’s evidence lacked the requisite convincing force to meet her burden of proof. Respondent Gomez did not establish her discharge was the result of a disabling medical condition or that her termination was preemptive of an otherwise valid claim for disability retirement. Respondent Gomez neither established by a preponderance of the evidence she had a diagnosed medical condition or that any medical condition interfered with her ability to perform her job duties. Nor did respondent Gomez establish by a preponderance of the evidence her right to a disability retirement had matured and thus survived her dismissal for cause. To the contrary, in addition to not establishing she had disabilities, respondent Gomez did not apply for disability retirement before her termination, nor did the


Board determine respondent Gomez was no longer capable of performing her duties.  
(Factual Findings 6-22.)

11. Respondent Gomez is not eligible to apply for disability retirement.

## ORDER

Respondent Julia E. Gomez's appeal of her eligibility to apply for disability retirement is denied.

DATE: **02/15/2023**

  
Chantal Sampogna (Feb 15, 2023 16:33 PST)

CHANTAL M. SAMPOGNA

Administrative Law Judge

Office of Administrative Hearings