

ATTACHMENT E

THE PROPOSED DECISION

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

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

**RANDY N. MONROE and PAROLES AND COMMUNITY
SERVICES DIVISION, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,**

Respondents.

Agency Case No. 2022-0654

OAH No. 2023030282

PROPOSED DECISION

Jami A. Teagle-Burgos, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on August 16, 2023.

Preet Kaur, Senior Attorney, represented complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS).

Larry Watkins, Attorney at Law, represented respondent Randy N. Monroe, who was present at the hearing.

No one appeared on behalf of respondent Paroles and Community Services Division, California Department of Corrections and Rehabilitation (CDCR).

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on August 16, 2023.

ISSUE

Is respondent Monroe¹ eligible to apply for industrial disability retirement or is he otherwise precluded by applicable law?

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent had been employed by respondent Paroles and Community Services Division, Division of Adult Parole Operations (DAPO), CDCR, as a Parole Agent I. By virtue of his employment, respondent became a state safety member of CalPERS subject to Government Code sections 21154 and 21156.

2. On March 1, 2022, respondent signed an application for service retirement pending industrial disability retirement, and he listed his specific disability

¹ Hereafter, "respondent" refers to respondent Monroe.

as "neck, bilateral upper extremities." Respondent requested a retirement date of March 1, 2022. His application was received by CalPERS on March 3, 2022.

3. On March 10, 2022, CalPERS processed respondent's service retirement portion of his application, and he was service retired effective March 1, 2022.

4. Thereafter, CalPERS received information and documents concerning respondent's employment that included a determination by CDCR of respondent's separation under unfavorable circumstances, as discussed further below.

5. In a determination letter signed on May 13, 2022, CalPERS notified respondent of its cancellation of his industrial disability retirement application. CalPERS notified respondent that CalPERS determined his employment with CDCR "ended for reasons which were not related to a disabling condition." CalPERS wrote:

When an employee is separated from employment as a result of disciplinary action or the employee enters into a settlement agreement where the employee chooses to voluntarily resign in lieu of termination, and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination and/or a mutual understanding of separation from employment due to a pending adverse action renders the employee ineligible to apply for disability retirement.

6. On June 10, 2022, respondent filed an appeal challenging the cancellation of his application and requesting a hearing.

7. Complainant signed the Statement of Issues on March 9, 2023, in his official capacity, alleging respondent is not eligible to apply for industrial disability retirement. This hearing followed.

Employment Background

8. On August 4, 2021, CDCR's Office of Internal Affairs provided respondent with a memorandum indicating that he would be interviewed for an investigation regarding alleged misconduct.

9. On August 10, 2021, respondent contacted CalPERS and inquired about disability retirement and industrial disability retirement.

10. On August 31, 2021, Special Agent Jamic Hamlin, an investigator with CDCR's Office of Internal Affairs, interviewed respondent regarding the following allegations:

- respondent "engaged in overfamiliar behavior with a family member of parolee [J.F.]" from about December 1, 2020, through May 14, 2021;
- respondent told Supervisor Maridee Richards on May 14, 2021, that he did not recognize the parolee's family member during a home visit on January 5, 2021, although he stated on May 17, 2021, that he did recognize the family member (A.H.);
- respondent was dishonest with Supervisor Richards when he informed her that he decided to pursue a relationship in May 2021 with A.H., the niece of parolee J.F., when at the time A.H. was already living in respondent's residence;

- after May 14, 2021, respondent utilized his state-issued cell phone approximately 10 times to contact the residence of parolee J.F., after parolee J.F. had been removed from supervision;
- on May 17, 2021, respondent was dishonest in a memorandum that he submitted to District Administrator Elissa Fernandez and Supervisor Richards in regards to his relationship with A.H.;
- from September 2020 through July 2020,² respondent misused his state assigned vehicle when he transported A.H. for personal reasons; and
- respondent was dishonest during his August 31, 2021, investigative interview when he stated that he had not talked to A.H. after approximately May 2021, when A.H. was living in his residence until at least June 25, 2021.

11. On January 25, 2022, Special Agent Hamlin completed interviews of Supervisor Richards, respondent, parolee J.F., and J.F.'s sister, which outlined the intimate relationship between respondent and A.H. Parolee J.F. has been fostered by his "mother" since he was an infant. J.F.'s sister is the daughter of their mother. A.H. is the 22-year old granddaughter of J.F.'s "mother." The interviewees reported that respondent and A.H. were introduced by parolee J.F. when respondent conducted a home visit for parolee J.F. at his mother's residence. J.F.'s sister reported the introduction occurred in the kitchen, respondent asked A.H. to remove her mask, and respondent remarked to A.H. that she was young and cute. This was inconsistent with respondent's statement that he met A.H. while she was working at a fast-food

² It appears this period was erroneously written as September 2020 through July 2020, and should read September 2020 through July 2021.

restaurant. The interviewees reported that respondent and A.H. began dating soon after they met at J.F.'s mother's residence, and they dated while parolee J.F. was assigned to respondent. J.F.'s sister reported that A.H. quit her job at a fast-food restaurant and moved into respondent's residence, and that respondent appeared to sometimes keep A.H. from communicating with her family. J.F.'s sister reported that she and A.H. were afraid to be interviewed for fear of retribution by respondent.

12. As discussed above, on March 1, 2022, prior to the conclusion of the internal affairs investigation, respondent filed an application with CalPERS for service retirement pending disability retirement. CalPERS processed his application on March 10, 2022, and respondent service retired effective March 1, 2022.

13. On March 23, 2022, DAPO-CDCR issued respondent a Notice of Adverse Action (NOAA), signed by Karen Thacker, Regional Parole Administrator for DAPO-CDCR, dismissing respondent from his employment as a Parole Agent I with CDCR due to inexcusable neglect of duty, dishonesty, willful disobedience, misuse of state property, and other failure of good behavior. The dismissal was effective April 1, 2022.

14. On March 30, 2022, a Skelly³ hearing was held, and the determination by DAPO-CDCR to dismiss respondent was upheld.

³ In *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215, the California Supreme Court held that in order to satisfy due process, an agency considering disciplinary action against a public employee must accord the employee certain "pre-removal safeguards," including "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." The

15. On April 7, 2022, respondent appealed DAPO-CDCR's determination of dismissal to the State Personnel Board (SPB).

16. On April 8, 2022, a letter was sent to respondent from Ms. Thacker (DAPO-CDCR) indicating that she had learned of his retirement from his employment with CDCR, effective March 1, 2022. Upon her review of the circumstances at the time of respondent's retirement, she determined that his retirement was "under unfavorable circumstances."

17. On April 12, 2022, Teresa Lewis, CDCR return-to-work coordinator, marked the following on respondent's CalPERS Employer Certification form: "The member resigned in lieu of termination." Ms. Lewis also handwrote that respondent's retirement date was March 1, 2022.

18. On May 24, 2022, DAPO-CDCR rescinded its NOAA that was the subject of respondent's SPB appeal. Thereafter, SPB closed respondent's appeal since the NOAA was withdrawn by CDCR. In emails on July 19, 20 and 27, 2022, between Teresa Lopez, Assistant Employee Relations Officer (ERO), DAPO-CDCR, and Mari Cobbler, CalPERS Disability & Survivor Benefit Division, Ms. Lopez reported the NOAA had not been overturned and respondent had not resigned for medical reasons, rather respondent had resigned in lieu of termination and he had received a letter of retirement "under unfavorable circumstances." Ms. Lopez wrote "an employee who knowingly retires while under investigation will be considered dishonorably retired,"

Supreme Court's directive gave rise to an administrative procedure known as a Skelly hearing, in which an employee has the opportunity to respond to the charges upon which the proposed discipline is based.

and respondent had no return rights to his position. Ms. Lopez wrote SPB no longer had jurisdiction of the appeal because respondent had retired on March 1, 2022, which was prior to the effective date of the NOAA on April 1, 2022.⁴ Ms. Lopez provided Ms. Cobbler with a copy of the letter of retiring “under unfavorable circumstances” and the investigation report.

Testimony of Teresa Lopez

19. The following is a summary of the testimony of Teresa Lopez, who was called as a witness on behalf of complainant: Ms. Lopez is employed by DAPO-CDCR as a Parole Agent II Supervisor. She has served as the Assistant ERO since 2021. She assists with NOAAs that are issued by the hiring authority (currently Gabriela Aguilera) who is the acting regional parole administrator for CDCR. The process of disciplinary action consists of allegations of misconduct that are presented to the hiring authority,

⁴ In support of CDCR rescinding the NOAA and SPB dismissing respondent’s appeal, complainant cited the decision of *In the Matter of the Appeal by Mary Catherine Gray* (June 8, 1999), Precedential Board Decision No. 99-08, SPB Case No. 98-0578, which states, “. . . a state civil service employee who resigned prior to the effective date of a dismissal could not thereafter be dismissed by his or her appointing authority.” The decision cited a previous decision where the Attorney General stated, “Resignation is designated as a method of permanent separation from the civil service relationship, . . . Thus, upon resignation the employer-employee relationship is permanently severed.” The decision provides that an employee will not return to permanent civil service status if the employee is otherwise permanently separated from civil service, which includes separation by dismissal and resignation. Otherwise, the employee has no return rights.

the hiring authority submits an investigation request to the Office of Internal Affairs, and the investigation report is sent to the hiring authority for disciplinary action. Thereafter, a "conference memorandum meeting" is held by the hiring authority and vertical advocate (attorney for CDCR), and she attends the meeting as the notetaker. At the meeting, the investigation report is reviewed and a penalty is assessed. A closure letter that lists the allegations and findings (sustained or not sustained) and the investigation packet is served upon the subject employee by herself and the ERO.

20. Ms. Lopez testified that prior to respondent being interviewed by the investigator, respondent submitted a memorandum to Supervisor Richards about his relationship with parolee J.F.'s relative – A.H. – who is identified throughout the record as J.F.'s foster/adopted sister and/or niece who lived with parolee J.F. when respondent met her. Respondent's memorandum was found to be dishonest regarding the history of his intimate relationship with A.H. Ms. Lopez and the ERO served respondent, at his residence, on August 4, 2021, with a notice of interview for the Office of Internal Affairs. The interview was supposed to take place on August 11, 2021, but respondent rescheduled to August 31, 2021, because of medical issues. Respondent's statements to the investigator during his interview regarding the history of his intimate relationship with A.H. were also found to be dishonest. A NOAA was prepared and Ms. Lopez and the ERO (Karen Reed who has since retired) served respondent with the NOAA on March 23, 2022, at his residence. Ms. Lopez was also present at respondent's Skelly hearing on March 30, 2022, as the notetaker, along with a Skelly officer/regional parole administrator or above, the vertical advocate, respondent, and respondent's attorney. The result of the Skelly hearing was to uphold respondent's termination of employment.

21. Ms. Lopez testified that DAPO-CDCR did not discover that respondent had “retired with CalPERS” until April 8, 2022. She stated, “Employees usually will retire with CalPERS and Division of Adult Parole Operations and they turn in their state-issued equipment . . . ammo, baton, pepper spray, weapon . . . but [respondent] didn’t return his equipment . . . [respondent] didn’t retire with DAPO, so we weren’t aware of his retirement.”

22. Ms. Lopez reported that on April 8, 2022, DAPO-CDCR issued a letter to respondent that informed him that he retired “under unfavorable circumstances.” She testified that respondent has “no return rights” because he retired “under unfavorable circumstances.” She stated that if respondent were to attempt to return to his prior employment, CDCR would pick up where it left off and it would again serve the NOAA upon respondent and he would be dismissed. The disciplinary action (NOAA) was not overturned and she remarked, “Just because the action was rescinded by CDCR doesn’t mean [respondent] has his job back as a parole officer, he has no return rights to his job as a parole officer, despite this rescission by CDCR.” She further explained that you cannot dismiss/fire an employee who service retired, as what happened here when respondent severed his relationship with CDCR when he service retired. This is why DAPO-CDCR rescinded the NOAA because SPB no longer had jurisdiction.

23. Ms. Lopez testified that respondent’s Employer Certification form was signed by Ms. Lewis (return to work coordinator) on April 12, 2022, and Ms. Lewis marked “the member resigned in lieu of termination.” Ms. Lopez noted an earlier Employer Certification form had been completed by Ms. Lewis on February 1, 2022, and Ms. Lewis selected “none of the above applies to this member,” but this could have been a “human error” because Ms. Lewis should have selected “the member has an adverse action pending against him/her.”

Testimony of Respondent

24. The following is a summary of the testimony of respondent: He was employed at CDCR from June 2007 through March 1, 2022. At CDCR, he worked as a youth authority counselor, an officer at a men's prison, a parole officer, an officer at a women's prison, and he returned to work as a parole officer.

25. Respondent testified he submitted a disability retirement application at the same time he submitted his retirement application. He service retired effective March 1, 2022. He retired because he "had no choice" because he used "almost all [his] benefits." He was served the NOAA after he service retired. It was his understanding that DOPA-CDCR rescinded the NOAA and "that means it doesn't exist." He understood that because the Employer Certification signed on February 1, 2022, was marked "none of the above applies," he was "not under investigation per the return work coordinator."

26. On cross-examination, respondent testified he did not recall the Employer Certification signed on April 12, 2022, where Ms. Lewis marked "the member resigned in lieu of termination." Respondent stated he believed SPB's dismissal of his appeal on May 24, 2022, meant he was "reinstated" with CDCR. When asked what would happen if he wanted to return to his position at CDCR, he replied, "Up until today, I didn't know."

27. Respondent testified he underwent wrist surgeries on August 20, 2019, October 1, 2020, August 3, 2021, and September 21, 2021, in connection with his workers' compensation claim. His surgeon was Domenick Sisto, M.D. He had more than 40 physical therapy sessions and more than 100 appointments with Dr. Sisto.

28. Respondent testified that on March 23, 2022, his concealed carry weapons permit was revoked because he was classified as a "dishonorable retiree." The letter of revocation, issued by Ms. Thacker on March 23, 2022, states that respondent's permit was revoked due to misconduct. He applied for a concealed carry weapons permit as a retired peace officer. The denial letter, issued by Ms. Tacker on August 11, 2022, states respondent "retired in lieu of termination" and he knowingly retired while under investigation, which is considered "dishonorably retired." He appealed and a hearing before a panel was held on December 5, 2022. The panel's decision granted endorsement for respondent to have a concealed carry weapons permit as a retired peace officer. The decision does not provide the reason(s) as to why the denial was overturned and the permit was granted.

LEGAL CONCLUSIONS

Applicable Statutes

1. Government Code section 21151, subdivision (a), provides that a state safety or state peace officer who is "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. . . regardless of age or amount of service."

2. Government Code section 21152 states, in relevant part, that an application for disability retirement may be made by the member or the head of the office or department in which the member is or last employed.

3. Government Code section 21154 provides:

The application shall 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. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

Applicable Case Law

4. In *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, the court held that an employee's termination for cause rendered him ineligible for disability retirement benefits. The court explained, "while termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship [citation], disability retirement laws contemplate the potential

reinstatement of that relationship if the employee recovers and no longer is disabled.” (*Id.* at p. 1305.). The court explained:

[W]e conclude that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of the disabling medical condition or preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed.

(*Id.* at p. 1307.)

5. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the same appellate court explained its rationale for the exception that applies when an employee is fired because he has a disabling medical condition, or his termination preempts an otherwise valid claim for disability retirement. The court held: “This caveat flows from a public agency’s obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability [citations] or indirectly through cause based on the disability [citation].” (*Id.* at p. 205.)

6. *Smith* involved a firefighter who filed a backdated application for disability retirement on the effective date of the termination of his employment. Focusing on the latter part of the exception articulated in *Haywood*, the appellate court explained that even a dismissal based solely for a cause unrelated to the employee’s disability “cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect.” (*Id.* at p. 206.) The right to a disability pension does not mature until the pension board has concluded the

applicant is substantially incapacitated for the performance of his usual duties. (*Ibid.*) However, the court considered the possibility that there might be an equitable exception to this matured disability requirement: Conceivably, there may be facts under which 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. The court provided two examples: (1) If an employee "had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal" or (2) if there is undisputed evidence that the employee "was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb)." Firefighter Smith came within neither of these situations. (*Id.* at pp. 206-207.)

7. Analyzing the *Haywood* court's qualification that an employer's dismissal may not preempt "an otherwise valid claim for disability retirement," the *Smith* court identified "the key issue [as] thus whether his right to a disability retirement matured before plaintiff's separation from service." (*Id.* at p. 206.) The court then explained that "a vested right matures when there is an unconditional right to immediate payment," and "a duty to grant the disability pension ... [does] not arise at the time of injury itself but when the pension board determine[s] that the employee [is] no longer capable of performing his duties." (*Ibid.*) But the appellate court also recognized an equitable exception when there is an impending ruling on an application for disability retirement that is delayed, through no fault of the applicant, until after his employer-employee relationship has been terminated. (*Id.* at pp. 206-207.)

8. The Board of Administration extended the rule articulated in *Haywood* to the termination of an employer-employee relationship caused by an employee's voluntary resignation and irrevocable waiver of any rights to reinstate to his former

position in *Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01. Mr. Vandergoot was a heavy fire equipment operator with the California Department of Forestry and Fire Protection. He was dismissed from his employment for cause, and appealed his dismissal to the SPB. He ultimately settled his appeal by agreeing to voluntarily resign his employment and waive any rights to reinstate to his former position in exchange for his employer withdrawing his dismissal for cause.

9. Concluding *Haywood* applies whether Mr. Vandergoot was terminated for cause or voluntarily resigned his employment and waived any reinstatement rights, the Board of Administration explained:

In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*. This is because *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the District if it ultimately is determined that respondent is no longer disabled. (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at pp. 1296-1297.) Such is not possible here. The employment relationship has not only been severed, but the terms of the Stipulation and Settlement Agreement expressly lock respondent out from being reinstated. Such a circumstance must be viewed as wholly inconsistent with the policy behind and rationale for disability retirement

(*Vandergoot, supra*, at p. 7.)

10. In *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156, the court held that *Vandergoot* is a reasonable extension of *Haywood* and *Smith*, and, moreover, is entitled to substantial weight due to the agency's area of expertise. (*Id.* at p. 1161-1162.) Like *Vandergoot*, *Martinez* involved CalPERS's denial of a disability retirement application of an employee who settled a termination for cause action against her and agreed never to return to her former job. The court rejected the employee's challenges to *Vandergoot's* logic and applicability, stating:

The Legislature and the Board have decided that resignation effects a "permanent separation" from state service. [Citations.] Which is exactly what Martinez did when she agreed to leave state service and "never again apply for or accept any employment" with DSS. Notwithstanding the theoretical possibility of reinstatement, Martinez was not going to return to her former job. From this perspective, *Vandergoot* is eminently logical: resignation in these circumstances does indeed appear to be "tantamount to a dismissal for purposes of applying the *Haywood* criteria."

(*Id.* at p. 1176.)

11. Finally, *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland*, Respondent, and California State Prison, Sacramento, California Department of Corrections and Rehabilitation, Respondent (2016) CalPERS Precedential Bd. Dec. No. 16-01 (*MacFarland*), the board held that when an employee retires just before a termination for cause becomes effective, in

order to avoid termination, the employee is ineligible for a disability retirement unless the employee qualifies for one of the exceptions carved out in *Haywood* and *Smith*.

12. *MacFarland* was employed as a clinical psychologist at CDCR. He was served with a NOAA and two days later he notified his employer that he was retiring in two days and he filed for disability retirement, due to his doctor's orders because of injuries he sustained while at work. His employer reviewed the circumstances present at the time of MacFarland's retirement and determined his separation was "under unfavorable circumstances." Two months later, MacFarland and his employer withdrew the SPB appeal of the NOAA because he had service retired prior to the effective date of the adverse action. Thereafter, CalPERS notified MacFarland that it was unable to accept his application for industrial disability retirement because CalPERS applied *Haywood* and its progeny. MacFarland was dismissed from employment for reasons not resulting of a disabling condition, and his dismissal did not appear to be with the purpose of preventing a claim for disability retirement. MacFarland appealed CalPERS decision and argued that he was not terminated because the NOAA was to not take effect until a few days after he retired. The *MacFarland* decision states:

At the time that CCHCS issued the NOAA and severed its employment relationship with applicant, applicant had no unconditional right to immediate payment of a disability retirement. His workers' compensation actions were unresolved, and he no bearing on a determination as to whether he was substantially and permanently incapacitated from his duties under retirement law. CalPERS had no opportunity to evaluate any disability claims; applicant did not even initiate the disability retirement

process until after giving cause for his dismissal. Application had no unconditional right to immediate payment of a disability pension at the time he was terminated.

Applicant is ineligible to apply for disability retirement for industrial disability retirement under Government Code section 21151. His eligibility is precluded by operation of the holdings in *Haywood, Smith and Vandergoot*.

13. The holdings in *Haywood* and its progeny are that the permanent severance of the employer-employee relationship renders the former employee ineligible for disability retirement, so long as termination is neither the ultimate result of a disability nor preemptive of a valid claim for disability retirement. It does not matter whether termination of the relationship was caused by the former employee's dismissal from employment for cause (*Haywood*), a voluntary resignation and permanent waiver of any right to reinstate to a former position (*Vandergoot* and *MacFarland*), or that there was an impending ruling on a claim for disability pension that was delayed (*Smith*).

14. In this case, respondent was aware of the investigation regarding his misconduct when he was given notice on August 4, 2021, that he would be interviewed by a CDCR investigator. Even earlier, in May 2021, respondent had been interviewed by Supervisor Richards and submitted a memorandum concerning his misconduct. On August 10, 2021, respondent contacted CalPERS to inquire about applying for disability retirement. He was interviewed by a CDCR investigator on August 31, 2021. The CDCR investigator interviewed witnesses in connection with respondent's overfamiliar relationship with parolee J.F.'s relative and his dishonesty about the relationship. The CDCR investigator's report was completed on January 25,

2022. On March 3, 2022, CalPERS received respondent's application for service retirement pending disability retirement, with a request for an effective date of service retirement on March 1, 2022. CalPERS processed respondent's request on March 10, 2022, and he was service retired on March 1, 2022. On that date, the employer-employee relationship was severed between respondent and CDCR.

15. On March 22, 2022, DOPA-CDCR notified respondent of the findings of the investigation report. On March 23, 2022, DOPA-CDCR served a NOAA upon respondent informing him of his dismissal, effective April 1, 2022. Respondent appealed the NOAA. A Skelly hearing was held on March 30, 2022, and respondent's dismissal was upheld. On April 7, 2022, respondent filed an appeal to SPB. The next day on April 8, 2022, DOPA-CDCR learned that respondent service retired, effective March 1, 2022. On April 8, 2022, DOPA-CDCR issued a letter to respondent informing him that he retired "under unfavorable circumstances." An Employer Certification form, signed on April 12, 2022, by Ms. Lewis – a return-to-work coordinator – marked that respondent had "resigned in lieu of termination." Thereafter, on May 24, 2022, CDCR rescinded the NOAA and SPB dismissed respondent's appeal.

16. Here, respondent service retired pending disability retirement during an active investigation concerning his misconduct. He filed his application for service retirement 22 days before the NOAA was served upon him that ordered his dismissal. This certainly constitutes a service retirement under unfavorable circumstances. Although DOPA-CDCR ultimately rescinded the NOAA and SPB dismissed his appeal, it is clear from the *McFarland* decision that *Haywood* applies even when an appeal of an adverse action is withdrawn. Put another way, the rescission of the NOAA and dismissal of the appeal has no effect on the fact that respondent still severed his employment relationship with CDCR under unfavorable circumstances. Consequently,

respondent had no return rights to his position of employment at DOPA-CDCR following his service retirement. Even if respondent were to attempt to return to his position at DOPA-CDCR, the NOAA would be re-effectuated by being served again upon him and he would be dismissed. Return rights are a requirement under *Haywood, Smith, and Vandergoot*, and because respondent resigned under unfavorable circumstances, he has no return rights.

17. It is appropriate to consider the NOAA that ordered respondent's dismissal even though it was later rescinded because respondent service retired prior to the effective date of his dismissal; the timing of respondent's service retirement during an active investigation and prior to an impending dismissal pursuant to an impending NOAA; and the dismissal of respondent's SPB appeal, which was due to respondent resigning prior to the effective date of his dismissal rendering the dismissal action moot. In consideration of all of the above, it is concluded that respondent service retired under unfavorable circumstances and would have no return rights under Government Code section 21193. Respondent's service retirement was therefore tantamount to a dismissal.

18. As such, respondent is not eligible to apply for industrial disability retirement benefits, and respondent's eligibility for industrial disability retirement is precluded by operation of *Haywood* and its progeny.

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ORDER

The appeal of Randy N. Monroe to be granted the right to file an application for industrial disability retirement is denied.

DATE: September 14, 2023



JAMI A. TEAGLE-BURGOS

Administrative Law Judge

Office of Administrative Hearings