

ATTACHMENT A

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:**

LINCOLN D. JOHNSON,

Respondent,

and

**CALIFORNIA CITY CORRECTIONAL FACILITY, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,**

Respondent.

Agency Case No. 2022-0696 (Statement of Issues)

OAH No. 2023060795

PROPOSED DECISION

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings,
State of California, heard this matter by videoconference on December 18, 2023.

Mehron Assadi, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Lincoln D. Johnson (Johnson) represented herself.

There was no appearance by or on behalf respondent California City Correctional Facility, California Department of Corrections and Rehabilitation (CDCR).

CalPERS and Johnson presented witness testimony and documentary evidence, and the matter was submitted for decision on December 18, 2023. In an order dated January 5, 2024, the administrative law judge reopened the record for briefing on several issues. CalPERS and Johnson timely submitted briefs with additional proposed exhibits, and the matter was deemed resubmitted on February 2, 2024.

The post-hearing briefs were marked for identification as exhibits 25 and 26 (CalPERS's briefs) and exhibit V (Johnson's brief). CalPERS's additional proposed exhibits are admitted as exhibits 27 through 32. Johnson's additional proposed exhibits are admitted as exhibits W through AA.

SUMMARY

Johnson was a CDCR employee from 2011 until he resigned in 2021 in anticipation of disability retirement. Before resigning, Johnson had his right leg amputated above the knee, and both he and CDCR applied to CalPERS for disability retirement on Johnson's behalf. In September 2021, CalPERS cancelled the applications because CDCR would not give CalPERS information about an ongoing internal affairs investigation of Johnson that started before he resigned.

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In early 2022, Johnson submitted a new application to CalPERS for industrial disability retirement. But CalPERS determined Johnson was ineligible to apply for disability retirement benefits after CDCR stated it completed its investigation and concluded Johnson committed job-related misconduct that would have led to an adverse action for dismissal if he had not resigned. Johnson appeals CalPERS's determination. For the reasons explained below, Johnson's appeal is granted.

FACTUAL FINDINGS

Background and Procedural History

1. CDCR hired Johnson as an employee in 2011. As of early 2019, he worked as a Supervisor of Correctional Education Programs for CDCR's California City Correctional Facility (CAC). As a CDCR employee, Johnson was a "state safety member" of CalPERS. (Gov. Code, § 20405.)

2. In late 2019, Johnson was suspended for three months and demoted to the position of Teacher (High School – General Education) at CAC. The disciplinary action was a stipulated settlement of Johnson's appeal to the State Personnel Board of a CDCR Notice of Adverse Action (NOAA) for Johnson's dismissal from employment. The NOAA charged Johnson with inexcusable neglect of duty, dishonesty, inexcusable absence without leave, and other failures of good behavior causing discredit to CDCR or Johnson's employment. Under the stipulation for settlement, Johnson did not admit the disciplinary charges, but he agreed to the suspension and demotion in lieu of dismissal. In return, CDCR agreed to modify the NOAA to remove the charge of dishonesty and any reference to dishonesty in the other charges. CDCR also agreed to

remove the NOAA from Johnson's personnel file upon request, while reserving the right to use it for progressive discipline in any future adverse action against him.

3. Johnson served the suspension and returned to work at CAC in the demoted position in October 2019. In May 2020, he received a "Letter of Instruction – Insubordination" from a supervisor for failing to report to work in person on one occasion, and an "Employee Counseling Record" for sending an email stating he was at CAC when he was not in his classroom and had not signed in. Neither document resulted in another adverse action against him.

4. In late August 2020, Johnson was placed on medical leave due to a condition involving his right leg. In September 2020, while Johnson was still on leave, CAC Warden George Jaime authorized an administrative review of Johnson's alleged failure to perform his job duties and responsibilities. The CAC Investigative Services Unit found support for the allegations, and Jaime submitted a request to CDCR's Office of Internal Affairs to investigate Johnson for adverse employment action. In November 2020, the Office of Internal Affairs assigned a special agent to the case. CDCR did not notify Johnson of the administrative review or the start of the investigation.

5. On November 16, 2020, Johnson had his right leg amputated above the knee. He received a prosthetic and returned from medical leave on or about April 19, 2021, with an accommodation from CAC allowing him to use crutches and take additional time to ambulate. Two days later, CDCR applied to CalPERS for a disability retirement on Johnson's behalf on account of the amputation. On the application, CDCR answered "Yes" to a question asking: "Is the employee being investigated for or has been convicted of a work related felony?" (Exhibit 3, p. A12.) CDCR answered "No" to other questions asking if Johnson had a pending adverse action against him, was

terminated for cause, resigned in lieu of termination, or agreed to waive his reinstatement rights. (*Ibid.*)

6. CalPERS notified Johnson of CDCR's application on his behalf and asked him to submit a Disability Retirement Election Application if he wanted to retire for disability. The notice from CalPERS did not reference the CDCR investigation or enclose a copy of CDCR's application on his behalf. Johnson submitted a Disability Retirement Election Application to CalPERS on June 1, 2021. Separately, CalPERS also tried to get more information from CDCR about the investigation, but CDCR stated it could not provide more information because the investigation was ongoing.

7. On July 28, 2021, Johnson notified CDCR that his last day at CAC would be on July 30, 2021, "in preparation for my disability retirement." (Exhibit 17, p. A90.) Johnson wrote he had notified CalPERS of his planned retirement date and stated, "I would say it has been a pleasure working with you all, but, considering the circumstances [¶] I jest Allegedly [¶] Thank you, Dr. Lincoln Johnson." (*Ibid.*) Cheryl Karoly, a CDCR personnel supervisor, confirmed Johnson's resignation in an email stating, "If a disability retirement is approved by CalPers, then we will of course update your employee history showing that it is a retirement instead of resignation, with the same effective date once approved." (*Ibid.*) Karoly's correspondence with Johnson did not mention the investigation.

8. Johnson's resignation became effective on July 30, 2021. A few days later, CAC Warden Leanna Lundy mailed Johnson a "Confirmation of Resignation" letter stating she had determined Johnson's resignation was "'under unfavorable circumstances.'" (Exhibit 19, p. A92.) In late August 2021, CDCR Special Agent Jamic Hamlin sent a letter to Johnson notifying him he was under investigation for alleged on-duty misconduct and asking if he would agree to be interviewed. (Exhibit 20, p.

A104.) Before replying to Hamlin, Johnson emailed CDCR in early September 2021 that he had just received the letter from Lundy and was “very curious to know how becoming an amputee and resigning due to a medical issue can be determined as unfavorable?” (Exhibit O, p. Z162.) Jody Marks, a CDCR Employee Relations Officer, told Johnson to contact Hamlin about his question.

9. On September 27, 2021, CalPERS notified Johnson it had cancelled his disability retirement application. The notice stated CalPERS did so because it had asked CDCR for additional documentation of Johnson’s separation from employment, and CDCR “indicated that [it] could not provide any additional information due to an on-going investigation involving your employment status.” (Exhibit 31, p. A222.) Therefore, CalPERS could not determine if Johnson was eligible for disability retirement. CalPERS also informed Johnson that any future request for disability retirement would require a new application.

10. Johnson subsequently declined Hamlin’s request for an interview in the CDCR investigation. In January 2022, CAC Warden Leanna Lundy sent Johnson an “Investigative Closure Letter” stating the Office of Internal Affairs had completed the investigation. Lundy also stated she reviewed Hamlin’s report of the investigation and concluded Johnson falsified documents, made dishonest statements to supervisors, and otherwise failed to perform his job duties. Since Johnson had already resigned, CDCR did not take any adverse employment action against Johnson based on the investigation.

11. On April 1, 2022, CalPERS received an application from Johnson for industrial disability retirement with an effective date of July 30, 2021. An “industrial disability” refers to a disability resulting from an “injury or disease arising out of and in

the course of [the employee's] employment." (Gov. Code, § 20046.) As in his previous application, Johnson claimed he was disabled due to the amputation of his leg.

12. CalPERS again asked CDCR for more information about its investigation of Johnson for alleged misconduct. This time, CDCR provided more information to CalPERS, including Lundy's Investigative Closure Letter and a copy of Hamlin's investigative report. CDCR also told CalPERS that "if Johnson was still employed by CDCR at the time of completion [of the investigation], he would have been served a dismissal." (Exhibit 23, p. A111.)

13. CalPERS reviewed this information and determined Johnson was not eligible for disability retirement benefits. On July 14, 2022, CalPERS notified Johnson of the determination, explaining, "We have determined that your employment ended for reasons which were not related to a disabling medical condition. 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." (Exhibit 5, p. A27.) In support of its determination, CalPERS cited three court cases (*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*); and *Martinez v. Public Employees Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*)), and two precedential Board decisions (*In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Dec. No. 13-01 (*Vandergoot*); and *In the Matter of Accepting the*

Application for Industrial Disability Retirement of Phillip MacFarland (2016) CalPERS Precedential Dec. No. 16-01 (*MacFarland*)). CalPERS informed Johnson of his right to challenge the determination by submitting a written appeal within 30 days. CalPERS also copied CDCR on the letter.

14. On August 10, 2022, Johnson appealed CalPERS's determination. CDCR did not appeal. On June 8, 2023, CalPERS filed a Statement of Issues "limited to the issue of whether respondent Johnson may file an application for industrial disability retirement based on an orthopedic . . . condition, or whether his application and eligibility for disability retirement is precluded by operation of [*Haywood, Smith, Martinez, Vandergoot, and MacFarland.*]" (Exhibit 1, p. A7.)

Hearing

CALPERS'S CASE

15. Daniel Schofield is a CalPERS Staff Services Manager who handles disability retirement applications and appeals. Schofield testified CalPERS cancelled Johnson's application for industrial disability retirement because Johnson's employment at CDCR ended for reasons other than a disability. Schofield explained that Johnson resigned under unfavorable circumstances and while under investigation for misconduct, and there was no evidence the investigation arose from Johnson's claimed disability. In CalPERS's view, those circumstances preclude Johnson's application and eligibility for disability retirement. CalPERS does not determine whether an employer's actions against an employee are correct or just; it only assesses the outcome of those actions.

16. Tammy Chandler is a CDCR Staff Services Manager. Chandler testified the consensus within CDCR was that Johnson would have been fired due to the findings of

the investigation if he had not resigned. Furthermore, CDCR employees may typically not return to CDCR after an adverse action against them related to employment.

17. CalPERS contends Johnson “rushed to resign and retire” to avoid being fired. (CalPERS’s Reply Br., p. 7.) According to CalPERS, “[Johnson’s] misconduct in 2017/2018 very nearly got him terminated from working at CDCR, his employment was hanging on by a thread, and his ongoing misconduct resulted in his employer deciding to finally sever that thread. Just before the employer formally did so, and while they were doing their due-diligence and investigating, [Johnson] resigned.” (*Id.* at p. 1.) CalPERS contends “[t]he resulting loss of the right to return to work after [Johnson] resigned” supports the cancellation of Johnson’s industrial disability retirement application. (*Id.* at pp. 1-2.)

Johnson’s Case

18. Johnson testified he resigned due to disability, not to avoid being fired. His leg amputation made it difficult for him to ambulate around CAC, and that became apparent immediately upon his return to work from medical leave. Johnson testified he had “no idea” he was being investigated for alleged misconduct when he resigned. The first time he heard anything negative about his departure was the letter from Lundy stating he resigned under unfavorable circumstances. Johnson disagrees with that characterization and with the results of the investigation, which were only disclosed to him after he resigned. In fact, Johnson received a Notice of Personnel Action in early September 2021 reporting that his separation was a “Resignation Without Fault,” not a resignation to avoid being fired. (Exhibit P, p. Z39.)

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ANALYSIS OF EVIDENCE

19. CalPERS contends Johnson “rushed to resign and retire” to avoid being fired (CalPERS’s Reply Br., p. 7), while Johnson contends he did not know he was being investigated when he resigned. The preponderance of the evidence supports Johnson’s contention. Hamlin wrote a letter to Johnson notifying him of the investigation in late August 2021, about one month after Johnson resigned. It is unlikely Hamlin would have sent such a notice if CDCR had previously told Johnson he was under investigation. Furthermore, Johnson does not appear to have “rushed to resign and retire” at all. He had his leg amputated in November 2020, returned to work in April 2021, and resigned in preparation for disability retirement in July 2021.

20. In his resignation email, Johnson stated, “I would say it has been a pleasure working with you all, but, considering the circumstances [¶] I jest Allegedly [¶] Thank you, Dr. Lincoln Johnson.” (Exhibit 17, p. A90.) CalPERS contends the tone of the email is evidence Johnson “had a deteriorating relationship with CDCR management” and knew “his employment was hanging on by a thread,” especially since Johnson had already been suspended and demoted in lieu of dismissal in 2019. (CalPERS’s Reply Br., pp. 1, 6.) But the tone of the email expressing apparent displeasure with CDCR management does not prove Johnson knew CDCR was investigating him for possible termination for cause.

21. CalPERS also contends CDCR would have fired Johnson if he had not resigned first. But CDCR never initiated an adverse action against Johnson by filing a NOAA for his dismissal. While Chandler testified CDCR would have filed a NOAA for Johnson’s dismissal absent his resignation, predicting the outcome of the unfiled NOAA is overly speculative on this record. Johnson could have contested the NOAA

and obtained an outcome other than dismissal, as he did with the previous NOAA against him.

22. CalPERS also contends the misconduct allegations against Johnson are true, while Johnson contends they are not. This dispute is beyond the scope of Johnson's appeal and immaterial to its outcome. Applying the law to the material facts supports granting Johnson's appeal, as explained below.

LEGAL CONCLUSIONS

Legal Standards

1. "A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age," unless the person has elected to receive a service retirement allowance under Government Code section 21076, 21076.5, or 21077. (Gov. Code, § 21150, subd. (a).) "The application shall be made only (a) while the member is in state service, or (b) while the member . . . 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." (Gov. Code, § 21154.) "Disability" and "incapacity for performance of duty" mean "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion." (Gov. Code, § 20026; see also Gov. Code, § 21156, subd. (a)(2).)

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2. "Government Code section 21156 . . . has always equated disability with a state employee being 'incapacitated physically or mentally for the performance of his or her duties.' And ordinarily, a governmental employee loses the right to claim disability benefits if terminated for cause." (*Martinez, supra*, 33 Cal.App.5th at p. 1161.)

3. "A pair of decisions from the Third Appellate District carved out three exceptions to this general rule. First, under [*Haywood*], a terminated-for-cause employee can still qualify for disability retirement when the conduct which prompted the termination was the result of the employee's disability. Second, under [*Smith*], a terminated employee may qualify for disability retirement if he or she had a 'matured right' to a disability retirement prior to the conduct which prompted the termination. Third, *Smith* further recognized that there might be instances 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.' [Citation.]" (*Martinez, supra*, 33 Cal.App.5th at p. 1161.)

4. "Applying *Haywood* and *Smith*, the [Board] adopted a precedential decision that, when an employee settles a pending termination for cause and agrees not to seek reemployment, this is 'tantamount to a dismissal,' thus precluding a disability retirement. [*Vandergoot, supra*, CalPERS Precedential Dec. No. 13-01.]" (*Martinez, supra*, 33 Cal.App.5th at p. 1161.) In *Martinez*, 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.'" (*Martinez, supra*, 33 Cal.App.5th at pp. 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,

"[t]he 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 [the Department of Social Services]. Notwithstanding the theoretical possibility of reinstatement [at another state agency], 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.'" (*Martinez, supra*, 33 Cal.App.5th at p. 1176.) Therefore, *Vandergoot's* extension of *Haywood* and *Smith* applied to the employee's disability retirement application. (*Ibid.*)

5. The Board has also adopted another precedential decision that, when an employee retires just before a termination for cause becomes effective to avoid the termination, the employee is ineligible for a disability retirement unless the employee qualifies for one of the exceptions carved out in *Haywood* and *Smith*. (*MacFarland, supra*, CalPERS Precedential Bd. Dec. No. 16-01.) In *MacFarland*, a CDCR psychologist was served with a NOAA that his employment would be terminated for cause. After receiving the NOAA, the psychologist notified CDCR he would retire just before the effective date of dismissal and apply to CalPERS for disability retirement. CalPERS declined to accept the psychologist's application for industrial disability retirement, and the psychologist appealed to the Board.

6. The Board affirmed CalPERS's determination on the grounds that the psychologist "retired to avoid termination from employment. His relationship with his employer had been severed prior to his retirement, when the NOAA was served on him. His severance became irrevocable when he withdrew any appeal [to the NOAA]. Applicant is barred from returning to his former employment and thus the holdings in

Vandergoot and *Haywood* render him ineligible for disability retirement, unless he meets an exception identified in *Haywood* and *Smith*." (*MacFarland, supra*, CalPERS Precedential Bd. Dec. No. 16-01, p. 8.) The Board found the psychologist did not meet any of those exceptions.

Burden of Proof

7. In an administrative matter involving an application for a disability retirement, the applicant has the burden of proving eligibility for a disability retirement by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.) A preponderance of the evidence means "'evidence that has more convincing force than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri- Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Analysis

8. CalPERS determined Johnson's application and eligibility for disability retirement are precluded by operation of *Haywood, Smith, Martinez, Vandergoot*, and *MacFarland*. The evidence presented does not justify that determination. Unlike the disability retirement applicants in those cases, Johnson separated from employment at CDCR with no termination for cause proceedings pending against him and without notice that he was under investigation for possible termination for cause. This distinguishes Johnson's case from those other cases.

9. *Haywood* and *Smith* involved applicants who were fired after the completion of termination for cause proceedings. *Martinez* and *Vandergoot* involved applicants who resigned to resolve ongoing termination for cause proceedings and agreed never to return to work for their employers. *MacFarland* involved an applicant

who “retired to avoid termination from employment” after he was served with a NOAA for dismissal. (*MacFarland, supra*, CalPERS Precedential Bd. Dec. No. 16-01, p. 8.)

10. Here, Johnson was not fired, and he did not resign to resolve ongoing termination for cause proceedings. He also did not agree never to return to work at CDCR. There was no NOAA for dismissal pending against Johnson when he resigned, and no prior notice to him from CDCR that he was under investigation for possible adverse employment action. In fact, CDCR applied for disability retirement on Johnson’s behalf in April 2021, several months before he resigned. The first notice to Johnson that he was under investigation was in August 2021, which was after he resigned. The preponderance of the evidence proves Johnson was unaware CDCR was investigating him for possible termination for cause before then.

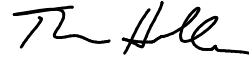
11. The closest comparison to this case is *MacFarland*, but unlike the applicant in that case, Johnson did not resign “to avoid termination from employment.” (*MacFarland, supra*, CalPERS Precedential Bd. Dec. No. 16-01, p. 8.) *MacFarland* involved a willful attempt of an employee to avoid the effects of a known and imminent termination for cause. Johnson could not have resigned for that purpose because he did not know CDCR was investigating him for possible adverse employment action when he resigned. Instead, Johnson resigned to pursue a disability retirement after the amputation of his leg and the application of his employer for disability retirement on his behalf. Thus, CalPERS’s determination that Johnson is precluded from applying for industrial disability retirement application extends *MacFarland* to a circumstance beyond its holding. Neither *MacFarland* nor the other authorities cited by CalPERS support that extension.

12. Given the above, Johnson is entitled to consideration of his industrial disability retirement application on the merits.

ORDER

The appeal of respondent Lincoln D. Johnson is granted. CalPERS shall review Johnson's industrial disability retirement application on the merits to determine whether he qualifies for industrial disability retirement.

DATE: **03/01/2024**



[Thomas Heller \(Mar 1, 2024 10:20 PST\)](#)

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings