

**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 the Cancellation of the  
Application for Industrial Disability Retirement of:**

**ABIODUN J. OGUNKUNLE, Respondent**

**and**

**DEPARTMENT OF STATE HOSPITALS, PATTON, Respondent**

**Case No. 2022-0388**

**OAH No. 2022080857**

**PROPOSED DECISION**

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference and telephone on January 5, 2023.

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

Abiodun J. Ogunkunle, respondent, represented himself.

Despite being properly noticed and served, there was no appearance by or on behalf of respondent, Department of State Hospitals, Patton (DSH-Patton), and the matter proceeded as a default against this respondent pursuant to Government Code section 11520.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 5, 2023.

## **ISSUE**

May Mr. Ogunkunle file an application for industrial disability retirement based on orthopedic (lumbar and cervical spine, bilateral shoulders, bilateral wrists, right knee, and left thumb) and psychological (headaches) conditions, or is his application and eligibility for disability retirement precluded by operation of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292?

## **PROTECTIVE ORDER**

To protect privacy and confidential personal information from inappropriate disclosure, a written Protective Order Sealing Confidential Records was issued. The order lists the exhibits that were sealed and governs the release of documents to the public. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517 may review the documents subject to the order, provided that such documents are protected from disclosure to the public.

## FACTUAL FINDINGS

### Jurisdictional Matters

1. Mr. Ogunkunle was employed as a psychiatric technician at DSH-Patton. By virtue of his employment, Mr. Ogunkunle became a state safety member of CalPERS subject to Government Code section 21154.

2. On November 29, 2021, CalPERS received a Disability Retirement Election Application, signed by Mr. Ogunkunle on November 15, 2021, seeking a "Service Pending Industrial Disability Retirement." Mr. Ogunkunle listed his retirement date as March 25, 2019, and identified his disabilities as: lumbar spine chronic pain due to bulging discs; cervical spine pain with multilevel disc protrusion; bilateral shoulders chronic pain; bilateral wrists pain; right knee chronic pain due to meniscal tear; left thumb pain; left elbow pain; headaches due to multiple injuries to the head; and high blood pressure. He asserted the injuries occurred on 14 dates between 2009 and 2018. Mr. Ogunkunle explained how the disability occurred as: "On each of these dates was assaulted multiple times by patients on the head, neck, shoulders, right [illegible], lower back, hitting my knee on the floor during containment of assaultive/aggressive behavior elbows, wrists, thumb."

Mr. Ogunkunle identified the limitations/preclusions because of his injuries and how they have affected his ability to perform his job. In the section of the application asking about any other information he would like to provide, Mr. Ogunkunle wrote that he was placed on total temporary disability because DSH-Patton could not accommodate the restrictions, and his pain was now constant and caused elevated blood pressure, anxiety, and depression. He identified his treating physicians and disclosed his 2018 workers' compensation claim.

3. By letter dated March 10, 2022, CalPERS cancelled Mr. Ogunkunle's application, stating he was ineligible for disability retirement benefits because his employment ended for reasons which were not related to a disabling medical condition. In support of its decision, CalPERS cited *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194; *Martinez v. Public Employees Retirement System* (2019) 33 Cal.App.5th 1156; *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Decision No. 13-01; and *In the Matter of Accepting the Application for Industrial Disability Retirement of Philip McFarland* (2016) CalPERS Precedential Decision No. 16-01.

4. Mr. Ogunkunle appealed CalPERS's decision and requested an administrative hearing. In his letter received by CalPERS on April 5, 2022, Mr. Ogunkunle wrote that he was placed on modified duty "around 6/11/2018" with various restrictions and:

The doctor stated that if there is no modify [*sic*] duty then TTD {temporary total disability}. My employer Patton State Hospital could not accommodate me due to all these restrictions, therefore I had been placed on temporary total disability at home since that time. I was still on the TTD when I was terminated on 3/25/2019. So on that ground that I was still receiving treatment and on TTD [*sic*]. That is a basis for industrial retirement and quite different from the cases mentioned as determining factor [*sic*] for the decision.

Eventually I was declared permanent and stationary by [physician]<sup>1</sup> on 9/9/2019.

5. On August 19, 2022, complainant filed the Statement of Issues in his official capacity, seeking to uphold CalPERS's determination that Mr. Ogunkunle is not eligible to apply for an industrial disability retirement.

### **Mr. Ogunkunle's Employment History**

6. DSH-Patton is a maximum security forensic facility that houses psychiatric patients, most of whom have been convicted of various felonies. The patients are generally long term, chronically or acutely mentally ill individuals, many of whom are in various stages of psychoses and prone to exhibit violent behaviors. The psychiatric technicians maintain order, supervise the patients' conduct, ensure patient and staff safety, and provide a basic level of general psychiatric nursing care. Psychiatric technicians are required to document patient evaluations and treatment outcomes, and those documents may be produced during discovery in legal proceedings. Psychiatric technicians must adhere to all hospital policies and procedures.

7. On March 6, 2019, Michael Barsom, M.D., Executive Director, California Department of State Hospitals, served Mr. Ogunkunle with a Notice of Adverse Action, stating that effective March 25, 2019, he was to be dismissed from his position as a psychiatric technician at DSH-Patton. The Notice Of Adverse Action was being taken

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<sup>1</sup> This physician's name was not referenced in the medical documents respondent introduced at this hearing.

against Mr. Ogunkunle pursuant to the causes specified in Government Code section 19572, subdivisions (d) [inexcusable neglect of duty]; (e) [insubordination]; (f) [dishonesty]; (m) [discourteous treatment of the public or other employees]; (o) [willful disobedience]; and (t) [other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or to the person's employment].

8. The factual bases for the adverse action are summarized as follows: Mr. Ogunkunle made numerous sexually inappropriate statements and unwanted sexual advances towards several female staff members despite the female staff members repeatedly telling him to stop. Many of his statements and advances were observed and reported by others staff members. When interviewed, Mr. Ogunkunle denied the allegations and/or could not remember any general or specific incidents. The Notice of Adverse Action advised Mr. Ogunkunle:

Your conduct in these incidents was self-serving, discourteous, highly inappropriate and traumatizing to your victims. Your conduct fails to rise to the expectations of any California Department of State Hospitals employee and has potentially exposed DSH-Patton to significant financial liability. Further, you were repeatedly dishonest and evasive during your Administrative Interview when you continuously denied having any knowledge of the cited incidents.

In addition, your dishonesty has caused your credibility to be called into question, making you an unviable witness in

any future court proceeding, and has caused you to lose credibility with your co-workers and supervisors.

The Notice of Adverse Action cited the numerous hospital policies that Mr. Ogunkunle's conduct violated. It also noted his progressive discipline which included sexual harassment training he underwent in 2016 and 2018, and the statement he signed in 2016 agreeing to maintain professional interactions with staff, patients and the public, and comply with hospital policies. The Notice of Adverse Action advised Mr. Ogunkunle of his appeal rights.

9. At some time not established, Mr. Ogunkunle appealed the Notice of Adverse Action to the State Personnel Board in Case No. 19-0463.

10. On May 21, 2019, Mr. Ogunkunle and Department of State Hospitals executed a Stipulation for Settlement to resolve that appeal. Mr. Ogunkunle voluntarily resigned from his position effective March 25, 2019, and waived any right to backpay. Mr. Ogunkunle further agreed to withdraw, with prejudice, his appeal from the Notice of Adverse Action and agreed not to appeal it "at any time or in any forum in the future." The stipulation further provided the following:

3. [Mr. Ogunkunle] agrees, as part of the consideration and inducement for the execution of this Stipulation for Settlement, never to apply for, transfer to, exercise reinstatement rights to, or accept any positions with the Department of State Hospitals. [Mr. Ogunkunle] agrees to waive and hereby does forever waive and release any right, known or unknown, to reinstatement of employment at Department of State Hospitals. If Department of State



Hospitals inadvertently reinstates or hires [Mr. Ogunkunle], and [Mr. Ogunkunle] breaches this Stipulation for Settlement by accepting any position with Department of State Hospitals, [Mr. Ogunkunle] may be terminated at such time as is convenient to Department of State Hospitals. [Mr. Ogunkunle] hereby waives any right [he] may have to appeal that termination in any forum.

4. [Mr. Ogunkunle] acknowledges that any future employment decisions involving [him] are at [Department of State Hospitals's] sole discretion. [Mr. Ogunkunle] hereby waives any right to challenge any decisions by [Department of State Hospitals] concerning whether or not to hire [him]. Should [he] not comply with the terms of this Agreement and subsequently obtain employment with [Department of State Hospitals], [he] agrees that [Department of State Hospitals] may summarily dismiss [him], and [he] hereby waives any right to appeal that dismissal in any forum.

In the Stipulation for Settlement, Department of State Hospitals agreed to withdraw the Notice of Adverse Action and remove it and any related Notice of Personnel Action from Mr. Ogunkunle's official personnel file. Department of State Hospitals further agreed not place a copy of the stipulation or the State Personnel Board's Decision Approving the Settlement in Mr. Ogunkunle's personnel file.

The Stipulation for Settlement represented "a full and complete resolution of all disputes between the parties relating in any manner to the matters in the subject

[Notice of Adverse Action] now pending before the [State Personnel Board], or in any other forum or court of law, or the facts contained therein.”

11. On June 3, 2019, the State Personnel Board issued a Decision Approving Stipulation for Settlement adopting the stipulation as its decision.

### **Ms. Gorsuch’s Testimony**

12. Jennifer Gorsuch is the Personnel Officer at DSH-Patton. Her duties include overseeing employee benefits and compensation, and employee and labor relations. The employee and labor relations division is responsible for handling personnel actions which include adverse actions taken against employees. She reviewed Mr. Ogunkunle’s personnel records and her testimony is summarized as follows: the Notice of Adverse Action set forth the applicable Government Code sections Mr. Ogunkunle violated and supporting facts; he was separated from state service under unfavorable circumstances; when that occurs an employee does not have reinstatement rights; he entered into a stipulation waiving his reinstatement rights; and the State Personnel Board adopted that decision. That decision is now final and, as a result, Mr. Ogunkunle was permanently separated from state service with no reinstatement or appeal rights. He is now permanently separated from state service making him ineligible to return to employment.

### **Mr. Ogunkunle’s Testimony**

13. Mr. Ogunkunle’s testimony is summarized as follows: he sustained multiple injuries at work for which he was receiving treatment; DSH-Patton was paying for his treatment; he had restrictions from his injuries that DSH-Patton could not accommodate; his physician placed him on total temporary disability and he was at home still being paid and receiving treatment when he received the Notice of Adverse

Action. Mr. Ogunkunle asserted that his employer should have advised him of his right to apply for disability, but instead told him to stay home until his condition changed but it never did. He did not know he could file for disability. He is still in constant pain and unable to work, so believes he qualifies for a disability retirement.

Mr. Ogunkunle initially testified that he did not file his claim for disability until after receiving his Notice of Adverse Action, but later testified about giving "a letter to the nurse" at DSH-Patton who would not sign it which he believed was done to delay the filing of his application. However, there was no corroborating evidence of any attempts before 2021 to file his application. His completed application was dated in 2021, and CalPERS did not assert it was incomplete.

Mr. Ogunkunle does not think the cases cited by CalPERS in its denial letter apply because he was on disability before the Notice of Adverse Action was served, and those applicants failed to provide competent medical evidence. He believes he has provided competent medical evidence with his workers' compensation documents showing he was physically and mentally disabled, receiving treatment, and his total temporary disability was eventually made a permanent disability.

On cross-examination, complainant questioned Mr. Ogunkunle about the facts alleged in the Notice of Adverse Action. Mr. Ogunkunle denied the first allegation that he touched a female coworker's buttocks, claiming he only hugged her. Further attempts to question him about the factual allegations in the Notice of Adverse Action were denied as explained in the Legal Conclusions below.

### **Mr. Ogunkunle's Documents**

14. Mr. Ogunkunle offered three documents which were received in evidence as administrative hearsay pursuant to Government code section 11513, subdivision (d).

As stated when the documents were received, and as noted below, a workers' compensation ruling is not binding on CalPERS regarding the issue of eligibility for disability retirement. The three documents related to his workers' compensation claim were received only to the extent they supplemented or explained Mr. Ogunkunle's testimony regarding his worker's compensation case.

15. A "Supplemental Orthopedic Panel Qualified Medical Evaluation Report" written by Donald D. Kim, M.D., in Mr. Ogunkunle's workers' compensation matter documented his review of supplemental records. Dr. Kim listed the date of injury as "March 21, 2018 CT June 5, 2006 to March 21, 2018." In the report Dr. Kim summarized additional records he reviewed, as well as a cover letter from Mr. Ogunkunle's attorney which noted "numerous dates of injuries." Dr. Kim documented 26 conditions in his "Assessment." In the "Discussion" section of his report Dr. Kim wrote:

I have been provided with numerous prior injuries, which were added to the current diagnoses, based on documentation.

Mr. Ogunkunle has had numerous injuries throughout the years, but I feel that his current symptoms comprise of not individuals [*sic*] injuries but rather one continuous trauma incident due to the numerous injuries which were sustained that are intimately intertwined. So that really the current symptoms and claim is considered one continuous trauma due to the numerous injuries to cumulative trauma exposure constituting one continuous trauma period starting with 2006 through March 21, 2018.

On March 21, 2018 I opined that he sustained a fairly significant injury which effectively took him out of work.

In the "Causation" section of his report Dr. Kim wrote:

Causation of the lumbar spine and right hip is due to specific trauma on March 21, 2018.

Despite the fact that Mr. Ogunkunle has documented the numerous injuries sustained to multiple body parts throughout the years, based on the intertwined nature of his numerous claims to multiple body parts, I feel that his current claim is more accurately reflected from one continuous trauma leading up to March 21, 2018.

Dr. Kim wrote that the recommendation he "outlined on August 14, 2018 still remains valid with no changes in the opinions, based on review of the current additional medical records." Those August 14, 2018, recommendations were not introduced at this hearing. Of note, at no point in the report did Dr. Kim opine that Mr. Ogunkunle was substantially disabled from performing his duties. Even if he had, for the reasons discussed below, such an opinion would not be binding in this matter.

16. A November 13, 2019, "Notice Regarding Permanent Disability Benefits Payment Starting" from the Claims Adjustor at the State Compensation Insurance Fund, the claims administrator for DSH-Patton workers' compensation claims, referenced Claim Number 06356646. The notice informed Mr. Ogunkunle of "the status of permanent disability payments for your workers' compensation injury of March 21, 2018." The Qualified Medical Evaluator determined in the Comprehensive Medical Evaluation that Mr. Ogunkunle's injury was "permanent and stationary and has

resulted in permanent disability which the Disability Evaluation Unit has determined to be 7%," a rating equivalent to \$6,090. The Qualified Medical Evaluator also determined Mr. Ogunkunle required future medical care. The notice advised that payments for permanent disability would begin for the period from September 10, 2019, through November 13, 2019 and continue until \$6,090 had been paid. The payments would be deducted from any award Mr. Ogunkunle might receive and, since he was represented by an attorney, 15 percent, or \$913.50, of the benefits would be withheld for attorney fees. The notice also advised that there was a temporary disability overpayment of \$1,562.49 that State Compensation Insurance Fund would attempt to assert as a credit against the permanent disability. Mr. Ogunkunle was advised of his appeal rights if he disagreed with the notice.

17. A "Notice Regarding Permanent Disability Benefits Payment Starting And Ending" from the same Claims Adjuster at the State Compensation Insurance Fund, also dated November 13, 2019, referenced Claim Number 06354268. The notice was sent to "advise you of the status of permanent disability payments for your workers' compensation injury of March 21, 2018." The Qualified Medical Evaluator determined a seven percent permanent disability rating and that Mr. Ogunkunle's injury was permanent and stationary with a need for future medical care. A payment in the amount of \$5,176.50 would be sent on November 13, 2019, for "the total amount in permanent disability" benefits (\$6,090 minus \$913.50 for attorney fees equals \$5,176.50). The benefits were ending because Mr. Ogunkunle's "permanent disability benefit has been paid in full." Benefits were paid from September 10, 2018, through January 11, 2019, and would be deducted from any award he may receive. Mr. Ogunkunle was advised of his right to appeal if he disagreed with the decisions set out in the notice.

## LEGAL CONCLUSIONS

### Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.].....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." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

### Applicable Code Sections

3. Government Code section 20021 defines "Board" as "the Board of Administration of the Public Employees' Retirement System" (CalPERS).

4. Government Code section 20026 provides:

"Disability" and "incapacity for performance of duty" as a basis of retirement, 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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

5. Government Code section 21151, provides that a state safety member who is "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . . "

6. Government Code section 21152 states in part:

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

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

[¶] . . . [¶]

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

7. Government Code section 21153 states:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions



to remain in the fund with rights to service retirement as provided in Section 20731.

8. Government Code section 21154 states:

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 and Precedential Decisions<sup>2</sup>

### ***HAYWOOD V. AMERICAN RIVER FIRE PROTECTION DISTRICT***

9. *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, involved an employee who filed an application for disability retirement after being terminated for cause. The court found that a terminated employee is ineligible for disability retirement because disability laws “contemplate a potential return to active service” (*Id.* at p. 1307) and termination constitutes “a complete severance of the employer-employee relationship” (*Id.* at p. 1306) thereby eliminating that potential return.

If an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination of the employment relationship renders the employee ineligible for disability retirement. (*Id.* at p. 1297.) However, pursuant to Government Code 21153, an employer may not terminate an employee because of medical disability if the employee would be otherwise eligible for disability retirement, and, instead, the employer must apply for disability retirement on the employee’s behalf. (*Id.* at p. 1305.) In the case before it, the court found that even though the employee had filed a claim for workers' compensation benefits before his termination, and had treated several times with a provider, there was “no claim, or evidence which would

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<sup>2</sup> Government Code section 11425.60 authorizes agencies to designate decisions as precedential that contain “a significant legal or policy determination of general application that is likely to recur.” Precedential decisions may be expressly relied upon by the administrative law judge and the agency.

support a claim, that the termination for cause was due to behavior caused by a physical or mental condition. There was also no claim, or evidence to support a claim, of eligibility for disability retirement that could have been presented before the disciplinary actions were taken. (*Id.* at p. 1306.)

### ***SMITH V. CITY OF NAPA***

10. The court in *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, examined the two exceptions set forth in *Haywood, supra*, namely whether the dismissal is the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim for disability retirement. The court held that if the employee can “prove that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot preempt the right to receive a disability pension” but that right “may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures.” (*Id.* at p. 206, citations omitted.) The key issue was whether an employee’s right to a disability retirement matured before the employee’s separation from service, which occurs when CalPERS determines the employee is no longer capable of performing his duties, not at the time of injury. (*Ibid.*, citations and footnote omitted.) Since CalPERS’s determination of the employee’s eligibility did not predate the cause for dismissal, the right to a disability retirement was immature, and the dismissal for cause defeated it. (*Ibid.*)

The court conceded there may “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.” (*Id.* at pp. 206-207.) Examples of a matured right to disability included (1) where 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) there was “undisputed evidence” 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).” (*Id.* at p. 207.)

The court found that neither exception applied. First, the employee did not even initiate the disability retirement application process until after giving cause for his dismissal. Second, at best, the record contained medical opinions of a permanent disability for purposes of the workers' compensation claims, but workers' compensation rulings are not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different. (*Id.*, citations omitted.)

### ***MATTER OF VANDERGOOT***

11. *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot, Respondent, and California Department of Forestry and Fire Protection, Respondent* (2013) Precedential Decision 13-01 (*Vandergoot*), addressed the question of whether CalPERS may properly apply *Haywood, supra*, in the absence of an actual dismissal for cause. There the employee appealed his dismissal for cause to the State Personnel Board. He settled his appeal via a stipulation, similar to the one at issue here, where he resigned, agreed not to seek employment with his employer in the future, and waived any rights of appeal regarding his dismissal. The employer agreed to withdraw the Notice of Adverse Action and remove it, the stipulation, and all supporting documents from the employee's personnel file.

In deciding the case, the Board made no findings regarding the factual basis underlying the disciplinary action taken against the employee. Instead it considered those matters for the sole purpose of determining whether the employee's dismissal was the result of a disabling medical condition, concluding it was not. The Board held:

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 . . . if it ultimately is determined that [the employee] is no longer disabled. (*Haywood, supra* 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: [which contemplate reinstatement to employment].

The Board next addressed the employee's argument that his dismissal was preemptive of an otherwise valid claim for disability retirement, one of the exceptions discussed in *Smith, supra*. In finding it was not, the Board noted that a right to a disability retirement matures when CalPERS determines the employee is no longer capable of performing his duties, something which did not predate the employee's separation from employment. Principles of equity also did not help the employee because he did not have an impending ruling on a claim for a CalPERS disability pension that was delayed through no fault of his own. In fact, he did not even initiate the process for receiving an industrial disability retirement allowance until after he received the Notice of Adverse Action. Second, there was no "undisputed evidence" that the employee was eligible for a disability retirement such that a disability

retirement was a foregone conclusion. The employee's prior industrial disability leave was not binding on the issue of eligibility for industrial disability retirement and the medical evidence was not unequivocal.

### ***MATTER OF MACFARLAND***

12. *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) Precedential Decision 16-01 (*McFarland*), the Board found the employee retired to avoid termination, and the employment relationship was severed prior to his retirement, when a Notice of Adverse Action was served. The severance became irrevocable when the employee withdrew any appeal he filed. As such, he was barred from returning to his former employment and the holdings in *Vandergoot* and *Haywood* rendered him ineligible for disability retirement, unless he met an exception identified in *Haywood* and *Smith*. The Board then found:

At the time [the employer] issued the [Notice of Adverse Action] and severed its employment relationship with [the employee, the employee] had no unconditional right to immediate payment of a disability retirement. His workers' compensation actions were unresolved, and had no bearing on a determination as to whether he was substantially and permanently incapacitated from his duties under retirement law. CalPERS had had no opportunity to evaluate any disability claims; [the employee] did not even initiate the disability retirement process until after giving cause for his dismissal. [The employee] had no unconditional right to

immediate payment of a disability pension at the time he was terminated. [The employee] is ineligible to apply for disability retirement or for industrial disability retirement under Government Code section 21151. His eligibility is precluded by operation of the holdings in *Haywood, Smith* and *Vandergoot*.

### ***MARTINEZ V. PUBLIC EMPLOYEES' RETIREMENT SYSTEM***

13. The court in *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156, evaluated the claim of a former employee who settled the appeal of her termination for cause by agreeing to resign and not reapply for employment. The employee later appealed CalPERS's denial of her application for disability retirement, challenging the soundness and continued validity of *Haywood* and *Smith*, particularly as extended in *Vandergoot*. In upholding the Board's decision, the court agreed with the lower court's rulings that *Haywood* and *Smith* "set out the relevant law" and were binding as stare decisis, and that "*Vandergoot* is a reasonable extension of *Haywood* and *Smith*" entitled to "substantial weight" because of CalPERS's "area of expertise." (*Id.* at pp. 1161-1162.)

### **Disability Retirement versus Workers' Compensation Determinations**

14. Although the Public Employees' Retirement Law and the Workers' Compensation Law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. Courts may not assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Pearl v. W.C.A.B.* (2001) 26 Cal.4th 189, 197.)

15. Receipt of any type of disability in a related workers' compensation proceeding does not establish qualification for a disability retirement. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) Nor does the issuance of prophylactic work restrictions or a reasonable fear of injury justify granting an industrial disability retirement. (*Hosford, id.* at p. 863-864.) Workers' compensation appeal board determinations do not apply to industrial disability retirement proceedings. (*English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal. App. 3d 839, 844-845; *Hawpe v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

16. Generally, a workers' compensation appeals board proceeding concerns whether the employee suffered any job-related injury, and if that injury resulted in some permanent residual loss, then the workers' compensation appeals board awards the employee a permanent disability rating. Retirement boards, on the other hand, focus on a different issue: whether an employee has suffered an injury or disease of such magnitude and nature that he or she is incapacitated from substantially performing his or her job responsibilities. Because of the differences in the issues, "[a] finding by the [workers' compensation appeals board] of permanent disability, which may be partial for the purposes of workers' compensation, does not bind the retirement board on the issue of the employee's incapacity to perform his duties." (*Bianchi v. City of San Diego* (1989) 214 Cal App 3d 563, 567, citations omitted.)

### **Administrative Hearsay**

17. Government Code section 11513, subdivision (d), provides in part: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."



18. Unless admissible over objection in civil actions, hearsay evidence shall not be sufficient in itself to support a finding in an administrative proceeding. (*Carl S. v. Commission for Teacher Preparation & Licensing* (1981) 126 Cal.App.3d 365, 371.)

19. Hearsay evidence is not competent evidence that can independently support a finding. (*Furman v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 416, 420.)

## **Evaluation**


20. By stipulation, Mr. Ogunkunle was permanently separated from service and waived all rights to appeal his dismissal. Mr. Ogunkunle's permanent separation with no right to reinstatement prevents him from applying for an industrial disability retirement absent an exception, which was not shown. Mr. Ogunkunle did not have a matured right to a disability retirement when he was dismissed. He did not submit his application until after his dismissal, and the records he introduced were determinations made in his workers' compensation case which are not binding in this proceeding. Further, Mr. Ogunkunle never asserted that his injuries caused the behavior that led to his dismissal, and his employer agreed to withdraw the Notice of Adverse Action and remove it from his personnel file, thereby making testimony regarding the facts that led to his dismissal irrelevant and properly excluded.

Mr. Ogunkunle may not file an application for industrial disability retirement based on an orthopedic (lumbar and cervical spine, bilateral shoulders, bilateral wrists, right knee, and left thumb) and psychological (headaches) conditions because his application and eligibility for disability retirement are precluded by law.

## ORDER

Mr. Ogunkunle's appeal is denied. The decision by CalPERS to cancel his application for industrial disability retirement is affirmed.

DATE: January 23, 2023

  
Mary Agnes Matyszewski (Jan 23, 2023 16:35 PST)

MARY AGNES MATYSZEWSKI

Administrative Law Judge

Office of Administrative Hearings