

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:**

GARY THOMPSON,

and

CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

Agency Case No. 2019-1252

OAH No. 2020050759

PROPOSED DECISION

Administrative Law Judge Barbara O'Hearn, State of California, Office of Administrative Hearings, heard this matter by videoconference and telephone on February 18, 2021.

California Public Employees' Retirement System Senior Attorney John Shipley represented Keith Riddle, Chief of the Disability and Survivor Benefits Division of the California Public Employees' Retirement System.

Respondent Gary Thompson represented himself.

No appearance was made by or on behalf of respondent City and County of San Francisco.

The matter was submitted for decision on February 18, 2021.

ISSUE

Is respondent precluded from applying for industrial disability retirement, as a result of his separation from employment with the City and County of San Francisco, by operation of the decisions of *Haywood, Smith, Martinez, and MacFarland*?

FACTUAL FINDINGS

1. Respondent Gary Thompson worked for respondent City and County of San Francisco (city) as a juvenile counselor for the juvenile probation department. By virtue of his employment, he is a local safety member of the California Public Employees' Retirement System (CalPERS), subject to Government Code sections 21151, 21154 and 21156.

2. On May 5, 2010, respondent took a laptop computer that he knew did not belong to him, while going through the security checkpoint at San Francisco International Airport. Respondent was arrested for theft. He did not notify his employer, even when he reported for work on May 10, 2010.

3. On May 12, 2010, the city notified respondent of its intent to place him on unpaid administrative leave, pending completion of an investigation of the

allegation that respondent committed an act that would constitute a felony or misdemeanor involving moral turpitude. On May 14, 2010, the city director of probation services and the human resources director met with respondent and his union representative. On May 17, 2010, the city notified respondent that he was placed on unpaid administrative leave.

4. The city scheduled an investigative interview with respondent, held with respondent's union representative on June 16, 2010. On the same date, respondent contacted CalPERS to inquire if his retirement would be affected if he was to be fired or dismissed for moral turpitude.

5. The investigation was not concluded until after resolution of criminal charges against respondent. On August 24, 2010, respondent was convicted of violating Penal Code section 485 (appropriating lost property) and placed on one year of court probation.¹ The follow-up investigative interview of respondent was held on September 13, 2010.

6. On December 16, 2010, the city's assistant chief probation officer issued the investigation report. Based on the report, on January 14, 2011, the city notified respondent of his proposed termination and *Skelly*² meeting to respond to the charges prior to a final decision. After respondent's postponement requests for a *Skelly* hearing were granted, respondent was permitted to submit a written response

¹ At hearing, respondent stated that the conviction was expunged; he incorrectly claimed that he was "cleared" of the charges.

² *Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194.

to the charges for dismissal. On February 17, 2011, respondent notified the city that he retained an attorney, instead of the union representative, to represent him. The union representative, however, submitted the response on behalf of respondent on February 18, 2011.

7. On February 22, 2011, the city sent respondent a notice of proposed termination. On the same date, respondent submitted an industrial disability retirement election application, with no information about his specific disability. He requested the retirement date effective June 10, 2011. Respondent has been receiving service retirement benefits since June 10, 2011.

8. On May 26, 2011, the city held a meeting requested by respondent to reconsider the proposed termination. On June 13, 2011, the city issued a final notice of termination of employment to respondent, effective immediately. The reasons for termination were: 1) commission of an act constituting moral turpitude; 2) failure to notify the probation department of his arrest; and 3) exhibiting conduct unbecoming a juvenile probation counselor. Respondent did not appeal his termination.

9. By letters dated March 6, 2011, May 18, 2011 and July 27, 2011, CalPERS requested the city to make a determination regarding respondent's industrial disability retirement application. On August 3, 2011, the city responded to CalPERS that it was unable to make a determination regarding respondent's disability because respondent failed to provide medical records. When respondent contacted CalPERS on August 11, 2011, he was advised that his employer (the city) makes the determination of his disability.

10. Without making a determination of disability, on August 15, 2011, the city issued a separation report form stating that respondent retired effective

June 9, 2011. On February 29, 2014, CalPERS closed respondent's 2011 industrial disability retirement application due to the city's failure to make a determination of disability.

11. On February 25, 2019, respondent signed and submitted another industrial disability retirement application. His claimed disability in that application was a "heart attack" that occurred on September 20, 2010. He requested the same retirement date of June 10, 2011, and stated his last day on the payroll was June 9, 2011.

12. On March 11, 2019, CalPERS asked the city about the reason for respondent's separation from employment. In May 2019, the city replied that respondent was recommended for termination for cause on June 13, 2011, but retired in lieu of termination effective June 9, 2011.

13. On November 15, 2019, CalPERS notified respondent and the city that respondent's application was cancelled because his separation from the city was not the result of a disabling medical condition. CalPERS based its determination on review of respondent's employment status and the cases of *Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292 (*Haywood*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*); and the precedential decisions of *In the Matter of Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Decision No. 13-01 (*Vandergoot*); and *In the Matter of Accepting the Application for Industrial Disability Retirement of Philip D. MacFarland* (2016) CalPERS Precedential Decision No. 16-01 (*MacFarland*).

14. On December 2, 2019, respondent filed a timely appeal and requested an administrative hearing. On April 29, 2020, Keith Riddle filed the Statement of Issues in this matter in his official capacity as CalPERS Chief of the Disability and Survivor Benefits Division. The Statement of Issues referred to the same cases in its November 2019 notice, except for *Vandergoot*.

Respondent's Evidence and Contentions

15. Respondent contended that he had a "massive heart attack" on September 20, 2010. Respondent blamed his heart attack on the stress of the city's disciplinary investigation. The heart attack postdated his action in May 2010 that resulted in his conviction in August 2010, and his investigative interview in September 2010.

16. Respondent claimed that he retired because of his heart attack. However, his industrial disability retirement application submitted in 2011 does not mention this condition. He also claimed at hearing that his decision to retire was not related to the May 2010 incident, as he retired to get his "life in order" after the heart attack.

17. Respondent submitted a decision of the Worker's Compensation Appeal Board dated April 24, 2012. The decision found that during the period of September 20, 2009 through September 20, 2010, respondent sustained an injury to his heart and cardiovascular system. The decision also found that the injury resulted in some temporary disability from September 20, 2010 to February 23, 2011, and some permanent disability starting February 23, 2011.

18. Respondent contended at hearing that he was not terminated from his employment with cause, because he did not have a signed agreement that would disqualify him from disability retirement. He did not agree to retire in lieu of

termination and believed CalPERS was misinformed by the city. Respondent relied on his separation report form which verified that he retired effective June 9, 2011. His retirement date preceded the final termination date of June 13, 2011.

19. Respondent did not establish that the reasons for the proposed termination of his employment on February 22, 2011, based on alleged misconduct that occurred in May 2010, were the result of a disability. Respondent provided no evidence that the pending termination was initiated because of his heart condition.

LEGAL CONCLUSIONS

1. The applicant for a benefit has the burden of proof to establish the right to the claimed benefit; the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; Evid. Code, § 115.)

2. Public employee pension legislation should be construed liberally in favor of the member; however, the legislative purpose is paramount. The rule of liberal construction cannot be permitted to eradicate the legislative purpose of the law or to allow eligibility for those for whom it obviously is not intended. (*Haywood, supra*, 67 Cal.App.4th at p. 1304.) Courts have given great weight to CalPERS's construction of the Public Employees' Retirement Law. (*Martinez, supra*, 33 Cal.App.5th at p. 1164.)

3. The Public Employees' Retirement Law contemplates the potential reinstatement of a member retired on disability if the member recovers and is no longer disabled. Under Government Code section 21193, whenever a member receiving a disability retirement allowance is found to no longer be disabled, the employer may reinstate the member and the member's disability allowance terminates.

4. The issue in this matter is whether respondent is eligible to apply for industrial disability retirement on the date of his notice of proposed termination, effective three days prior to the final termination notice. Respondent resigned under unfavorable circumstances.

Haywood

5. Haywood, a firefighter, was terminated for cause. Haywood applied for disability retirement claiming that stress from disciplinary actions caused him to suffer a major depression that rendered him incapable of performing his usual duties. The court observed that Haywood's dismissal for cause constituted a complete severance of the employer-employee relationship. A necessary requirement for disability retirement is the potential reinstatement of the employment relationship if it is determined that a member is no longer disabled. (*Haywood, supra*, 67 Cal.App.4th at pp. 1296-1297.)

6. Even if respondent in this matter was found to be disabled at the time of his industrial disability application, similar to Haywood, respondent did not have potential reinstatement of employment with the city if it is determined that he was no longer disabled. (Findings 8 and 12.)

Smith

7. Smith, a firefighter, was terminated after he failed remedial tests related to his competency and applied for disability retirement asserting "stress" related to his employment was the reason that he failed the required testing. CalPERS denied Smith's disability claim, concluding that his dismissal for cause extinguished his right to disability retirement. The court noted that Smith's disability application being filed on the effective date of dismissal was not significant. Smith "did not even initiate the

process until after giving cause for his dismissal." (*Smith, supra*, 120 Cal.App.4th at pp. 205-207.)

8. The *Smith* decision also noted that the holding in *Haywood* would not apply where a cause for dismissal was the result of a disabling medical condition or where the dismissal would preempt an otherwise valid claim for disability retirement. If a dismissed employee could prove the right to disability retirement matured before the date of the event giving rise to cause for dismissal, the employee's dismissal would not preempt the right to receive a disability pension for the duration of the disability. (*Smith, supra*, 20 Cal.App.4th at pp. 205-207.) In this matter, respondent has not proven that his right to industrial disability retirement matured before the events in May 2010 that gave rise to cause for dismissal. (Findings 15 and 19.)

Martinez

9. In *Martinez*, the court summarized *Haywood* and *Smith* and acknowledged 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. (*Martinez, supra*, 33 Cal. App. 5th at pp. 1173-1176.) This court decision is not applicable to this matter. (Finding 18.)

MacFarland

10. MacFarland, a clinical psychologist, was served with a Notice of Adverse Action (NOAA), after an internal affairs investigation, advising that he would be terminated from his position. Two days after the NOAA was served, he filed for service and disability retirement. The executive officer confirmed receipt of MacFarland's intent to retire and indicated that his separation was under unfavorable circumstances. MacFarland withdrew his appeal of the NOAA. When CalPERS advised him that his

application for disability retirement was canceled, he wrote that he was not terminated because the proposed adverse action was not to take effect until after he retired. (*MacFarland, supra*, Precedential Decision No. 16-01.)

11. The *MacFarland* decision found evidence that MacFarland retired to avoid termination from employment and his resignation did not prevent the agency from enforcing the NOAA should he attempt to reinstate. McFarland's "separation type" was retirement as stated on his separation form. (*MacFarland, supra*, at p. 5, para. 19.) McFarland argued that he was never terminated because his resignation letter preceded the effective date of the NOAA. (*Id.* at p. 6, para. 24.)

12. The decision found that MacFarland's employer made its decision to terminate him before it issued the NOAA, advising when his employment would be terminated. The decision stated: "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 he filed." (*MacFarland, supra*, at p. 7, para. 26 and p. 8, para. 29.)

13. This matter is similar to *MacFarland*, where the evidence is persuasive that respondent retired in an attempt to avoid termination. Respondent knew that his termination was pending before he submitted his application on February 22, 2011. (Findings 3, 4, and 6 through 8.) His pending final termination date and voluntary resignation effectively barred him from seeking reemployment with the city and extinguished his right to file an application for disability retirement.

Respondent's Separation from Employment

14. The city's investigation of respondent beginning in May 2010, and the resulting discipline recommending termination, which prompted his separation from

employment with the city, must be treated as tantamount to the dismissals in *Haywood, Smith, and MacFarland*. Respondent's application for industrial disability retirement is precluded by the holdings in these cases.

15. CalPERS correctly determined that respondent is ineligible to apply for industrial disability retirement and respondent's appeal must be denied.

ORDER

The appeal of Gary Thompson is denied.

DATE: 03/18/2021

Barbara O'Hearn

BARBARA O'HEARN

Administrative Law Judge

Office of Administrative Hearings