

ATTACHMENT A
PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Industrial
Disability Retirement of:

DAVID S. CLARK,

and,

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
SALINAS VALLEY STATE PRISON,

Respondents.

Case No. 8344

OAH No. 2011080669

PROPOSED DECISION

This matter was scheduled for an evidentiary hearing before Rebecca M. Westmore, Administrative Law Judge, Office of Administrative Hearings, State of California, on February 2, 2012, in Sacramento, California. On that date and at that time, the parties agreed that this case involves exclusively a matter of law with no factual dispute, and requested that the case be resolved through written legal arguments.

Carol A. McConnell, Senior Staff Counsel, represented complainant, California Public Employees' Retirement System (CalPERS).

Steven B. Bassoff, Attorney at Law, represented respondent, David S. Clark.

There was no appearance by or on behalf of respondent, California Department of Corrections and Rehabilitation, Salinas Valley State Prison (CDCR).

The parties timely submitted their written Opening Briefs on July 16, 2012, and their written Reply Briefs on August 17, 2012. The record was closed, and the matter was submitted for decision on August 17, 2012.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 9/17 2012
W. Westmore

ISSUE

Is respondent eligible to apply for industrial disability retirement in light of the decisions in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194?

FACTUAL FINDINGS

1. Respondent was employed as a Physician and Surgeon for CDCR beginning on April 1, 1996. By virtue of his employment, respondent became a state safety member of CalPERS. On April 15, 2002, respondent was served with a Notice of Adverse Action terminating his employment, effective April 15, 2002, based upon violations of Government Code section 19572, subdivisions (d) (inexcusable neglect); (o) (willful disobedience); (m) (discourteous treatment of the public or other employees); 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 the person's employment).

2. The facts and circumstances of respondent's termination arose on June 27, 2000, when respondent evaluated an inmate who had been placed on a backboard and in a neck brace following a fight involving five other inmates. According to the Notice of Adverse Action, respondent "initially evaluated the inmate for four hours, ordered the brace to be removed and the inmate was placed in a wheelchair. You had the inmate returned to his cell because you believed that he was malingering. You did not order an X-ray to determine whether or not there was spinal damage. You were negligent in your duties by not providing standard medical care in the treatment of [the inmate] and by treating him with disrespect in ignoring his injury."

3. Respondent appealed the Notice of Adverse Action, and a hearing was held before the State Personnel Board (SPB) on June 8, August 31, and September 2, 2005, and on November 28 and 29, 2005. On the last day of hearing, the parties entered into a Stipulation for Settlement (Stipulation), in which CDCR agreed to withdraw its Notice of Adverse Action in exchange for respondent's resignation effective July 29, 2003, and respondent's agreement never to apply for or accept employment with CDCR.

4. However, pursuant to a term of the Stipulation, CDCR exercised its right to revoke the Stipulation on December 7, 2005, and requested that the matter be reset for hearing before the SPB.

5. On December 13, 2005, respondent submitted a Disability Retirement Election Application (Application) to CalPERS,¹ which was received by CalPERS on January 4, 2006. Respondent identified his specific disability as “Severe Major Depression onset 6/29/00 following medical I rendered to an inmate on 6/27/00.” Respondent described his limitations/preclusions as follows: “Too depressed to practice medicine. California Medical Board suspended license & then required I surrender license.” Respondent also noted that the injury affected his ability to perform his job because of “Loss of mental alertness. CMB determined I would be a hazard to my patients.”

6. By letter dated May 30, 2007, CalPERS denied respondent’s application for disability retirement on the grounds that he was terminated from his position as a physician and surgeon for CDCR. Respondent timely appealed the denial and requested a hearing before the Office of Administrative Hearings.

7. On January 23, 2012, Mary Lynn Fisher, Chief of the CalPERS Benefit Services Division, filed the Statement of Issues in her official capacity. Based on its review of the cases of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, CalPERS determined that because respondent was terminated for cause by CDCR, and respondent’s termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, respondent was ineligible to apply for industrial disability retirement.

Procedural History of Disciplinary Action by CDCR

8. On November 6 and 7, and 12 through 14, 2008, respondent’s appeal hearing was reconvened before the SPB. In its decision, SPB recounted the facts surrounding respondent’s medical evaluation of the inmate, and his decision to return the inmate to his cell based on his belief that the inmate was malingering or faking his injuries. According to the facts set forth in the SPB decision, x-rays performed on the inmate the following day revealed a spinal cord injury. The inmate was rendered a quadriplegic. The SPB issued its decision on September 22, 2009, sustaining CDCR’s termination of respondent’s employment for cause. SPB adopted the decision of the Administrative Law Judge, effective October 22, 2009.

9. On January 19, 2010, pursuant to Code of Civil Procedure section 1094.5, respondent filed a Petition for Writ of Mandamus, requesting that the Sacramento Superior Court set aside the SPB’s decision sustaining his termination.

10. On May 4, 2011, respondent and CDCR entered into a Stipulation and Release in which respondent agreed to withdraw his appeal of the Notice of Adverse

¹ Respondent filed a Service Retirement Election Application on May 23, 2002, which was approved effective May 1, 2002.

Action and Writ, with prejudice; resign from his position with CDCR effective at the beginning of business on April 15, 2002; never apply for or accept employment with CDCR; and waive all reinstatement and employment rights with CDCR.

11. Respondent contends that the *Haywood* and *Smith* cases are not controlling in this matter, in that those cases involved employees who were terminated for cause from their civil service positions, and respondent resigned from his civil service position.

LEGAL CONCLUSIONS

1. “As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence.” (*McCoy v. Board of Retirement* (1980) 183 Cal. App. 3d 1044, 1054.) As the applicant, respondent has the burden of proving by a preponderance of the evidence that he is eligible for the disability retirement benefit he seeks.

2. Government Code section 21151, subdivision (a), provides that “[a]ny patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.”

3. Government Code section 21152 provides in pertinent part that an application for disability retirement of a member may be made by: “(a) [t]he 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) [t]he member or any person in his or her behalf.”

4. Government Code section 21154 provides, in pertinent part, that “[t]he 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.”

5. Key appellate court decisions have interpreted Government Code section 21154 to mean that a CalPERS member terminated for cause is ineligible to apply for disability retirement after the termination. The decisions find that a continuing employment relationship is required, in order to make possible reinstatement to employment, if the disability resolves. “We conclude that where, as here, 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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed. (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194).

Discussion

6. Respondent's contention that he is not precluded by *Haywood* and *Smith* from applying for industrial disability retirement because he resigned from his employment with CDCR, and was not terminated for cause, is not persuasive. The evidence establishes that CDCR commenced a disciplinary action against respondent on April 15, 2002 (Factual Finding 1), and terminated respondent from his employment with CDCR effective April 15, 2002 (Factual Findings 1 and 8), based on his failure to properly examine and treat an inmate claiming to be paralyzed on June 27, 2000 (Factual Finding 2). CDCR's decision to terminate respondent's employment for cause was sustained by the SPB in a decision dated September 22, 2009, and adopted by CDCR effective October 22, 2009. (Factual Finding 8.) The character of the disciplinary action terminating respondent's employment from CDCR did not change because respondent elected to settle the case prior to exhausting his appeal rights. But for the pendency of the disciplinary action, respondent would not have entered into a settlement agreement with CDCR resigning from his position. Furthermore, respondent's resignation is a distinction without a difference. His resignation resulted in his permanent separation of service from CDCR. (California Government Code section 19996; see also *Collins v. County of Los Angeles* (1976) 55 Cal.App.3d. 594, 597.) Therefore, respondent's employment relationship with CDCR was ultimately terminated effective April 15, 2002, as a result of his care and treatment of an inmate on June 27, 2000, and his termination for cause bars his eligibility to apply for industrial disability retirement.

7. Respondent's contention that he is "eligible to apply for disability retirement because he is eligible to be reinstated into state service, just not with CDCR," is without merit. CDCR was respondent's employer at the time of his claim for disability retirement, and in the stipulated settlement, respondent waived any and all rights of reinstatement to employment with CDCR. (Factual Finding 10.) While respondent may obtain another civil service position with the State of California in the future, such employment will not resurrect his eligibility to apply for disability retirement based on an onset of major depression at CDCR. That claim is foreclosed as a result of respondent's termination for cause. As respondent's employment relationship with CDCR was completely severed effective April 15, 2002, there is no potential for reinstatement if respondent is found to be no longer disabled. (*Haywood*, supra, at pp. 1305-1306.) Therefore, respondent is disqualified from applying for disability retirement.

8. Finally, respondent's contention that his right to disability retirement had matured 21 months prior to the effective date of his dismissal, and therefore survived a termination for cause, is without merit. Respondent filed his application for industrial disability retirement on December 13, 2005, asserting that his onset of major depression on June 29, 2000, resulted from his examination and evaluation of an inmate on June 27, 2000 (Factual Finding 5.) Therefore, respondent admitted that his claimed disabling psychological condition arose subsequent to the event that resulted in the termination of his employment relationship with CDCR. The exception respondent seeks to avail himself of exists to preclude employers from terminating disabled employees to prevent them from obtaining disability retirement. There was no evidence that respondent was disabled before the incident leading to his termination, and therefore, respondent is not a member of the class of persons the exception was designed to protect.

9. Respondent was terminated for cause from his employment with CDCR, and the cause was not the ultimate result of a disabling medical condition or preemptive of a valid claim for disability retirement. The termination for cause severed respondent's employment rights with CDCR, and therefore severed his eligibility to apply for disability retirement.

ORDER

1. The appeal of respondent David S. Clark is DENIED.
2. CalPERS' denial of respondent David S. Clark's application for industrial disability retirement is AFFIRMED.

DATED: September 13, 2012


REBECCA M. WESTMORE
Administrative Law Judge
Office of Administrative Hearings