

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues Against:

MARK ANTHONY RODRIGUEZ-FAZ,

and

DEPARTMENT OF DEVELOPMENTAL
SERVICES (Porterville Developmental Center),

Respondents.

Agency Case No. 2010-0415

OAH No. 2012040738

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on August 15, 2012, in Bakersfield. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Rory J. Coffey, Senior Staff Counsel, represented Petitioner, Mary Lynn Fisher, Chief of the Benefit Services Division of the California Public Employees' Retirement System (PERS).

No appearance was made by or on behalf of Mark A. Rodriguez-Faz (Respondent).

No appearance was made by or on behalf of the Department of Developmental Services (Department).

FACTUAL FINDINGS

Parties and Jurisdiction

1. Petitioner filed the Statement of Issues in her official capacity.
2. Respondent was employed by the Department as a Peace Officer II, Sergeant, effective on or about February 1, 1998. By virtue of this employment, Respondent became a state safety member of PERS subject to Government Code section 21154.

3. A Notice of Hearing (Notice) for this matter was mailed to Respondent on May 25, 2012. Respondent received the Notice on June 6, 2012.

4. The Notice stated the correct date, time and place for the hearing, except that the Notice stated the hearing location was at the Department of Alcohol and Beverage Control (ABC) office located at "1800 Stockdale Highway;" the correct address for the ABC is 4800 Stockdale Highway.

5. On August 8, 2012, an Amended Notice of Hearing (Amended Notice) was mailed to Respondent, clarifying that the ABC office where the hearing would be held was located at 4800 Stockdale Highway. The Amended Notice was sent to Respondent by regular mail through the United States Postal Service.

6. Respondent did not appear for the hearing. The morning of the hearing, he spoke by telephone to the secretary of Petitioner's counsel, stating to her that he had just received the Amended Notice and was unable to attend the hearing for unspecified reasons.

7. Respondent was deemed to be in default by his failure to appear at the hearing. He timely received the Notice which correctly stated the time, date and place of the hearing, except for the street number of the ABC office where the hearing would be held. That error was remedied by the Amended Notice, which Respondent had received no later than the day before the hearing. Respondent, who lives in Bakersfield, could have easily noted the correct address provided in the Amended Notice. Respondent provided no reasonable excuse for not attending the hearing.

Respondent's Application for Disability Retirement

8. On or about April 16, 2009, Respondent signed an application for disability retirement, which was received by PERS on April 20, 2009. In his application, Respondent claimed orthopedic disabilities to his left shoulder, mid-back, and right hand, occurring on January 3, 2007.

9. On a date not established, the Department informed PERS that Respondent was ineligible to submit an application for disability retirement application because it had terminated him from employment for cause specified in Government Code section 19572.

10. PERS received information and documents concerning Respondent's termination from employment. PERS determined that Respondent had been terminated for cause, effective April 16, 2008, on the grounds of inappropriate, unprofessional, and dishonest conduct.

11. By a letter dated October 22, 2009, Respondent was notified of PERS' determination that he was not eligible for a disability retirement by virtue of his being terminated from employment for cause.

12. Respondent filed an appeal of PERS' determination by a letter dated May 17, 2010, and requested a hearing.

LEGAL CONCLUSIONS

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

2. Government Code sections 21152 and 21154 provide that a PERS member may be entitled to a disability retirement under certain circumstances.

3. However, pursuant to the case of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, a public employee who has been terminated for cause is not eligible to apply for a disability retirement. To make sure that an employer cannot unfairly abridge an employee's right to request a disability retirement, the court in *Haywood* clarified that an employee terminated for cause can still seek a disability retirement if the termination was either (1) the ultimate result of a disabling medical condition or (2) preemptive of an otherwise valid claim for disability retirement. (*Id.*, at p. 1307.)

4. In this case, Respondent was terminated for cause and his discharge was not proven to be either the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim for disability retirement. Respondent failed to appear at the hearing and/or present any evidence establishing an exception to the rule articulated in the *Haywood* case. Therefore, Respondent is precluded from a disability retirement. (Factual Findings 1-12, Legal Conclusions 1-3.)

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ORDER

Respondent Mark Anthony Rodriguez-Faz's appeal is denied. Respondent Rodriguez-Faz's application and eligibility for a disability retirement are precluded by operation of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292.

DATED: September 11, 2012

A handwritten signature in black ink, appearing to read 'ES', with a long horizontal flourish extending to the right.

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings