

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of  
Issues/Cancellation of the Application for  
Industrial Disability Retirement of:

Agency Case No. 2012-0281

OAH No. 2012060930

HERCULANO GARCIA,

Respondent,

and

CITY OF ELK GROVE

Respondent.

**PROPOSED DECISION**

On August 29, 2012, Ann Elizabeth Sarli, Administrative Law Judge (ALJ) of the Office of Administrative Hearings, State of California, heard this matter in Sacramento, California.

Complainant, Mary Lynn Fisher, Chief Benefit Services Division, California Public Employees' Retirement System (CalPERS), was represented by Elizabeth Yelland, Senior Staff Counsel.

Respondent, City of Elk Grove, was represented by David W. Tyra, Attorney at Law.

Respondent Herculano Garcia was properly noticed to the hearing and did not appear.

Evidence was received. The matter was submitted and the record was closed on August 29, 2012.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED October 15 20 2012

Lisa Okamoto

## FACTUAL FINDINGS

1. Mr. Garcia was employed by the City of Elk Grove (City) as a Police Officer, effective June 26, 2008. By virtue of this employment, Mr. Garcia became a local safety member of CalPERS subject to Government Code sections 21154 and 21156.

2. On September 13, 2008, Mr. Garcia sustained a neck injury while subduing a suspect. He sought medical treatment, was placed on light duty with periods of temporary disability leave, and filed a worker's compensation claim.

3. On November 16, 2009, Mr. Garcia was terminated for cause from his employment. He appealed the termination to the City Manager. The termination was upheld. He next appealed the termination through an arbitration process provided by contract between the City and the Elk Grove Police Officers Association. On March 22, 2011, the arbitrator issued a Decision and Award (arbitrator's decision), denying the appeal and upholding the termination.

4. The arbitrator's decision held that Mr. Garcia violated the following Elk Grove Police Department (Department) Policies and Disciplinary Policies:

A. Department Policy 1040.6, which provides:

Department members engaged in outside employment who are placed on disability leave or modified/light-duty shall inform their immediate supervisor in writing within five days whether or not they intend to engage in such outside employment while on leave or light duty status.

B. Department Disciplinary Policy 340.3, (e) which provides:

(e) Disobedience or insubordination to constituted authorities including refusal or deliberate failure to carry out or follow lawful directives and orders from any supervisor or person in position of authority.

C. Department Disciplinary Policy 340.3.5, subdivision (a-c) which provides:

(a-c) Giving false or misleading statements, or misrepresenting or omitting material information to a supervisor, or other person in a position of authority, in connection with any investigation or in the reporting of any department related business.

D. Department Disciplinary Policy 340.3.5, subdivision (m) which provides:

Any knowing or negligent violation of the provisions of the department manual, operating procedures or other written directive or an authorized supervisor.

E. Department Disciplinary Policy 340.3.1, which provides:

(b) Unexcused or unauthorized absence or tardiness on scheduled day(s) of work;

(c) Failure to report to work or to place assigned at the time specified and fully prepared to perform duties without reasonable excuse.

5. On May 17, 2011, Mr. Garcia filed a completed Disability Retirement Election Application for Industrial Disability Retirement (application) with CalPERS. Mr. Garcia wrote that on September 13, 2008, he sustained a pinched nerve in the upper spine when he slipped and fell on a concrete floor apprehending a suspect. He wrote that he was no longer able to sit in a patrol vehicle for a long time and was unable to do any physical takedowns of suspects.

6. On June 2, 2011, CalPERS requested, pursuant to Government Code sections 21156 and 21157, that the City determine whether Mr. Garcia was substantially incapacitated from the performance of his job duties due to a physical or mental condition.<sup>1</sup>

7. CalPERS received information and documents concerning Mr. Garcia's termination from employment and determined that Mr. Garcia had been terminated for cause effective November 16, 2009. CalPERS determined that the discharge was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. CalPERS determined that pursuant to *Haywood v. American River Fire Protection District* (1998) 67 Cal. App. 4th 1292, (*Haywood*) Mr. Garcia was not eligible to retire for disability due to his termination.

8. CalPERS notified Mr. Garcia in writing on February 22, 2012, that his application would not be accepted and would be canceled pursuant to the holding in *Haywood*. Mr. Garcia replied in writing that *Haywood* did not apply to his application because at the time of his injury a worker's compensation case had been opened and remained open until the date of his termination. He noted that he attached a letter from a Dr. Hembd with the State Compensation Insurance Fund in which Dr. Hembd determined his injury was permanent. This letter was not offered into evidence at the hearing.

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<sup>1</sup> There is no evidence in the record of whether the City complied with these sections and made a determination whether Mr. Garcia was substantially incapacitated from performance of his job duties.

9. Mr. Garcia's letter was considered as his appeal of the CalPERS cancellation of his application. Accordingly, complainant made and filed a Statement of Issues in her official capacity. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et. seq. Mr. Garcia did not appear at hearing. The matter proceeded as a default against Mr. Garcia, pursuant to Government Code section 11520, subdivision (a).

### ISSUE

The issue in this proceeding is whether Mr. Garcia is ineligible for disability retirement benefits due to his termination from employment.

### LEGAL CONCLUSIONS

1. Government Code<sup>2</sup> section 21151, subdivision (a), provides:

Any 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.

2. Section 2154 provides in pertinent part:

The application shall be made only (a) while the member is in state 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... 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

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<sup>2</sup> All statutory references are to the California Government Code, unless otherwise noted.

the application with respect to a local safety member..., the board shall request the governing body of the contracting agency employing the member to make the determination.

3. California Code of Regulations (CCR), title 2, section 555 provides in pertinent part:

The Executive Officer is hereby authorized to act: on any application for ... retirement for disability or service... and to fix and authorize the payment of any refund, allowance or benefit to which such applicant may be found to be entitled; to cause medical examination of retired persons; and to reinstate such persons from retirement upon his determination that disability does not exist. The Executive Officer may refer the question of an applicant's entitlement to any ... benefit ... to a hearing officer for hearing.

[¶...¶]

4. CCR, title 2, section 555.1 provides in pertinent part:

Any applicant dissatisfied with the action of the Executive Officer on his application, other than his referral of the matter for hearing, may appeal such action to the Board by filing a written notice of such appeal at the offices of the Board ...

#### *Burden of Proof*

5. As set forth in the Findings, CalPERS made the determination that Mr. Garcia is ineligible for benefits and Mr. Garcia appealed. The appeal is governed by the provisions of the Administrative Procedure Act and relevant case law. In *McCoy v Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, the court addressed the burden of proof in an administrative hearing concerning retirement benefits and found as follows:

As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof, including the initial burden of going forward and the burden of persuasion by a preponderance of the evidence.

6. In the absence of a statutory provision to the contrary, the applicant for a benefit has the burden of proof to established a right to the claimed benefit. That burden is unaffected by the general rule that pension statutes are to be construed liberally. (1 Cal. Public Agency Practice, sec 39.03 [9].) See also *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332)

7. Mr. Garcia has the burden of proving that *Haywood* does not apply to his application for disability retirement. He has presented no evidence, only an argument in his letter of appeal that he had an open worker's compensation claim at the time that he was terminated.

*Effect of Termination on Application*

8. In *Haywood*, the appellate court found that "where an employee is terminated 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." The court explained that "a firing for cause constitutes a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement-the potential reinstatement of [the employee with the employer] if it is ultimately determined that he is no longer disabled ... The disability provisions of the PERS law contemplate a potential return to active service and a terminated employee cannot be returned to active service." (*Haywood, supra*, 67 Cal.App.4th at pp. 1306-1307.

9. More recently, the court in *Smith vs. City of Napa* (2004) 120 Cal.App.4th 194, enlarged on the holding in *Haywood*. The *Smith* court held that dismissal for cause extinguishes the right to disability retirement, except if an applicant were able to prove that the right to disability retirement matured before the date of the event giving cause to dismiss; the dismissal cannot preempt the right to receive a disability pension for the duration of the disability. (*Id. at p. 206.*) The court identified the key issue as whether the right to the disability retirement matures before the date of separation from service. It found that a vested right matures when there is an unconditional right to immediate payment. When CalPERS disability retirement is claimed, there is no unconditional right to immediate payment without a finding by CalPERS of the right to a disability retirement pension. (*Id. at p. 206.*)

10. As set forth in the Findings, Mr. Garcia was terminated for: insubordination; giving false or misleading statements; failure to report to duty as required and failure to notify his employer whether he was continuing to work in outside employment while on medical leave and light duty.

11. The evidence is persuasive that Mr. Garcia was terminated for cause, and not as the ultimate result of a disabling medical condition or as a pretext or a "preemptive strike" to prevent him from filing a claim for disability retirement. Moreover, Mr. Garcia did not have a mature right to disability retirement benefits prior to his termination and had not even applied for disability retirement benefits before he was terminated. Consequently, Mr. Garcia is not eligible for disability retirement benefits.

**ORDER**

**CalPERS determination that Herculano Garcia is not eligible for disability retirement benefits is UPHELD.**

**Herculano Garcia's appeal of the CalPERS determination that he is not eligible for disability retirement benefits is DENIED.**

**DATED: October 11, 2012**

  
**ANN ELIZABETH SARLI**  
**Administrative Law Judge**  
**Office of Administrative Hearings**