

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

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

JOHN MACARI,

Respondent,

and,

DEPARTMENT OF MENTAL HEALTH,
ATASCADERO STATE HOSPITAL,

Respondent.

Case No. 2011-1272

OAH No. 2012020667

PROPOSED DECISION

On September 20, 2012, this matter was scheduled for an evidentiary hearing before Danette C. Brown, Administrative Law Judge, in Sacramento, California.

Petitioner, California Public Employees' Retirement System (CalPERS), was represented by Elizabeth Yelland, Senior Staff Counsel.

Respondent, John Macari (respondent), was represented by Steven B. Bassoff, Attorney at Law.

There was no appearance by or on behalf of respondent Department of Mental Health, Atascadero State Hospital (Atascadero).

Pursuant to a telephonic status conference held on September 20, 2012, the parties agreed that this case involves exclusively a matter of law with no factual dispute, and requested that it be resolved through written legal arguments. A briefing schedule was set pursuant to a telephonic status conference order. The parties filed written opening briefs by October 5, 2012. The parties agreed that Senior Staff Counsel Elizabeth Yelland would prepare the exhibits and attach them to CalPERS' written opening brief. The parties were to file their responsive briefs by October 19, 2012. The record was closed on October 19, 2012, and the matter was submitted. The joint exhibits were marked as Exhibits 1 to 7, corresponding to the tab numbers

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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in the exhibit folder, and admitted into evidence. CalPERS' opening brief was marked for identification as Exhibit 8. Respondent's Opening Brief was marked for identification as Exhibit A. CalPERS' Reply brief was marked for identification as Exhibit 9. Respondent did not submit a Reply Brief.

CalPERS requested Official Notice, pursuant to Government Code section 11515, California Rules of Court section 323, subdivision (b), and Evidence Code sections 452 and 453, of:

1. The final decision, *In the Matter of Accepting the Application for Disability Retirement of Paul Bado, respondent*, dated April 14, 2011, adopted by the CalPERS Board of Administration on June 15, 2011.
2. *Haywood v. American River Fire Protection District* (1999) 67 Cal.App. 4th 1292 (*Haywood*).
3. *Smith v. City of Napa* (2004) 120 Cal.App. 4th 194 (*Smith*).

Respondent did not object to CalPERS' request for Official Notice. Official Notice is hereby taken of the items cited above.

ISSUE

This appeal is limited to the issue of whether respondent is precluded from applying for disability retirement because he was terminated for cause before he filed his disability retirement application.

FACTUAL FINDINGS

1. Respondent was employed by Atascadero as a Psychiatric Technician effective August 31, 2007. He was promoted to Senior Psychiatric Technician on November 18, 2007, and he remained in this position until June 24, 2009.

2. Effective June 24, 2009, respondent was terminated for cause after he got into an altercation with a patient. Respondent appealed his termination to the State Personnel Board (SPB). On March 8, 2011, SPB upheld respondent's termination, finding that: (1) respondent engaged in inexcusable neglect of duty and other failure of good behavior in his interactions with the patient on May 26, 2008; and (2) respondent was intentionally dishonest and engaged in other failure of good behavior during the investigatory interview on October 8, 2008.

3. On July 1, 2011, more than two years after he was terminated for cause, respondent submitted his application for disability retirement to CalPERS. Respondent based his application on injuries he allegedly incurred during the altercation with the patient on May 26, 2008.

4. On September 8, 2011, respondent was notified by CalPERS that his application had been rejected based upon his termination for cause.

5. The CalPERS Board did not determine that respondent was no longer capable of performing his duties before the effective date of his termination. Respondent did not have an unconditional right to immediate payment of disability retirement benefits at the time of his termination. There was no indication in any of the evidence that Atascadero terminated respondent's employment in order to preempt him from filing a disability retirement application. Instead, as set forth in the notice of adverse action served on him and the decision of the SPB, respondent's termination was based on factual and legal causes unrelated to respondent's current claim for disability retirement.

LEGAL CONCLUSIONS

1. 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." (*Haywood, supra*, 67 Cal.App.4th at p. 1307.) 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." (*Id.* at pp. 1306-1307.)

2. More recently, the court in *Smith* analyzed the holding in *Haywood*. The *Smith* court held that a termination for cause extinguishes the right to disability retirement, except if an employee were able to prove that the right to disability retirement matured before the date of the event giving cause to dismiss. (*Smith, supra*, 120 Cal.App. 4th at p. 206.) The court explained that a right to disability retirement matures as follows:

A vested right matures when there is an unconditional right to immediate payment. [Citations.] In the course of deciding when the limitations period commenced in a mandate action against a pension board, the Supreme Court noted that a duty to grant the disability pension (i.e., the reciprocal obligation

to a right to immediate payment) did not arise at the time of the injury itself but when the pension board determined that the employee was no longer capable of performing his duties. (*Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672 [197 P.2d 710] [“the right has not come into existence until the commission has concluded that the condition of disability renders retirement necessary.”] [Footnote omitted.] In the present case, a CalPERS determination of eligibility did not antedate the unsuccessful certification on the ladder truck. His right to a disability retirement was thus immature, and his dismissal for cause defeated it.

(*Ibid.* Bolding added.)

3. At the time respondent was terminated, he did not have a mature right to disability retirement. The CalPERS Board had not determined that he was no longer capable of performing his duties as a Senior Psychiatric Technician. He did not have an unconditional right to immediate payment of disability retirement benefits. There was no indication that Atascadero terminated respondent’s employment in order to pre-empt him from filing a disability retirement application. Instead, as set forth in the notice of adverse action and the decision of the SPB, respondent’s termination was based on factual and legal causes unrelated to respondent’s current claim for disability retirement. Because respondent did not have a mature right to disability retirement before he was terminated, his termination precluded him from thereafter applying for disability retirement. Consequently, in accordance with *Haywood* and *Smith*, respondent’s application for disability retirement must be dismissed.

ORDER

Respondent John Macari’s application for disability retirement is
DISMISSED.

DATED: December 6, 2012



DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings