ATTACHMENT B

THE PROPOSED DECISION

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

In the Matter of Application for Disability Retirement of: ROBERT C. VANDERGOOT, Respondent, and CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION, Respondent.	Case No. 2012-0287 OAH No. 2012050989

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, State of California, on December 12, 2012, in Sacramento, California.

Elizabeth Yelland, Senior Staff Attorney, California Public Employees' Retirement System (CalPERS), appeared on behalf of petitioner.

Mark R. Kruger, Attorney at Law, appeared on behalf of Robert C. Vandergoot, who was present.

Paul S. Eck, Senior Staff Counsel, appeared on behalf of the California Department of Forestry and Fire Protection.

Evidence was received, the hearing was closed, and the record was held open for the submission of written closing argument. Respondent Robert Vandergoot's Closing Argument was received on January 11, 2013, and marked as Exhibit A for identification. CalPERS' Reply Brief was received on January 28, 2013, and marked as Exhibit 10 for identification. The record was closed and the matter was submitted for decision on January 28, 2012.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED February 25 20 2013
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FACTUAL FINDINGS

1. Mary Lynn Fisher, Chief, Benefits Services Division, California Employees' Retirement System (CalPERS), made and filed the Statement of Issues in her official capacity.

2. Robert Vandergoot (respondent) was employed by respondent California Department of Forestry and Fire Protection (Department) as a Heavy Fire Equipment Operator. By virtue of his employment, respondent became a state safety member of CalPERS subject to Government Code sections 21151 and 21154.

3. On or about April 9, 2010, respondent signed an application for industrial disability retirement, which was received by CalPERS on April 12, 2010. In filing the application, disability was claimed on the basis of chronic Hepatitis C, stage 0-1 fibrosis, porphyria cutanea tarda (blisters on skin from sun exposure), systemic hypertension, spine injury and depression conditions.

4. Earlier, by letter from the Department dated March 5, 2010, respondent was informed of a Notice of Adverse Action (NOAA) against him pursuant to Government Code section 19574. The notice informed respondent that he was dismissed from his position as a Heavy Fire Equipment Operator effective March 31, 2010. The NOAA included information advising respondent of his right to appeal the NOAA to the State Personnel Board (SPB) by written appeal, within 30 calendar days after the date of the NOAA.

A Skelly hearing was held on March 25, 2010. After considering the testimony, it was determined that the NOAA was appropriate and would stand. Respondent received notice of the outcome of the Skelly hearing by letter dated March 23, 2010. Respondent filed an appeal with SPB, and was advised of the receipt of his appeal by letter dated April 27, 2010.

5. CalPERS received and reviewed information and documents concerning respondent's termination from employment. CalPERS determined that respondent had been terminated for cause effective March 31, 2010, on the following grounds set forth in Government Code section 19572:

(d) Inexcusable neglect of duty

(f) Dishonesty

(g) Drunkenness on duty

(h) Intemperance

(o) Willful disobedience

(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.

6. CalPERS determined that respondent was barred from any entitlement to disability retirement because he was terminated for cause and the discharge was neither the ultimate result of a disabling medical condition nor preemptive of any otherwise valid claim for disability retirement. CalPERS notified respondent of its determination by letter dated October 1, 2010, which included notice that respondent could appeal.

7. Respondent filed an appeal by letter dated October 28, 2010, and requested a hearing. As noted in the Statement of Issues, the appeal is limited to the issue of whether respondent may file an application for industrial disability retirement, or whether his application and eligibility for disability retirement is precluded by operation of law. (See *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*).)

Employment Background and Termination

8. Respondent was employed by the Department since June 20, 1988. He contracted Hepatitis C while assisting the victim of a car accident, and thereafter underwent interferon therapy to battle the effects of chronic Hepatitis. Respondent indicated that he was placed on industrial disability leave on two occasions, the last one commencing approximately January 2010.

9. The incident leading to the NOAA occurred on August 21, 2009. The Department alleged that on August 20, 2009, respondent's strike team was assigned to a 48-hour rest and recuperation (R&R) period in Grass Valley at an assigned motel. He remained on full pay status notwithstanding being on R&R, the expectation being that he might be called back to duty at any time during the 48 hours. The Department alleged that on August 21, 2009, respondent was intoxicated while on duty. He was arrested and he subsequently pled guilty to the criminal charge of disorderly conduct under the influence of alcohol. The Department further alleged that in connection with these events, respondent was dishonest, for having misrepresented himself to be a Captain with the Department, and later for altering time records to reflect using leave credits for the date that he was intoxicated, arrested and taken into police custody.

10. No findings are made in this case respecting the factual basis underlying any disciplinary action taken by the Department against respondent. The above matters were considered for the sole purpose of determining whether respondent's termination from employment with the Department was the result of a

disabling medical condition. CalPERS correctly determined that this was not the case.

11. As noted earlier, respondent filed an appeal of the termination with the SPB. On February 6, 2011, prior to that SPB matter going to hearing, respondent and the Department entered into a Stipulation for Settlement. The Department agreed to withdraw the NOAA and remove the adverse action, the Stipulation for Settlement and all supporting documents from respondent's official personnel file. The parties agreed that respondent would resign from his employment, for personal reasons, with the Department, effective December 9, 2010. For the period of time from March 31, 2010, through December 9, 2010, respondent was considered to be on unpaid leave status with the Department.

12. The Stipulation for Settlement specified in paragraph 3:

> [Respondent] agrees that he will not seek, transfer to, apply for or accept any employment in any capacity with [Department] at any time in the future. If [respondent] returns to employment with [Department] in violation of the terms of this Stipulation for Settlement, [Department] may dismiss [respondent] at such time as is convenient to [Department] and [respondent] waives any right of appeal of said dismissal in any forum.

Application of Haywood

13. The sole issue in this hearing is whether respondent may file an application for industrial disability retirement, or whether his application and eligibility for disability retirement is precluded by operation of *Haywood*. In *Haywood*, the employee "was terminated for cause following a series of increasingly serious disciplinary actions against him. After his discharge, the employee applied for disability retirement, claiming that stress from the disciplinary actions caused him to suffer a major depression, which rendered him incapable of performing his usual duties with the [employer]." (*Haywood v. American River Fire Protection District, supra,* 67 Cal.App.4th at p. 1295. The Court of Appeals concluded that the employee was not entitled to disability retirement, stating as follows:

> As we shall explain, there is an obvious distinction in public employment retirement laws between an employee who has become medically *unable* to perform his usual duties and one who has become *unwilling* to do so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. Nor are they intended as a

> means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. In addition, while termination of an unwilling employee for cause completely severs the employer-employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled.
>
> In this case, Haywood challenged his employer's authority and lost when, after a series of disciplinary actions, he was terminated for cause. The behavior which resulted in Haywood's firing--his unwillingness to faithfully perform his duties--was not caused by a physical or mental condition, and Haywood had no valid claim for disability retirement which could have been presented before he was fired.
>
> Haywood's firing for cause constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement--the potential reinstatement of his employment relationship with the District if it ultimately is determined that he no longer is disabled. Moreover, to award Haywood a disability pension would interfere with the District's authority to discipline recalcitrant employees. Such an award in effect would compel the District to pension-off an employee who has demonstrated unwillingness to faithfully perform his duties, and would reward Haywood with early retirement for his recalcitrance. In other words, granting Haywood disability retirement would override Haywood's termination for cause despite his inability to set aside the termination through the grievance process.
>
> It follows 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, termination of the employment relationship renders the employee ineligible for disability retirement.

(*Id.* at pp. 1296-1297, footnote omitted.)

14. Respondent contends that pursuant to the Stipulation for Settlement, he remained an employee of the Department until his resignation date – December 9, 2010, and that his application submitted on April 9, 2010, was therefore timely. (Gov. Code, § 21154, subd. (a).) Respondent does not contend that his termination was the result of a disabling medical condition. He does contend that the Department's action in terminating him was preemptive of his otherwise valid claim for disability retirement.

15. CalPERS, relying upon both the date of the incident (August 21, 2009) giving rise to the NOAA and the date of the NOAA (March 5, 2010), has suggested that respondent was properly terminated for cause on March 31, 2010. And that respondent filed his application for industrial disability retirement after being "terminated." Respondent's employment relationship with the Department was severed in December 2010, after he filed for industrial disability retirement. The Stipulation for Settlement between the Department and respondent further clarified that respondent resigned from his "employment" with the Department on December 9, 2010. Respondent remained employed with the Department, albeit on unpaid leave status, between March 31, 2010, through the date of his resignation.

Termination for Cause

16. This case raises the question of whether CalPERS may properly apply *Haywood* in the absence of an actual dismissal for cause. The Stipulation for Settlement between respondent and the Department provided that respondent would "resign" from his employment for "personal reasons." The Department agreed to withdraw the NOAA that would have made any dismissal effective March 31, 2010, and instead made December 9, 2010, his effective date of "resignation." The Stipulation for Settlement expressly provided that it was "neither an admission of guilt or of wrongdoing by either party."

CalPERS urges that respondent's separation from employment was tantamount to a termination for cause. In support, the record is that respondent filed his application for industrial disability retirement shortly after he received his NOAA, which indicated the Department's intent to terminate him effective March 31, 2010. He went on unpaid leave after that date. Respondent appealed from the NOAA. But for the pendency of the disciplinary action, respondent would never have entered into the Stipulation and Settlement resigning from his position. CalPERS also considered the language in the Stipulation and Settlement in which respondent agreed that he would "not seek, transfer to, apply for or accept any employment in any capacity with the Department at any time in the future." The Department reserved the right to dismiss respondent should he be employed again, and respondent expressly waived any right of appeal of such dismissal. (See Finding 12.) Under the above circumstances CalPERS believes the fact respondent "resigned" from employment is a distinction without a difference. CalPERS contends that for purposes of applying *Haywood*, it is enough that respondent's employment relationship with the

Department was severed as a result of the pending disciplinary action. And that the severance of the employment relationship now serves as a bar to his applying for industrial disability retirement.

17. CalPERS requested official notice of its Decision in the matter of *David S. Clark* (CalPERS Case No. 8344, OAH No. 2011080669.) Though not precedential, and therefore not binding, it was cited by both parties as a prior administrative decision to inform this case as an administrative interpretation. (*City of Oakland v. CalPERS* (2002) 95 Cal.App. 4th 29, 57.) In facts similar to this case, CalPERS determined in its *Clark* decision that the character of disciplinary action terminating an employee did not change because the employee elected to settle the case prior to exhausting his appeal rights. The employee in *Clark* had filed a Petition for Writ of Mandamus, requesting that the superior court set aside SPB's decision sustaining his termination. The employee then entered into a settlement agreement similar to the Stipulation and Settlement here, characterizing his separation from employment as a resignation. CalPERS determined that the "resignation" was a distinction without a difference, and upheld application of *Haywood* to those facts. Respondent contends that *Clark* is distinguishable from this case because the employee in *Clark* entered into a stipulation only after the State Personnel Board had rendered its decision upholding his termination of employment. Here, respondent had a Skelly hearing, but his appeal before the SPB did not go through an actual SPB hearing.

18. In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*. This is because *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the District if it ultimately is determined that respondent is no longer disabled. (*Haywood v. American River Fire Protection District*, *supra*, 67 Cal.App.4th at pp. 1296 - 1297.) Such is not possible here. The employment relationship has not only been severed, but the terms of the Stipulation and Settlement Agreement expressly lock respondent out from being reinstated. Such a circumstance must be viewed as wholly inconsistent with the policy behind and rationale for disability retirement:

> [D]isability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches an age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues. (§ 21192.) And an employee on disability retirement may apply for reinstatement on the ground of recovery. (*Ibid.*) If an employee on disability retirement is found not to be disabled any longer, the

> employer may reinstate the employee, and his disability allowance terminates. (§ 21193.)

(*Haywood v. American River Fire Protection District*, *supra*, 67 Cal.App.4th at p. 1305.)

19. Were respondent to receive a disability retirement allowance, he would have no employer who could require him to undergo a medical examination under Government Code section 21192. And it is no longer possible for him to be reinstated under Government Code section 21193. These necessary prerequisites for receiving a disability retirement allowance are simply not present in this case. For this reason alone, CalPERS can fairly consider the terms of the Stipulation for Settlement of respondent's SPB case as being tantamount to a dismissal for purposes of applying the *Haywood* criteria.

Preemptive of Valid Claim

20. Respondent contends in the alternative that the Department's NOAA was preemptive of an otherwise valid claim for disability retirement. Thus, even if a an agency dismisses an employee solely for a cause unrelated to a disabling medical condition, this will not result in the forfeiture of a matured right to a pension allowance. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206.) "Thus, if a plaintiff were able to prove that the right to a 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. [Citations omitted.] Conversely, 'the right may be lost upon occurrence of a condition subsequent such as a lawful termination of employment before it matures...' (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749, ..." (*Ibid.*)

21. Respondent had a vested right to apply for industrial disability retirement upon acceptance of employment with the Department. While the "right" to the benefits vests upon acceptance of employment, an employee would not be entitled to receive the benefit until all the conditions prescribed have been met. (*Dickey v. Retirement Board of the City and County of San Francisco* (1976) 16 Cal.3d 745.) There is a marked difference between the vesting of a pension right and the accrual of a cause of action to enforce a vested right. "The right to a pension is a vested right; the amount of the pension may not always be ascertained until the last contingency has occurred." (*Id.* at p. 750; *Brooks v. Pension Board* (1938) 30 Cal.App.2d 118, 123.) The vested right to the pension benefit may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures, or because of the nonoccurrence of one or more conditions precedent. (*Id.* at p. 749.) Thus, the issue here is whether respondent's vested interest in disability retirement "matured" prior to his separation from employment.

22. A vested right matures when there is an unconditional right to immediate payment. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 206.) Typically, this arises at the time a pension board determines that the employee was no longer capable of performing his/her duties. (*Ibid; Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672.) Here, a CalPERS determination of eligibility does not antedate respondent's separation from employment. His right to industrial disability retirement has thus not matured.

23. *Smith* recognized that even where there has not yet been a determination of eligibility, there may be facts which a court, applying principles of equity, will deem an employee's right to a disability retirement. (*Id.* at pp. 206-207.) *Smith* then went through a number of situations where equitable principles might apply. They are also considered here. As in *Smith*, this is not a case where respondent had an impending ruling on a claim for a CalPERS disability pension that was delayed through no fault of his own. (*Id.* at p. 207.) Here, he did not even initiate the process for receiving an industrial disability retirement allowance until after he received the NOAA and after he received the adverse Skelly determination. Nor was there "undisputed evidence" that respondent was eligible for a CalPERS disability retirement, "such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb)." (*Ibid.*) The fact that he had been placed on industrial disability leave on two occasions is not binding on the issue of eligibility for industrial disability retirement. As was the case in *Smith*, for purposes of the standard for disability retirement, the medical evidence here is not unequivocal. CalPERS would have a basis for litigating whether the evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. (*Ibid.*) Here, CalPERS has indicated that the mere fact that respondent has Hepatitis C is by no means a "foregone conclusion," leading to certain approval of his application. CalPERS has denied disability applications in the past based on Hepatitis C.

24. When the above matters are considered as a whole, respondent has not presented unequivocal medical evidence of such nature that approval of his application for disability retirement was a "foregone conclusion." Any right to an industrial disability retirement allowance cannot be deemed to have matured in this case. For all these reasons, his application for disability retirement should be precluded by operation of *Haywood.*

LEGAL CONCLUSIONS

1. Government Code section 21152 reads, in pertinent part:

> Application to the board for retirement of a member for disability may be made by...

(d) The member or any person in his or her behalf.

2. Government Code section 21154 reads, in pertinent part:

> The 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. On receipt of any application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or on 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 the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

3. Where 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, termination of the employment relationship renders the employee ineligible for disability retirement. (*Haywood v. American River Fire Protection District* (1998) 67 Cal. App.4th 1292, 1297.) The Third District Court of Appeal explained that the dismissal "constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement-the potential reinstatement of his employment relationship with the District if it ultimately is determined that he is no longer disabled." (*Ibid.*)

4. CalPERS demonstrated that respondent's separation from employment was tantamount to a dismissal for purposes of applying the *Haywood* criteria. (See Findings 16 through 19.) It was also established that respondent's separation from employment was not the ultimate result of a disabling medical condition.

5. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the same court reiterated the principles of the *Haywood* decision. The court further explained that a disability claim must have "matured" in order to find that a disciplinary action preempts the right to receive a disability retirement pension, and this maturation did not occur at the time of the injury, but rather when the pension board determined that the employee was no longer capable of performing his duties. (*Id.* at p.206.) The *Smith* court further allowed consideration of equitable principles to "deem an employee's right to a

disability retirement to be matured and thus survive a dismissal for cause." (*Id.* at p. 207.)

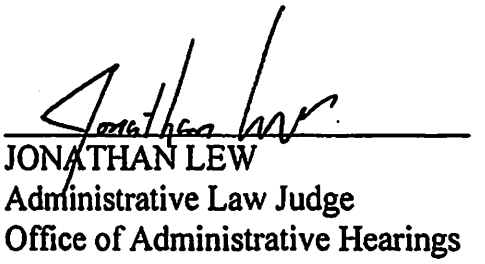
As noted in Findings 23 and 24, even where principles of equity are applied, this was not a case where there was undisputed evidence that respondent was eligible for a CalPERS industrial disability retirement allowance, such that a favorable decision on his claim would have been a "foregone conclusion." Respondent's vested interest in an industrial disability retirement allowance never "matured" prior to his separation from employment.

6. For all the above reasons cause exists to uphold CalPERS' determination that respondent is not entitled to file an application for an industrial disability retirement allowance.

ORDER

The appeal of Robert C. Vandergoot to be granted the right to file an application for industrial disability retirement is DENIED.

Dated: February 19, 2013



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings