



## Agenda Item 10

August 21, 2013

**ITEM NAME:** Precedential Decision – In the Matter of the Application for Industrial Disability Retirement of ROBERT VANDERGoot, Respondent, and CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION, Respondent

**PROGRAM:** Benefit Services Division

**ITEM TYPE:** Action

### **RECOMMENDATION**

Staff recommends that the Board of Administration direct the CalPERS Legal Office staff to solicit written comments from the public on whether the Board's decision in this matter should be designated as precedential.

### **EXECUTIVE SUMMARY**

Pursuant to section 11425.60 in the California Administrative Procedure Act (APA), the Board is authorized to designate all or part of a quasi-judicial administrative decision of the Board as precedential. An agency may designate as a precedential decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision as a precedential decision is not subject to judicial review. The Board's established policy regarding the designation of precedential decisions calls for consideration of the following two questions:

- A. Does the decision contain a significant legal or policy determination of general application that is likely to recur?
- B. Does it include a clear and complete analysis of the issues in sufficient detail so that the interested parties can understand why the findings of fact were made, and how the law was applied?

Staff recommends that public comment be solicited on adoption of the Vandergoot decision as precedential. Once comments are received, staff will bring back an item to consider designating the decision as precedential.

### **BACKGROUND**

On April 17, 2013, the Board adopted the Proposed Decision in this matter. The Board's decision became final and effective on May 22, 2013. The Proposed

Decision determined that Respondent was not entitled to file an application for industrial disability retirement under the “*Haywood*” doctrine. When 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.4<sup>th</sup> 1292, 1297, (*Haywood*)). The dismissal constitutes a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement – the potential reinstatement of employment with the former employer if it ultimately is determined that the member is no longer disabled. (*Ibid.*) In *Smith v. City of Napa* (2004) 120 Cal.App.4<sup>th</sup> 194 (*Smith*), the same court reiterated the principles of the *Haywood* decision.

Respondent’s termination permanently severed his employment relationship with his employer. The fact that Respondent reached a stipulated settlement with his employer, which was ultimately approved by the State Personnel Board (SPB), is immaterial. The character of the disciplinary action does not change because Respondent elected to settle his case prior to exhausting his appeal rights. The Board decision holds that CalPERS correctly determined that the cases of *Haywood* and *Smith* bar Respondent’s eligibility to apply for industrial disability retirement. There is no precedential decision of the Board which relates to the preclusion of applications for disability retirement pursuant to the *Haywood/Smith* doctrine.

## **ANALYSIS**

In general, the effect of making a Board decision precedential is to give it “precedential effect,” which in this context means:

- The decision may be officially cited in other administrative hearings and also in other court proceedings.
- The decision is considered “case-made” law, comparable to agency rule-making in its legal effect and may be applied broadly to other cases and the parties involved in other cases. The decision-maker in another administrative matter may expressly rely on the precedential decision to decide the matter, that is, give the law or policy in the decision binding effect in a case involving the same issue as it affects other parties, unless the other case can be factually or legally distinguished.<sup>1</sup>

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<sup>1</sup> See: 13 CCR 1290 (Office of Administrative Hearings regulation); official *Calif. Law Revision Comments* regarding APA section 11425.60, where it is stated that the statute “...recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking”, and “...is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision.” Also, see: *Pac. Legal Foundation v. Unemployment Insur. App. Board* (1991) 29 Cal.3d 101, 109; 21 *Jour. Nat. Ass’n Admin. Law Judges* 247 (2001), at pp. 265-267.

A precedential decision of the Board is not binding on the courts, which remain the final arbiters of the law; but a Board precedential decision, as the decision of the agency most knowledgeable and responsible for administering and making policy with respect to the California Public Employees' Retirement Law (PERL), is normally accorded great weight or given deference by the courts.<sup>2</sup> If a Board decision is not designated as precedential, its effect is more limited. It may be referenced in other administrative matters or to a reviewing court to inform the judge regarding the Board's administration or interpretation of the PERL, but it has no precedential effect.<sup>3</sup>

The Board's established policy regarding the designation of precedential decisions calls for consideration of the following two questions:

- A. Does the decision contain a significant legal or policy determination of general application that is likely to recur?
- B. Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied?

A. "Significant Legal or Policy Determination of General Application That is Likely to Recur"

The significant legal and policy determination presented in the *Vandergoot* decision is the explanation and application of the *Haywood* and *Smith* cases, when used to preclude an application for disability retirement (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4<sup>th</sup> 1292; *Smith v. City of Napa* (2004) 120 Cal.App.4<sup>th</sup> 194). The *Vandergoot* decision details the applicable legal analysis to be used under *Haywood* and *Smith*, and quotes the most relevant portions of the cases. Furthermore, the *Vandergoot* decision provides analysis on the proper steps to be employed when a terminated employee elects to settle his case prior to exhausting his appeal rights. The decision states that settlement is tantamount to a dismissal for purposes of applying *Haywood* criteria.

CalPERS staff repeatedly determines that applications for disability retirement submitted by terminated employees (with or without a settlement agreement) are barred by operation of *Haywood* and *Smith*. As a result, CalPERS repeatedly litigates issues presented in "*Haywood*" type cases, including cases in which terminated employees reach a settlement agreement with their employers to reverse the "official" termination. However, a permanent separation from employment with that employer is still the outcome in many cases.

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<sup>2</sup> *City of Oakland v. Pub. Employees' Ret System* (2002) 98 Cal.App.4<sup>th</sup> 29, 39; *Hudson v. Board of Administration of the Calif. Pub. Ret. Sys.* (1997) 59 Cal.App.4<sup>th</sup> 1310, 1324-1325.

<sup>3</sup> *City of Oakland, supra*, at p. 57.

Despite the fact that *Haywood* was decided in 1998 and *Smith* was decided in 2004, there is no precedential decision relating to *Haywood/Smith* currently available to provide guidance to members and employers. The result is that many of these determinations are challenged, and CalPERS is required to repeatedly litigate these issues, thereby expending staff resources on issues that should by now have been well settled. Therefore, a precedential decision analyzing the law pertaining to this issue will provide members and employers guidance, and reduce the amount of future litigation.

B. “Clear and Complete Analysis Sufficient For an Understanding of Why the Finding of Facts Were Made and How the Law Was Applied”

The factual findings in the *Vandergoot* decision are straightforward and easy to understand. The decision follows a logical analysis of the facts, employment background and circumstances of Respondent’s termination. Then it applies *Haywood* and *Smith* to these facts. The decision sets forth a logical analysis to explain why *Haywood* precludes filing an application for disability retirement. It discusses a prior *Haywood* decision with similar facts (*In re David Clark*). It correctly cites to Government Code sections 21192 and 21193. Because Respondent has no employer who could require him to undergo medical examination pursuant to Government Code 21192, and it is no longer possible for Respondent to be reinstated pursuant to Government Code 21193, the fundamental underlying concepts of disability retirement could not be applied to him.

The decision then cites to *Smith v. Napa*, when dismissing Respondent’s claim that his termination was preemptive of an otherwise valid claim for disability retirement. The decision discussed the *Smith* equitable principles which might apply to give an employee a right to disability retirement despite the prohibitions stated in *Haywood*.

The decision then moves on to conclusions of law, consisting of findings that:

CalPERS demonstrated that Respondent’s separation from employment was tantamount to a dismissal for purposes of applying the *Haywood* criteria. It was also established that Respondent’s separation from employment was not the ultimate result of a disabling medical condition.

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.

As described, the *Vandergoot* decision is therefore constructed logically and properly interprets the Government Code, *Haywood* and *Smith* in the context of applications for disability and industrial disability retirement.

The staff therefore believes that the findings and legal conclusions of the *Vandergoot* decision, if the case is made precedential, will provide useful, specific rules both for staff and public entities.

### **BENEFITS/RISKS**

The benefits to making the decision in the Robert Vandergoot case precedential have been described in detail in the above Analysis section. In summary, there are no other precedential decisions of the Board which relate to preclusion of applications for disability retirement pursuant to *Haywood* and *Smith*. Since these issues recur repeatedly in litigation before the Office of Administrative Hearings (OAH), a precedential decision regarding these matters would assist CalPERS staff in analyzing applications for disability and Industrial Disability Retirement. There is very little risk in adopting the decision as precedential, as an agency's designation of a decision as precedential is not subject to judicial review. If, in the future, the precedential decision becomes outdated by future developments in the law, there is a procedure by which the Board could remove the precedential designation.

### **BUDGET AND FISCAL IMPACTS**

Not applicable.

### **ATTACHMENTS**

Attachment A: Decision  
Attachment B: Proposed Decision

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