

ATTACHMENT A
THE PROPOSED DECISION

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

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

ROBERT ICENOGLE

Applicant/Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION
(SIERRA CONSERVATION CENTER),

Respondent.

OAH No. 2012100049

PROPOSED DECISION

Ann Elizabeth Sarli, Administrative Law Judge (ALJ) of the Office of Administrative Hearings, State of California, heard this matter on July 30, 2013, in Sacramento, California.

Complainant, California Public Employees' Retirement System (CalPERS), was represented by Jean Laurie Ainsworth, Senior Staff Attorney.

Applicant appeared and represented himself.

There was no appearance on behalf of California Department of Corrections and Rehabilitation, Sierra Conservation Center, and a default was taken against this respondent, pursuant to Government Code section 11520.

Evidence was received. The matter was submitted and the record was closed on July 30, 2013.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED August 12 20 13
Debra Moore

FACTUAL FINDINGS

Background

1. Applicant was born in 1966. On June 17, 2000, applicant was hired by the California Department of Corrections, Sierra Conservation Center (SCC), as a Correctional Officer. By virtue of this employment, applicant became a safety member of CalPERS, subject to California Government Code section 21154.
2. Applicant injured his left knee on November 8, 2001, and underwent surgery on April 16, 2002, and a knee replacement on July 31, 2003. His last day on payroll was July 29, 2003, and he began receiving industrial disability leave payments through August 16, 2003. On August 17, 2003 applicant began receiving temporary disability payments.
3. Applicant was arrested in late 2003 and charged with multiple criminal offenses related to child molestation and child pornography. SCC terminated applicant from employment effective December 1, 2003, on an absent without leave (AWOL) separation. The AWOL termination was based upon California Government Code section 19996.2, which authorizes "automatic resignation from state service" due to absence without approved leave in excess of five consecutive working days. Applicant was absent without approved leave and unavailable to his employer because he was confined in the Tuolumne County Jail.
4. On December 1, 2004, SCC terminated applicant through an Adverse Action. The Adverse Action was based upon applicant's pending criminal matters in Tuolumne Superior Court, where applicant was charged with multiple counts of lewd acts upon a child, child molestation, possession of child pornography and sending harmful matter. Applicant was also charged in the Federal District Court with possessing child pornography.
5. SCC conducted an investigation in connection with the Adverse Action. SCC found that in September, October, and November 2003, applicant showed his 11-year-old daughter and her friends explicit pornographic videos of minor children having sex with an adult. One of the videos showed an adult male giving oral sex to a young girl approximately 7 years of age. Applicant admitted during the investigation that on November 1, 2003, at his daughter's birthday party he took digital pictures of his daughter and her two friends with balloons stuffed in their shirts over their breast areas. The investigation also concluded that in the months of June through November 2, 2003, applicant inappropriately touched four minor female children between the ages of 12 and 14 on their buttocks and/or breasts. Applicant also persuaded the minor female children to put "sex oil" on their hands and to taste the "sex oil." Applicant admitted during the investigation that he took inappropriate pictures of his daughter, including one picture showing his daughter's genital area with her underwear on, and between June through December 5, 2003, he traded 5 to 10 inappropriate pictures of his daughter over the Internet in exchange for pornographic images of children.
6. On or about January 7, 2005, in Tuolumne Superior Court applicant pled guilty to and was convicted of multiple criminal offenses related to this conduct. He was

sentenced to serve six years in prison. He was also sentenced to prison by the Federal District Court.

7. On August 13, 2004, after he was terminated from SCC for being AWOL and while he was awaiting disposition of his criminal charges, applicant filed a Disability Retirement Election Application (application) with CalPERS. He wrote that on November 8, 2001, he slipped on a wet floor responding to an alarm. He wrote that his limitations include "no heavy lifting, running, limited stairs, pulling, pushing and squatting." As a result, he had chronic knee pain and popping. He wrote that he had five surgeries and he was told that "the one thing that could be done is a total knee replacement."

8. Since applicant was in prison, he was not available for an independent medical examination. CalPERS canceled the application on March 23, 2006.

9. Applicant re-filed the application on April 14, 2010.

10. SCC informed CalPERS that applicant was not eligible to submit an application for industrial disability retirement due to his termination from employment for cause on December 1, 2004. CalPERS reviewed the information provided by SCC regarding applicant's termination. Pursuant to *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, CalPERS determined that applicant was terminated for cause and 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 applicant was barred from entitlement to a CalPERS disability retirement.

11. CalPERS informed applicant by mail on November 2, 2010, that his application for disability retirement would not be accepted pursuant to *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292. Applicant timely appealed the denial of his application.

12. A hearing was held on June 10, 2013, at the Office of Administrative Hearings. Applicant failed to appear. By order dated June 11, 2013, the hearing was reopened and the instant hearing ensued.

Issue

13. The issue at hearing is whether applicant is precluded from filing an application for disability retirement because he was terminated from employment for cause and did not meet the exceptions set forth *Haywood vs. American River Fire Protection District* (1998) 67 Cal. App. 4th 1292 [*Haywood*] and *Smith vs. City of Napa* (2004) 120 Cal App.4th 194 [*Smith*].

Application of Haywood and Smith

14. In *Haywood* the appellate court found: “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.” (*Id.* at 1306-1307.)

15. More recently, the court in *Smith* expanded the holding in *Haywood*. The *Smith* court held that dismissal for cause extinguishes the right to disability retirement, except if a plaintiff 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 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. And, in the case of CalPERS disability retirement, there is no unconditional right to immediate payment without a finding by CalPERS that there is a right to a disability retirement pension. (*Ibid.*)

16. In *Smith*, the court pointed out that in its *Haywood* ruling:

We took pains to exclude from our holding in *Haywood* a party otherwise entitled to a disability retirement before a dismissal for cause.... The distinction with which we were concerned is between employees dismissed for cause and employees unable to work because of a medical disability.... We repeatedly cautioned that our holding would not apply where the cause for dismissal was the result of a disabling medical condition, or where the dismissal would be ‘preemptive of an otherwise valid claim for disability retirement.’ This caveat flows from a public agency’s obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability (citing *Haywood*) or indirectly through cause based on the disability Our use of the term ‘preempt’ admittedly could lead one to the interpretation that both defendants have embraced: an intent to thwart an otherwise valid claim for disability. However, as the plaintiff has correctly attempted to argue throughout the CalPERS proceedings, even if an agency dismisses an employee *solely* for a cause *unrelated* to a disabling medical condition, this cannot

result in the forfeiture of a matured right to a pension absent express legislative direction to that effect ... 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. .. Conversely, the right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures....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.

(*Id.* at 205- 206.)

Conceivably, there may be facts under which a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause. This case does not present facts on which to explore the outer limits of maturity, however. It is not as if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal. Rather, he did not even initiate the process until after giving cause for his dismissal. Nor, for that matter, is there undisputed evidence that the plaintiff 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). At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers' compensation claims. But a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different. And for purposes of the standard for a disability retirement, the plaintiff's medical evidence is not unequivocal.

(*Id.* at 206-207.)

The defendants would have a basis for litigating whether this evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862, 143 Cal.Rptr. 760; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877, 86 Cal.Rptr. 450; *In re Keck*

(2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)
Thus, an *entitlement* to a disability retirement cannot rest on the medical evidence of the plaintiff.

(*Id.* at 207, FN 13.)

17. Applicant maintains that he had a valid claim for industrial disability retirement at the time he was terminated from employment, both at the time of the AWOL termination and at the time of his subsequent “for cause” termination. He argues that he was receiving temporary disability, had many surgeries, and his workers’ compensation physician had told him that he was permanently disabled. Essentially, he argues that his termination from employment did not extinguish that claim.

18. SCC’s termination of applicant was not designed to preempt a valid claim for disability retirement, but was due to applicant’s criminal conduct. Applying *Haywood* and *Smith*, the termination did not have the effect of preempting an otherwise valid claim for disability retirement. Applicant’s claim for disability retirement had not matured at the time of his separation from service. Applicant did not hold an unconditional right to immediate payment, as there was no finding by CalPERS that there was a right to a disability retirement pension. At the time applicant was separated from employment, CalPERS had not determined whether applicant demonstrated a substantial inability to perform his duties. The opinion of applicant’s treating worker’s compensation physician did not establish a matured right to disability retirement. Applicant’s right to a disability retirement was thus immature, and his dismissal for cause defeated it.

LEGAL CONCLUSIONS

1. Government Code section 21152 provides in pertinent part:

Application to the board of 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 provides in pertinent part:

The application shall be made only (a) while the member is in state service, or (b) ... or (c) within four months of discontinuance of state service of the member, or while on an

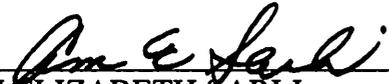
approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion...On receipt of an application for disability retirement of a member... the board shall, or of its own motion it may, order a medical examination of the member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty....

3. As set forth in the Findings, applicant's application for disability retirement is precluded by the holdings in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 and *Smith vs. City of Napa* (2004) 120 Cal App.4th 194. Applicant's termination from employment extinguished his right to file a Disability Retirement Election Application.

ORDER

CalPERS's determination that Robert Icenogle may not file a Disability Retirement Election Application is Affirmed. Robert Icenogle's appeal is Denied.

DATED: August 8, 2013


ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings