

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Application for
Disability Retirement of:

RAUL L. BAUTISTA,

Respondent,

and

CITY OF TORRANCE,

Respondent.

Case No. 9167

OAH No. 2013050720

PROPOSED DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, on November 26, 2013, in Orange.

Rory J. Coffey, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Raul L. Bautista represented himself.

Mary Giordano, Assistant City Manager, Terri Connaughton, Workers' Compensation Manager, and Leyta Fuentes, Human Resources, appeared for the City of Torrance.

Oral and documentary evidence was received, and argument was heard. The record was closed and the matter was submitted for decision on November 26, 2013.

ISSUE

May Respondent file an application for disability retirement based on carpal tunnel and/or orthopedic conditions (back pain and upper back and arm tremors) or is his application and eligibility for disability retirement precluded by operation of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292?

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED *December 27 2013*

[Signature]

FACTUAL FINDINGS

Parties and Jurisdiction

1. Anthony Suine made and filed the Statement of Issues in his official capacity as the Chief of the Benefit Services Division of CalPERS.
2. Respondent was employed as a refuse truck operator by respondent City of Torrance. By virtue of this employment, Respondent became a local miscellaneous member of CalPERS subject to Government Code section 21154.
3. On November 9, 2007, Respondent signed an application for disability retirement. In filing the application, Respondent claimed disability on the basis of carpal tunnel, back pain, and upper back and arm tremors. On the application, Respondent indicated that his last day on the payroll with the City of Torrance was November 30, 2005.
4. On January 10, 2008, Respondent signed an application for service retirement pending disability. He was retired for service effective April 10, 2008, and has been receiving his retirement allowance from that date.
5. On February 27, 2008, CalPERS requested information from the City of Torrance regarding Respondent's employment. By letter dated March 19, 2008, the City of Torrance provided information to CalPERS that Respondent's employment was terminated for cause effective November 30, 2005.
6. By letter dated October 6, 2008, CalPERS notified Respondent that it was unable to accept his application for disability retirement on the grounds that he was "dismissed from employment for reasons which were not the result of a disabling condition," and "the dismissal does not appear to be for the purpose of preventing a claim for disability retirement." The letter cited the case of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 as legal authority for CalPERS' decision.
7. By letter dated November 3, 2008, Respondent filed a timely appeal and requested a hearing. The Statement of Issues was filed on May 9, 2013. This hearing ensued.

Workers' Compensation Claim

8. Respondent was hired by the City of Torrance (also referred to as City) as a refuse worker on November 4, 1991. On March 31, 1997, Respondent was appointed to the position of refuse truck operator. As a refuse truck operator, Respondent was required "to drive, load and dump a solid waste disposal packer truck; to perform a variety of semi-skilled or unskilled manual tasks; and to do related work as required." The minimum qualifications for the position include knowledge of the operation and maintenance of heavy power-driven

equipment, lifting and loading heavy articles in a safe manner, operating assigned equipment with skill and safety, and performing heavy manual labor.

9. On March 24, 2005, Respondent made a report of a work related injury to his supervisor. He claimed injury to his left arm and side from using the control stick all day for operating the automated loader for the refuse truck. Respondent was referred to Dr. Richard Kim, who examined Respondent on March 24, 2005. Based on Respondent's complaint of pain in his left arm and wrist, Dr. Kim ordered work restrictions for Respondent that he not use his left arm, he perform no work with his left arm and hand, and that he wear an elbow brace and waist brace provided by the doctor's office. Respondent returned to work the same day. The City provided Respondent with a modified duty schedule to accommodate his injury and the work restrictions ordered by Dr. Kim.

10. Respondent was re-evaluated by Dr. Kim on March 29, April 5, and April 19, 2005. Following each of these visits, Dr. Kim continued the work restrictions he previously ordered for Respondent. During the April 19 visit, Respondent requested to see an orthopedic specialist. Dr. Kim provided Respondent with a referral to an orthopedic specialist. Dr. Kim also included a written order that Respondent wear an elbow brace and a waist brace. The City continued to accommodate the work restrictions ordered by Dr. Kim by providing Respondent with a modified duty schedule. Respondent worked a modified duty schedule from March 24, 2005, until April 27, 2005.

11. On April 27, 2005, a modified duty assignment was no longer available, so Respondent was sent home on an industrial leave. The Memorandum of Understanding between the City of Torrance and Respondent's employee union provided that an employee who sustains an injury or illness arising out of or occurring in the course of his or her employment with the City shall be entitled to industrial leave, which shall be 85 percent of regular salary. (TME-AFSCME MOU, § 4.4, subds. (b) and (b)(4).) Respondent was placed on industrial leave status from April 27 to May 17, 2005, during which period he received the City's workers' compensation benefit of 85 percent of his salary.

12. On May 3, 2005, Respondent was evaluated by orthopedic specialist Dr. Stuart Gold. Based on Respondent's complaints, Dr. Gold placed Respondent under work restrictions of no lifting over 10 pounds, no overhead work, limited use of his left arm, and that he must wear a brace. Respondent was re-evaluated by Dr. Gold on May 17, 2005. At the time of this visit, Dr. Gold had been provided a videotape (described more fully in Finding 15, below) showing Respondent lifting and carrying heavy items and furniture. Following this evaluation, Dr. Gold released Respondent to regular duty status as of May 18, 2005. Respondent returned to full duty on May 18, 2005.

//

//

//

Termination of Employment

13. Torrance Municipal Code section 14.47.1(a) provides that, with approval of the City Manager, a department head may discharge any employee "for misconduct, incompetence, inefficiency, failure to perform duties or to observe the rules and regulations of the department or of the City."

14. Respondent was terminated from his employment as a refuse truck operator for the City of Torrance effective November 30, 2005. The City determined that Respondent engaged in misconduct and failed to observe rules of the City by intentionally misusing and abusing the Workers' Compensation Benefit System, which resulted in his receiving pay and benefits to which he was not entitled.

15. (A) As noted in Finding 9, above, Respondent first made a claim of a work related injury on March 24, 2005. The previous day, on March 23, 2005, Respondent's request for a two-week vacation had been denied by his supervisor on the grounds that other employees had already requested vacation for the same time period. Because of the timing of Respondent's vacation request and subsequent claim of a work related injury, the City hired an investigator to conduct surveillance of Respondent's activities. Unknown to Respondent, the investigator conducted videotaped surveillance of Respondent's activities over the period March 26, 2005, to April 24, 2005.

(B) Respondent was observed and videotaped on March 26, 2005, lifting and carrying various household furniture items without any apparent difficulty or discomfort to his left arm. The items included a mattress, furniture, and a television. Respondent was not wearing the arm brace given to him by Dr. Kim. Two days earlier, on March 24, 2005, Respondent had complained of pain to his left arm and hand and was evaluated by Dr. Kim, who placed him under work restrictions that he not use his left arm, not do work using his left arm and hand, and he wear a brace for his elbow and waist.

(C) Respondent was observed and videotaped on April 7, 2005, exiting his vehicle and holding some items in his left hand. He did not appear to have any difficulty moving his arm, and he was not wearing his arm brace. The previous day, on April 6, 2005, Respondent came to the City's Human Resources Department to drop off some forms and was seen wearing his arm brace. On April 5, 2005, Respondent had been evaluated by Dr. Kim, who continued the work restrictions that Respondent not use his left arm and perform no work with his left arm and hand.

(D) Respondent was observed and videotaped on April 8, 2005, standing in front of a large trashcan, placing pieces of paper around the edge, and then using both of his hands to wrap plastic saran wrap film around the outside of the trashcan. Respondent was not wearing his arm brace. He appeared to be moving his left arm easily without any expression of pain or discomfort.

(E) Respondent was observed and videotaped on April 24, 2005, at a gas station pumping gas and also observed picking up lunch. He was not wearing his arm brace. Five days earlier, on April 19, 2005, Respondent was evaluated by Dr. Kim, who continued the work restrictions previously ordered and also provided Respondent with a referral to an orthopedic specialist as Respondent requested.

16. Dr. Kim viewed the videotape of Respondent's activities for the first time on May 26, 2005. In a letter dated May 26, 2005, Dr. Kim noted that the video showed Respondent "moving furniture, without apparent difficulty. Several of the items were heavy, weighing over fifty pounds. He moved these items, without expressions of pain or weakness. In addition, he was not wearing the wrist and forearm braces." Dr. Kim concluded his letter by stating: "Based on my observation of the films, [Respondent] could have perform [sic] his regular duties on March 26. If I had seen the films earlier, I would not have placed [Respondent] on modified work at the follow-up visit on March 29. I would have placed him on regular work." Dr. Gold viewed the videotape on May 17, 2005. In a report dated May 17, 2005, Dr. Gold noted that, after reviewing the videotape, he "had significant concerns with respect to the authenticity of [Respondent's] subjective complaints."

17. By letter dated October 20, 2005, the City of Torrance notified Respondent of its recommendation that his employment should be terminated. The letter explained: "The timing of your alleged injury, your misleading complaints to doctors, your being caught on videotape lifting and carrying heavy furniture, wearing your arm brace only to doctor appointments and when on City premises, all demonstrate a willful intent to misuse the Workers' Compensation system. As a result, you benefitted financially by receiving a period of paid time off work, as well as a period of modified duty assignment which made you unavailable to perform your regular duties. During the time you were accommodated with a modified duty assignment, . . . you received your full pay. During the time you were not at work on an industrial leave, . . . you received 85% percent [sic] of your regular pay. In addition to the pay you received, other employees in the Department were paid a move-up premium to cover your duties for the time you were not available to work. The City also incurred substantial cost for all of the doctor appointments and medical treatment you received."

18. On November 1, 2005, an administrative conference was held before Mary Giordano, Assistant City Manager and Hearing Officer. Respondent was present at the conference and was represented by James Murphy, Employee Representative. Mr. Murphy spoke on Respondent's behalf. Following the administrative conference, Hearing Officer Giordano issued a decision letter dated November 30, 2005, upholding the City's decision to terminate Respondent's employment.

19. Respondent contends that his application for disability retirement should not be denied because he has limitations in the activities he can perform. He presented appointment notices, payment receipts, and a prescription order form related to recent medical appointments in 2013. He presented the documents to show that he is doing all he can to get better. Respondent testified he has been unable to find a job due to his medical

condition. The ALJ observed Respondent appeared to have arm and body tremors during the hearing. Respondent testified he still has pain and limited use of his left arm. Respondent testified that the City's videotape occurred during a period he was getting divorced and he could not find anyone to help him move his furniture and things, which is why he had to move his things himself.

20. Respondent offered no testimony or documents to establish that the termination of his employment was not for cause or that the discharge was the ultimate result of a disabling condition or preemptive of an otherwise valid claim for disability retirement.

LEGAL CONCLUSIONS

1. Cause exists for CalPERS to reject Respondent's application for disability retirement because Respondent is ineligible for disability retirement due to his firing, for cause, by the City of Torrance. (Factual Findings 1-20.)
2. Government Code section 21152, subdivision (d), provides that an application to the [CalPERS] board for retirement of a member for disability may be made by the member or any person in his or her behalf.
3. In *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1307, the court held that "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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed."
4. The two exceptions to the *Haywood* case are inapplicable to Respondent's case. First, Respondent's termination was not preemptive of an otherwise valid claim for disability retirement. The phrase "preemptive of an otherwise valid claim for disability retirement" was explained by the court in *Smith v. City of Napa* (2004) 120 Cal.App.4th 194. "The key issue is thus whether [the employee's] right to a disability retirement matured before [the employee's] separation from service. A vested right matures when there is an unconditional right to immediate payment." (*Smith, supra*, 120 Cal.App.4th at p. 206.) In this case, Respondent did not have, and could not have, a matured right to disability retirement at the time he was terminated. Respondent had not made any application to CalPERS for disability retirement at the time he was fired in November 2005. He did not apply for disability retirement until November 2007, two years after his firing by the City of Torrance.
5. Second, Respondent's termination by the City of Torrance was not the ultimate result of a disabling medical condition. It is clear from the evidence that Respondent was terminated for misconduct and failure to observe rules of the City arising from his claim for and receipt of workers compensation benefits that he was not entitled to receive. Unknown to Respondent, the City hired an investigator who observed and videotaped Respondent

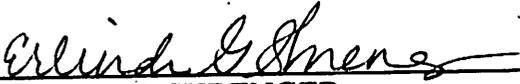
engaging in activities including lifting heavy items without apparent difficulty or pain. The doctors who treated Respondent indicated they would not have placed Respondent on work restrictions and would have placed him on regular work had they been provided the videotape earlier.

6. Based on the foregoing, CalPERS properly rejected Respondent's application on the grounds that he is ineligible for disability retirement.

ORDER

Respondent's appeal from the decision of CalPERS to reject his application for disability retirement is denied.

Dated: December 26, 2013



ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings