

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Statement of Issues  
Against:

DAVID R. BOWMAN,

Respondent,

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND  
REHABILITATION, SUBSTANCE  
ABUSE TREATMENT FACILITY,

Respondent.

Case No. 2013-0003

OAH No. 2013030278

**PROPOSED DECISION**

This matter was heard before Marilyn A. Woollard, Administrative Law Judge (ALJ) for the Office of Administrative Hearings, State of California, on October 10, 2013, in Fresno, California.

Christopher Phillips, Staff Attorney, represented complainant, California Public Employees' Retirement System (CalPERS).

David Burnett, Attorney at Law, represented respondent David R. Bowman who was present.

There was no appearance by or on behalf of the California Department of Corrections and Rehabilitation (CDCR).<sup>1</sup>

<sup>1</sup> The matter proceeded as a default against respondent CDCR pursuant to Government Code section 11520.

Oral and documentary evidence was received. At the conclusion of the hearing, the parties offered oral closing argument. The record was then closed and the matter was submitted for decision on October 10, 2013.

## ISSUE

Should respondent's October 5, 2011 application for industrial disability retirement based on back and left knee injuries incurred in January 2008 be accepted, or is his application precluded due to his February 2011 termination for cause, pursuant to *Haywood v. American River Fire Protection District* (1998) 67 Cal. App. 4th 1292 (*Haywood*) and *Smith v. City of Napa* (2004) 120 Cal. App. 4th 194 (*Smith*)?

## FACTUAL FINDINGS

1. Respondent was employed as a Correctional Officer by CDCR's Substance Abuse and Treatment Facility and State Prison at Corcoran. His initial date of hire was January 25, 1989.
2. On January 16, 2008, respondent was injured while attempting to restrain an inmate or inmates. As a result of this altercation, respondent had injuries to his low back and left knee. A claim for workers' compensation benefits was filed.
3. Effective February 15, 2011, respondent was terminated by CDCR for cause.
4. On October 5, 2011, respondent filed his Application for Industrial Disability Retirement (Application), based on his back and left knee injuries from the January 16, 2008 altercation. Respondent indicated that he was not physically able to perform the required physical duties of a correctional officer and had "limited motion and stamina."
5. On August 28, 2012, Mary Lynn Fisher, Chief of the Benefit Services Division, advised respondent that CalPERS could not accept his Application pursuant to the ruling in *Haywood*. Specifically, respondent was informed that:

Following a review of your application and file, it has been determined that the facts of your case fit within the *Haywood* case. You were dismissed from employment for reasons which were not the result of a disabling medical condition. Additionally, the dismissal does not appear to be for the purpose of preventing a claim for disability retirement. Therefore, under the *Haywood* case, you are not eligible for disability retirement. For that reason, CalPERS cannot accept this application for disability retirement. (Italics supplied.)

6. On September 27, 2012, respondent filed a two-page letter of appeal explaining the reasons why he believed the decision to cancel his Application was erroneous. Specifically, respondent noted that his January 16, 2008 injuries predated his dismissal, that his workers' compensation claim regarding these injuries was ongoing, and that these injuries are the basis for his disability retirement application. Respondent provided copies of various medical reports about his condition in 2008 in which doctors either recommended retirement or indicated that he was "pending probable retirement." Respondent indicated that "the only reason my application for disability retirement was not submitted prior to my dismissal from CDCR was because the doctors had not completed the necessary papers. My injuries indisputably justified disability prior to my dismissal from CDCR." Respondent asserted that *Haywood* was not applicable to his case because "in contrast to the applicant in *Haywood*, I had a claim of disability retirement that could have been presented prior to my dismissal."

7. The matter was then set for evidentiary hearing before the Office of Administrative Hearings.

8. Respondent was the only witness at hearing. He offered several medical reports prepared for his workers' compensation case, which were admitted as administrative hearsay to the extent permitted by Government Code section 11513, subdivision (d). These reports are reviewed and considered for the limited purpose of assisting in a determination of whether respondent's Application should be accepted for further medical evaluation and consideration of his eligibility for disability retirement.

#### *Reports of Respondent's Injuries and Treatment*

9. On January 16, 2008, respondent filed a report of job-related injury or illness to his supervisor after being "battered by I/M," who used "I/M's body" to batter him. Respondent described the injury as "whole body is sore" and he identified the "neck, shoulder, knees, [and] wrists" as affected body parts. Respondent later reported that a second inmate had been involved in the incident.

10. As part of his treatment, respondent was seen by Peter D. McGann, M.D. On August 25, 2008, Dr. McGann saw respondent three months after his left knee arthroscopy and distal trochlear drilling procedure for grade IV cartilage loss on the distal femur. Dr. McGann recommended that respondent continue with his (unspecified) gym activities and that he be provided a bicycle for daily exercise. Dr. McGann also reported that, "[i]n the long run, I think it will be probably advisable for him to retire from this occupation as he will be at high risk for something similar happening again, and the next time it may not be quite as straightforward."

11. On August 28, 2008, respondent was treated by Paul Rudolph, D.O., who prepared a Primary Treating Physician's Progress Report (PR-2). Dr. Rudolph noted respondent's subjective symptoms of "great pain: neck, back; R finger paresthesias." Objectively, respondent had limited head rotation. Dr. Rudolph requested an MRI of the

neck/back as well as an “EMG/NEV” and he wrote: “Retirement advised.” Respondent was to remain off work.

12. On October 16, 2008, Dr. McGann reported that respondent was working hard using a stationary bike, but had some discomfort and giving away of the left knee. Dr. McGann recommended that respondent receive Synvisc viscosupplementation to his left knee. He also stated that respondent was “pending probable retirement.”

13. In his November 6, 2008 PR-2, Dr. Rudolph reported that respondent’s left knee had buckled the previous week. Respondent reported great pain and mistrust of his left knee; objectively, he had decreased range of motion and guarding. Dr. Rudolph wrote: “Advised retirement.” His treatment plan included another left knee MRI and a prescription for a stationary bicycle for home.

14. On August 20, 2010, William J. Previte, D.O., Diplomate, American Board of Orthopaedic Surgery, prepared an Orthopaedic Agreed Medical Evaluation (AME) for respondent’s workers’ compensation case. This report detailed respondent’s previous injuries, including the 2008 injury. Dr. Previte noted that respondent had “aggravated his already symptomatic low back condition with radiating left leg pain” when he “chased an inmate up a flight of stairs, on 5/6/10...” Respondent reported he had been off of work for two years after the January 16, 2008 injury and did not return to work until January 2010. Back fusion surgery had been considered but not performed.

Respondent complained of ongoing issues with his low back, which would “go out” with any simple jolt or twist maneuver. He also reported numbness from his left hip to left knee, with weakness and grinding in both his low back and left knee. Dr. Previte reviewed the effects of respondent’s multiple injuries over time to his body, including low back and left knee. He noted that respondent’s low back injuries had transitioned “from a single level of abnormality (L5-S1) to what recently on MRI testing is reflected as two levels of disc disease (L4-5 & L5-S1).” According to Dr. Previte, based upon his current low back “micro-instability,” respondent was at risk of harm to both himself and others around him. Dr. Previte determined, *inter alia*, that respondent’s left knee condition was permanent and stationary but that his low back could not be so determined, and that respondent should be considered temporarily totally disabled. Dr. Previte recommended surgical management of respondent’s low back.

#### *Respondent's Termination from CDCR*

15. *Internal Affairs Investigation:* From 2009 through October 2010, at the request of Corcoran’s Warden, an Internal Affairs (IA) investigation was undertaken to determine whether respondent had filed a fraudulent workers’ compensation claim about his January 16, 2008 low back and knee injuries. The investigators reviewed medical records, performed sub-rosa surveillance videos of respondent’s physical activities, and conducted interviews, including of respondent, some of his doctors, his physical therapist, and health club personnel.

The IA Investigative Report noted that, on July 6, 2009, a criminal case was referred to the office of the Kings County District Attorney for review. On September 23, 2010, respondent was arrested and charged with several felonies, including workers' compensation fraud.

16. *Second Amended Notice of Adverse Action:* CDCR filed its Second Amended Notice of Adverse Action (hereafter, NOAA), terminating respondent for cause pursuant to Government Code section 19574, effective February 15, 2011.<sup>2</sup> The basis for respondent's dismissal was: (1) his inexcusable neglect of duty, dishonesty, willful disobedience, and other failure of good behavior either during or outside of duty hours that caused discredit to the appointing authority or employment, within the meaning of Government Code section 19572, subdivisions (d), (f), (o), and (t); (2) his violation of California Code of Regulations, title 15, sections 3391 (employee conduct) and 3413 (incompatible activity); and (3) his violation of various sections of the Department Operations Manual, CDCR's Code of Conduct and the Law Enforcement Code of Ethics. The specific factual bases for the dismissal were: fraud surrounding a workers' compensation claim for January 16, 2008 incident; dishonesty surrounding personal injury claim against Chili's Grill and Bar (Chili's); and his dishonesty in the investigative interview regarding the impact of his injury, his statements to his physical therapist, his statements about the Chili's Incident and the sub-rosa and surveillance videos.

17. The following pertinent factual findings were included in the detailed NOAA:

a. Following his January 2008 injury, respondent was given medical limitations and instructions "to use the recumbent stationary bicycle as your primary means of rehabilitation and instructed not to push/pull weight in excess of five pounds."

Despite these instructions, and your own repeated complaints of pain to your left and right knees, back and shoulder, and debilitating headaches, you were working out at Hanford's In-Shape City Health Club (Health Club) one hundred ninety (190) times between January 16, 2008 and May 7, 2009. Your workouts included: warm-ups on Stairmaster equipment and then moved to the free and cable weights room where you used weights between forty to one hundred twenty pounds to perform shoulder, latissimus dorsi, bicep, tricep exercises in addition to flat bench leg lifts, and crunches on an exercise ball ( . . . "WORKOUTS"). You failed to notify, and gain approval of your doctors and therapists of the manner and extent of your WORKOUTS.

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<sup>2</sup> On January 14, 2011, the time of the NOAA, respondent was on Administrative Time Off (ATO). His ATO ended on that date. The NOAA's February 15, 2011 effective date was premised on respondent's use of accumulated unused furlough time.

Many of these Health Club visits occurred on the same day as doctor appointments. . . Subsequent to filing that worker's compensation claim, you made false material statements and representations to your employer, treating doctors, outside insurance carrier, and State Compensation Insurance Fund (SCIF) for the purpose of receiving monies and extending your worker's compensation benefits

b. Despite these medical restrictions and respondent's ongoing complaints to doctors and physical therapists of pain, video surveillance tapes showed respondent: (1) "lifting, carrying and pushing between 40 to 120 pounds, as well as twisting your body without showing signs of pain or difficulty..."; (2) "moving a refrigerator by yourself, bending over and picking items up, carrying refrigerator doors, and raising up the ramp on the moving truck with ease and without assistance from anyone"; (3) "riding a motorcycle with your son grasping you around your back from behind"; and (4) conducting WORKOUTS in violation of restrictions on multiple dates in 2008 and 2009.

c. Respondent's conduct demonstrated that he was exaggerating his injuries and malingering to avoid going back to full duty. He was released for full duty by Dr. Deshmukh on or about April 13, 2009. "Your misrepresentations, and failure to follow doctor's orders defrauded the state of money included \$23,600.64 in payments by SCIF and the Department lost \$78,413.68 in Industrial Leave Disability and \$10,200 in criminal investigation hours."

d. On August 15, 2008, while at Chili's, respondent "claimed that a server...had bumped his knee with a wooden highchair." Respondent later informed Chili's manager that this injury had caused pain and swelling to his knee and he obtained a claims number. He then informed a Chili's Insurance Claims Adjuster that he had to stay in bed all weekend as a result of this incident, but "this statement is contradicted by Health Club records" showing respondent worked out twice in violation of his medical restrictions. Other untruthful statements by respondent regarding this incident were detailed. Respondent was paid \$1,000 by Liberty Mutual Insurance for the alleged Chili's injury; however, he "never disclosed this injury, or your compensation for it to SCIF, the Return to Work Coordinator, nor to your treating physicians." Respondent had a duty to disclose because this alleged injury was to the same knee respondent had claimed in the workers' compensation case.

e. The NOAA detailed numerous untruthful statements by respondent to the IA Special Agents regarding these incidents during the September 23, 2010 investigatory interview.

18. Respondent appealed his dismissal to the State Personnel Board (SPB); however, on October 26, 2011, respondent withdrew his appeal. The findings of CDCR's



NOAA are thus final and are deemed to be true.<sup>3</sup> No further findings are made respecting the factual basis underlying any disciplinary action taken by CDCR against respondent. Rather, these findings are considered solely to determine whether respondent's termination from employment with CDCR was the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim for disability retirement.

### *Respondent's Testimony and Contentions*

19. Respondent testified that after his 2008 injury, he was off work on temporary disability for approximately two years. Sometime in 2010, respondent returned to work as a correctional officer at the prison full-time, and he was assigned to a less interactive job. Respondent continued to work full-time until his administrative investigatory interview on September 23, 2010, which was his last day at work. He was then placed on administrative leave until his termination in February 2011.

Respondent did not dispute the facts, law or timeline of events. He contends that his application should be considered on the merits because the assertion that he was faking his injuries is not true. His workers' compensation claim based on the 2008 injuries is still ongoing and there have been no new injuries. His claim is acknowledged by both workers' compensation and SCIF, which he stated have never said his injuries were faked.

Regarding the specific findings in the NOAA, respondent does not deny working out, lifting weights of 40 to 120 pounds, and moving a fully stocked refrigerator by himself. Respondent testified that he told his doctors about his exercise regime and speculated that they may have simply forgotten about this due to their patient volume.

20. To support his testimony regarding the ongoing nature of his workers' compensation claim, respondent provided Dr. Previte's September 21, 2012 orthopedic AME re-evaluation. This report indicated that in June of 2011, respondent "underwent multilevel lumbar fusion surgery," and did well until February 2012 when he felt a "pop" with increased low back pain. A new MRI was obtained which showed that the disc above the fusion had deteriorated. Respondent was referred to a pain specialist. Following examination and record review, Dr. Previte reported he was unable to conclude that respondent's back condition was permanent and stationary, due to a concern that he had pseudoarthrosis from the surgical procedure performed by Dr. Najafi. Dr. Previte concluded that respondent's left knee was not permanent and stationary and should be referred for viscosupplementation. He opined that respondent "is incapable of functioning as a correctional officer."

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<sup>3</sup> Because applicant failed to overturn the decision to fire him, the court in *Smith, supra*, 120 Cal. App. 4th at p. 199, "reviewed the record through a filter that gives preclusive effect to all actual determinations in the decision of the City Council."



21. Respondent testified that, pursuant to a plea bargain, three of the criminal charges against him were dismissed and he pled guilty to a misdemeanor single count. He was sentenced to three years of informal probation and payment of fines.

22. As indicated in the September 27, 2011 Kings County Superior Court Minute Order (Case No. 10CM3125), respondent pled no contest to a misdemeanor violation of Insurance Code section 1871.4, subdivision (a)(2), which makes it unlawful to “present or cause to be presented a knowingly false or fraudulent written or oral material statement in support of, or in opposition to, a claim for compensation for the purpose of obtaining or denying any compensation, as defined in Section 3207 of the Labor Code.”<sup>4</sup>

23. Respondent testified that he was required to withdraw his SPB appeal of the NOAA as a condition of this plea bargain. His memory on this point had to be prompted by his attorney, and this asserted condition was not contained in any of the court orders related to his conviction or sentencing.

24. Respondent argues that he comes within an exception to *Haywood* and *Smith* because his injuries occurred in 2008, several years before his dismissal, and he was advised to retire by several medical providers in 2008. According to respondent, the delay in filing his disability retirement application was based on factors outside his control. He testified he was told by unnamed CalPERS employees that he could not file his Application until workers’ compensation was “willing to sign off on” it and this process was delayed by his 2011 back surgery.

### *Discussion*

25. In light of his termination for cause, respondent’s Application can be considered for disability retirement only if he has established that his termination from CDCR was either the “ultimate result of a disabling medical condition” or “preemptive of an otherwise valid claim for disability retirement,” within the meaning of the Third District Court of Appeal decisions of *Haywood* and *Smith*. The holdings of *Haywood* and *Smith*, as summarized below, have been adopted by CalPERS in decisions designated as precedential by the CalPERS Board of Administration.<sup>5</sup>

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<sup>4</sup> Labor Code section 3207, defines compensation as “compensation under this division and includes every benefit or payment conferred by this division upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence.”

<sup>5</sup> See: In the Matter of Application for Disability Retirement of Robert C. Vandergoot and California Department of Forestry and Fire Protection (April 2013, OAH Case No. 2012050989), and In the Matter of Application for Disability Retirement of Paul Bado and Garden Valley Fire Protection District (2011, OAH Case No. 2011020611).

26. In *Haywood*, the employee demonstrated an insubordinate attitude for many years and 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, supra*, 67 Cal. App.4th at p. 1295.) Several months before his dismissal, the employee had filed a workers’ compensation claim for psychic injuries due to “excessive supervision.”

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, termination of the employment relationship renders the employee ineligible for disability retirement.” (*Haywood, supra*, 67 Cal. App.4th at p. 1297.) The court concluded that Haywood had not been terminated due to his physical or mental condition and that he had “no valid claim for disability retirement which could have been presented before he was fired.” The court explained that public employment retirement laws are “not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service.” It noted that “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.” The court characterized the “potential reinstatement of his employment relationship with the District if it ultimately is determined that he is no longer disabled” as a “necessary requisite for disability retirement.” (*Haywood, supra*, 67 Cal. App.4th at pp. 1296-1297, footnote omitted.)<sup>6</sup>

27. In *Smith*, the court reiterated and clarified the principles of its *Haywood* decision. There, the applicant had injured his back and had received a partial permanent disability rating through workers’ compensation. Some years later, applicant was disciplined and required to complete remedial testing under a settlement agreement. He failed the test and was dismissed. The City then reinstated him, conditioned on his completion of certification in certain areas within a set time frame. After passing several tests, applicant requested postponement of the “ladder test” until he completed a medical evaluation for a workers’ compensation case and due to stress. His supervisor determining that the ladder test did not exceed applicant’s existing lifting restrictions and denied the request. Applicant took the test “under protest” and failed. After being notified of his dismissal for cause, applicant filed an application for service-connected disability retirement on the effective date of his dismissal. While the disability application was pending, the applicant’s appeal of his

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<sup>6</sup> In reaching its decision, the *Haywood* court explained that “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.” (*Haywood, supra*, 67 Cal. App.4th at p. 1296-7.) The *Smith* court clarified that the appropriate “distinction with which we were concerned is between employees dismissed for cause and employees unable to work because of a medical disability.” (*Smith, supra*, 120 Cal.App.4th at p. 205.)

employment dismissal was affirmed by the City Council. CalPERS then denied his disability application under *Haywood*, because he no longer had an employment relationship with the City. On appeal of the denial of his disability retirement, Smith argued that his test failure was the result of degraded performance due to his low back condition, which was the basis for his service-connected disability retirement application.

Affirming the denial, the court explained that *Haywood*'s use of the term "preempt" included both an "intent to thwart an otherwise valid claim for disability" and a dismissal for a reason unrelated to a disabling medical condition that results in the forfeiture of a matured right to a pension. "Thus, if a plaintiff were 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...' (Citations omitted). The "key issue is thus whether his right to a disability retirement matured before [his] separation from service." (*Smith, supra*, 120 Cal.App.4th at p. 206.)

The *Smith* court determined that a disability claim must have "matured" in order to find that a disciplinary action does not preempt the right to receive a disability retirement pension, and that maturation does 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. (*Smith, supra*, 120 Cal.App.4th at p. 206.) The 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.) It explained that, "[c]onceivably, 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." In this case, Smith did not have an impending ruling on a claim for a disability pension that was delayed through no fault of his own until after his dismissal, and he had "not even initiate[d] the process until after giving cause for his dismissal." (*Id.* at p. 207.)

The court explored other possible situations in which a matured right to a disability retirement might be found. It suggested that such a case might arise where there is "undisputed evidence" that the applicant was eligible for disability retirement "such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb)." (*Smith, supra*, 120 Cal.App.4th at 207.) The court also noted that *an entitlement* to disability retirement cannot rest on the applicant's medical evidence where that evidence is "not unequivocal." (*Ibid.*)

28. The evidence in this case does not support a conclusion that respondent was dismissed from his position by CDCR as the "ultimate result of a disabling medical condition." Rather, as reflected in the factual basis for the uncontested NOAA (Factual Finding 17), respondent's termination was based upon multiple instances of dishonesty that were related not only to his 2008 workers' compensation claim but also to his attempt to obtain an insurance payment from Chili's and his IA interview statements. Respondent's conduct violated the statutes, regulations and policies outlined in Factual Finding 16.

Respondent's conduct was also sufficiently egregious to result in criminal prosecution and his ultimate conviction for insurance fraud. These facts do not demonstrate that, by dismissing respondent, CDCR intended to thwart his otherwise valid claim for disability.

29. The evidence in this case does not support a conclusion that respondent's dismissal from CDCR was "preemptive of an otherwise valid claim for disability retirement" because there is no evidence that he had a matured claim for disability before his dismissal.

First, respondent's ongoing workers' compensation claim from his 2008 injuries does not establish that he is entitled to industrial disability retirement under the CalPERS system. It is well-established that the issues before the Workers' Compensation Appeal Board (WCAB) and a disability retirement pension system are different, and findings of partial permanent disability by WCAB are not binding on the pension system. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App. 3d 689, 697; *Winn v. Board of Pension Commissioners* (1983) 149 Cal.App.3d 532, 539-540; *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567- 569. As explained in *Smith, supra*, 120 Cal.App.4th at 207, medical opinions that an applicant had a permanent disability for prior and pending workers' compensation claims are not binding on the issue of eligibility for disability retirement, due to the difference in the focus of the issues and the parties.

Second, medical opinions before respondent's termination that he should retire or was pending probable retirement based on his 2008 injuries do not establish that his claim for industrial disability retirement was "matured" sufficient to survive termination. In fact, following these 2008 opinions, respondent returned to work full-time as a correctional officer in 2010 and worked for approximately nine months before being relieved of duty.

Third, respondent did not present unequivocal medical evidence of such a nature that approval of his application for disability retirement was a "foregone conclusion," analogous to a missing limb. Maturation does not occur at the time of the injury, but rather when the pension board determines that the employee is no longer capable of performing his duties. (*Smith, supra*, 120 Cal.App.4th at p. 206.) In this case, respondent's return to full-time work in 2010 undercuts any claim that approval of a disability retirement application would have been a foregone conclusion due to the nature of his injuries.

Fourth, respondent did not establish that he was prohibited from filing an application before his dismissal by CalPERS. Respondent's testimony that he waited to file his application on the advice of CalPERS employees was not raised in his detailed appeal letter from the denial of his Application. Given the credibility issues presented by the facts underlying the NOAA, respondent's testimony is given little weight. In addition, respondent provided no evidence of his contacts and conversations with CalPERS through documents or witnesses. To the extent respondent is, by implication, asserting that CalPERS should be equitably estopped from denying his Application, he has not met his burden of proof.

30. Respondent's dismissal for cause from his position as a Correctional Officer by CDCR was not the ultimate result of a disabling medical condition or preemptive of an

otherwise valid claim for disability retirement. As a result of his termination, respondent does not have a right to reinstatement to CDCR. Respondent thus lacks a necessary requisite for disability retirement. Consequently, respondent's Application for disability retirement must be dismissed.

### LEGAL CONCLUSIONS

1. By virtue of his employment, respondent was a state safety member subject to Government Code Section 21154, which provides, 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. . .


2. "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence. . . ." (*McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044; Evid. Code 500, 115.) In this matter, respondent has the burden of proving by a preponderance of the evidence that his Application is not precluded by his termination from employment under controlling appellate authorities.

3. As set forth in the Factual Findings and Legal Conclusions as a whole, respondent did not establish that his discharge from CDCR was either the "ultimate result of a disabling medical condition" or "preemptive of an otherwise valid claim for disability retirement," within the meaning of *Haywood v. American River Fire Protection District* (1998) 67 Cal. App. 4th 1292 and *Smith v. City of Napa* (2004) 120 Cal. App. 4th 194. Consequently, his Application is dismissed.

### ORDER

The application for service-connected disability retirement filed by respondent DAVID R. BOWMAN is hereby DISMISSED.

DATED: November 15, 2013

  
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MARILYN A. WOOLLARD  
Administrative Law Judge  
Office of Administrative Hearings