ATTACHMENT E

THE PROPOSED DECISION

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

In the Matter of the Statement of Issues (Application For Industrial Disability Retirement) Of: JACKIE WILSON, Respondent, and ATASCADERO STATE HOSPITAL, Respondent.	Case No. 2012-0085 OAH No. 2013041071

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on November 12, 2013.

Elizabeth Yelland, Senior Staff Counsel, represented petitioner Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Respondent Jackie Wilson appeared and represented himself.

Respondent Atascadero State Hospital was not represented.

Evidence was received and the matter was submitted on November 12, 2013.

ISSUE PRESENTED

Whether respondent Jackie Wilson is eligible for an industrial disability retirement following his voluntary resignation from state service.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 9 Dec 2013

FACTUAL FINDINGS

1. Petitioner Anthony Suine filed the Statement of Issues solely in his official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent Wilson was employed by respondent California Department of State Hospitals. Beginning on June 7, 1993, he was employed as a Custodian at respondent Atascadero State Hospital. By virtue of his employment, respondent Wilson was a state miscellaneous member of CalPERS subject to government code section 21154.

3. On or about May 24, 2011, respondent Wilson signed an application for industrial disability retirement which was received by CalPERS on May 31, 2011. Respondent Wilson claimed disability on the basis of a low back pain condition resulting from an injury on November 7, 2002.

4. On or about May 24, 2011, respondent Atascadero State Hospital informed CalPERS that respondent Wilson was ineligible to submit an application for disability retirement because he had been terminated from his employment as a Custodian. CalPERS received information and documents concerning respondent Wilson's separation from employment at respondent Atascadero State Hospital and concluded that he was barred from any entitlement to a CalPERS disability retirement based on the holdings in *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*).

5. Respondent Wilson was notified of CalPERS' determination and was advised of his appeal rights by letter dated November 30, 2011.

6. Respondent Wilson filed an appeal by letter dated December 14, 2011, and requested an administrative hearing.

7. The appeal is limited to the issue whether respondent Wilson is precluded from filing an application for industrial disability retirement by reason of his separation from employment with respondent Atascadero State Hospital under the circumstances presented in this matter.

Respondent Wilson's Separation From Employment with Respondent Atascadero State Hospital

8. On July 26, 2011, respondent Wilson was served with an adverse action terminating his employment with respondent Atascadero Hospital effective July 26, 2011. The Notice of Adverse Action (NOAA) alleged that during the months of July 2008 through December 2008, respondent Wilson had falsified his hours of work resulting in approximately 259.5 regular hours and 9.4 hours overtime hours reported by respondent Wilson when he had not worked, and payment to respondent Wilson of approximately $4,705 to which he was not entitled.

9. Respondent Wilson appealed his termination. A pre-termination hearing was held (*Skelley* hearing) and the allegations were affirmed, as well as the determination to terminate respondent Wilson.

10. The disciplinary action was resolved by stipulation incorporated into a Proposed Decision by a State Personnel Board Administrative Law Judge. The State Personnel Board adopted the Decision Approving Stipulation for Settlement.

11. The State Personnel Board Decision dated October 28, 2011, rescinded the termination and changed it to a voluntary resignation. By the terms of the stipulated settlement, the Department of Mental Health[1] withdrew its Notice of Adverse Action and removed it from respondent Wilson's official personnel file. Respondent Wilson agreed to withdraw his appeal and voluntarily resign his position as a Custodian with respondent Atascadero State Hospital effective February 24, 2011. The parties agreed that the period from August 2, 2010, until February 24, 2011, would be considered as an unpaid leave of absence. Respondent Wilson also agreed that he "shall not apply for or accept future employment with the [Department of Mental Health] or exercise any right or return, mandatory right of return, reinstatement, or rehire at any time with the [department]". In the event that he was inadvertently rehired, the rehire would be void.

Respondent Wilson's Claim That His Termination and Separation From Service Were the Ultimate Result of His Claimed Disability

12. The *Haywood* and *Smith* cases, discussed below in the Legal Conclusions, acknowledged two exceptions to the rule that a civil service member may not apply for an industrial disability retirement if he or she has been terminated from employment. These are (1) where the employing agency's termination is designed to preempt the employee's application for industrial disability retirement; and, (2) where the termination is the ultimate result of a disabling condition. Respondent Wilson did not contend that respondent Atascadero's NOAA was an attempt to preempt his disability claim. He did suggest, however, that his claimed disability created the situation that led to respondent Atascadero State Hospital's decision to terminate him.

13. Respondent Wilson began working for the Department of Mental Health in 1993. He was working in the kitchen at Atascadero State Hospital on November 7, 2002, when he slipped and fell. He received emergency treatment and was sent home. That night, he began to vomit and he was treated at Twin Cities Hospital for a concussion. He was off work for what he described as "a few years" during which he was treated for residual problems with his back and head. The treatment included injections and physical therapy. His treating physician prescribed pain medications including Vicodin. Once permanent and stationary, he received what he described as a nine percent disability rating, and he returned to work on August 23, 2004, as a Custodian.

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[1] Former name of the Department of State Hospitals.

14. Respondent Wilson was required to sign in when he reported to work as a custodian and sign out at the end of shift or whenever he left Atascadero State Hospital. The allegations leading to his termination were based on a comparison of the hours that respondent signed in and out and the actual time that he was in the facility recorded by an electronic system that tracked employees by badge number as they entered and left Atascadero State Hospital. Respondent Wilson testified during these proceedings that the condition of his back made it difficult for him to get around and it was especially hard for him to use the stairs between floors. According to him, he could not easily get to a restroom when he had to urinate and this caused him to urinate in his pants. At his lunch time, or at other times convenient to him, he left the facility to change clothes at his home approximately one mile away. He testified that on some of these occasions, he neglected to sign out. He also deliberately failed to sign out on other occasions, because the sign out sheets were in an employee common area and he said he was embarrassed to be seen with soiled pants.

15. Even if respondent Wilson's explanation of his absences is accepted as true, nothing he said supports his assertion that his termination was the ultimate result of a disabling condition. The Notice of Adverse Action recited numerous occasions on which the electronic system showed respondent Wilson leaving the facility during his 6:00 a.m. to 2:30 p.m. shift without signing out or signing back in. During the six months period addressed in the Notice, respondent was charged with false entries on his time sheets for most of the days that he worked. On many of these occasions, he was absent from his workplace for more than four hours.

LEGAL CONCLUSIONS

Whether Respondent Wilson's Resignation and Waiver of All Return Rights is Tantamount to Termination for Cause

1. *Haywood* and *Smith* hold that, ordinarily, an employee who has been terminated for cause is ineligible to apply for an industrial disability retirement. The rationale underlying the principle is the requirement that a disabled employee have the potential for reemployment if he or she is no longer disabled, and this cannot occur with a complete severance of the employer-employee relationship when an employee is terminated. (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. 1297.)

2. While respondent Wilson was initially terminated, and the termination was affirmed at the pre-termination hearing, the settlement converted the termination for cause into a resignation and waiver of any return rights to the Department of Mental Health. Thus, the question presented is whether this form or separation is tantamount to termination such that the bar to application for an industrial disability retirement applies. This very question was addressed by the CalPERS Board of Administration in a precedential decision entitled, "*In the Matter of Application for Disability Retirement of Robert C. Vandergoot, Respondent, and California Department of Forestry and Fire Protection, Respondent*," Case

number 2012-0287, Office of Administrative Hearings Case number 2012050989. Mr. Vandergoot was also initially terminated for cause and then entered into a stipulated settlement by which the Notice of Adverse Action was withdrawn, and Mr. Vandergoot resigned and waived any return rights. The CalPERS Board of Administration adopted the Administrative Law Judge's Proposed Decision, which included the determination that the resignation constituted a complete severance of the employment relationship and it was not possible to reinstate Mr. Vandergoot if he was no longer disabled. Therefore, the necessary prerequisite for receiving disability benefits was not satisfied and Mr. Vandergoot was not eligible to apply for them. The precedential decision concluded that CalPERS "can fairly conclude 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."

3. Government Code section 11425, subdivision (b), empowers state agencies to designate decisions or parts of decisions as precedent where the decision contains significant legal or policy determinations of general application that are likely to recur. The facts in this matter are virtually identical to those in the precedential decision recited above and the decision is controlling. In summary, a voluntary resignation and waiver of return rights is tantamount to termination for cause and each bars the former employee from applying for an industrial disability retirement.

Whether Respondent Wilson Established That His Separation from Service Was The Ultimate Result Of His Disabling Condition

4. As noted above, the *Haywood* decision determined that when an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim for disability retirement, the termination renders the employee ineligible for disability retirement. (*Haywood, supra*, 67 Cal.App.4th at p. 1307.) The exception for discharge that results from a disability is consistent with the court's distinction in the body of the opinion between employees who are *unwilling* to perform the usual duties and those that are medically *unable* to do so. The court noted, in the latter instance, that the Legislature has prohibited employers from terminating employees because of a medical disability if the employee would otherwise be eligible for disability retirement. In such instances, the employer must instead apply for disability retirement for the employee. (*id.* at p. 1305, citing Gov. Code, §19583.1.) Respondent Wilson was not terminated because of a medical inability to perform his usual duties. He was terminated because he falsified time keeping records resulting in compensation for time that he was away from the facility. The termination action was resolved by his resignation and waiver of return rights. In his testimony in this proceeding, respondent Wilson admitted that he failed to sign out when he left the facility, and while he explained that his departures were indirectly related to his physical condition, he did not contend that his failure to properly record his time away from the job site was the result of a disabling condition.

Whether Respondent Wilson Established That His Separation from Service Preempted His Application For Industrial Disability Retirement

5. The *Smith* case includes an extensive discussion of this exception and explained that it is not necessary that the employer intends to preempt the disability claim by terminating the employee, but it is necessary for the employee to establish that the entitlement to industrial disability retirement had matured at the time of the separation. According to the court, this would usually entail a determination, before the separation, that the employee was incapacitated for the usual performance of his or her duties thus creating an unconditional right to immediate payment. (*Smith v. Napa, supra*, 120 Cal.App.4th at p. 206.) Respondent Wilson's separation was effective February 24, 2011, and he did not apply for industrial disability retirement until May 24, 2011. Therefore, his disability claim had not matured on the date he was separated from service and the separation did not preempt his claim. The *Smith* court acknowledged that there may be equitable reasons to consider a claim not yet vested at the time of the separation, such as delay through no fault of the employee or where there was undisputed evidence that the employee was eligible for a CalPERS disability retirement such that a favorable decision on his claim would have been a foregone conclusion. (*id.* at p. 207.) Respondent Wilson did not assert that his application was unreasonably delayed, and his claimed back condition did not present a situation in which a favorable resolution of his disability claim was a foregone conclusion.

ORDER

Respondent Wilson's appeal from CalPERS' determination that he was not eligible to file an industrial disability application is denied.

Dated: December 5, 2013

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings