

**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:

PATRICK CANCELLA,

Respondent,

and

CALIFORNIA DEPARTMENT OF  
TRANSPORTATION,

Respondent.

Case No. 2012-0691

OAH No. 2013060666

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on January 22, 2014, in Sacramento, California.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Patrick Cancilla (respondent) represented himself.

There was no appearance by or on behalf of the California Department of Transportation (Caltrans).

Evidence was received on January 22, 2014. The record was left open to allow respondent to submit a closing brief and copies of the attachments to the notice of adverse action served upon him, and for CalPERS to submit a response. On February 4, 2014, respondent filed his brief with the attachments, which were collectively marked as Exhibit B. The attachments in Exhibit B are admitted into evidence as the attachments to the notice of adverse action. On February 10, 2014, CalPERS filed a response, which was marked as Exhibit 13. The record was closed, and the matter was submitted for decision on February 10, 2014.

## ISSUE

Is respondent precluded from filing an application for disability retirement in light of his voluntary resignation after being served with a notice of adverse action dismissing him from state service?

## FACTUAL FINDINGS

### *Respondent's Disability Retirement Application*

1. On June 3, 2011, respondent filed a Disability Retirement Election Application (Application). In his Application, respondent designated his application type as "Service Pending Disability Retirement." The Application indicated that respondent's last day on the payroll was July 31, 2011.

2. In his Application, respondent described his disability as follows:

Depression & Anxiety resulting from inappropriate termination which was later withdrawn.

Respondent provided the following "other information" in his Application:

Caltrans withdrew Adverse Action per SPB settlement.

### *Notice of Adverse Action and Settlement*

3. On July 8, 2010, Caltrans served a Notice of Adverse Action (NOAA) on respondent, dismissing him from his position as a Staff Services Manager II (Supervisory). The NOAA stated that adverse action was being taken against him under the following subdivisions of Government Code section 19572:

- (c) Inefficiency
- (d) Inexcusable neglect of duty
- (e) Insubordination
- (f) Dishonesty
- (m) Discourteous treatment of the public or other employees
- (o) Willful disobedience
- (r) Violation of the prohibitions set forth in accordance with Section 19990
- (t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment

The NOAA alleged that these legal causes for discipline were based upon acts and omissions including that respondent: (1) failed to follow instructions given to him by his supervisor to ensure that an internal audit was conducted; (2) failed to ensure that a database had the ability to capture all the data for reports that his supervisor requested; (3) was dishonest when he falsely indicated on a memo that all the references for the employees that he recommended for promotion ranged from average to exemplary, and that a review of their office personnel files supported the reference statements; (4) was dishonest when he informed the Branch Chief that a hiring package that would have resulted in the promotion of one of her staff was on the Division Chief's desk for approval; (5) was insubordinate and willfully disobedient when he made a tentative job offer, despite the fact that his supervisor instructed him not to move forward with the hire; (6) neglected his duty when he failed to ensure that a 60-day status report was prepared in a timely manner; and (7) failed to follow instructions given to him by his supervisor to work with IT on updating an intranet portal page.

4. The effective date of respondent's dismissal was July 19, 2010. Respondent elected not to have a *Skelly* hearing on the NOAA. He appealed from the NOAA to the State Personnel Board (SPB).

5. On October 4, 2010, respondent's appeal came on for an evidentiary hearing before an SPB administrative law judge (SPB ALJ). Respondent was represented by a union representative. During a settlement conference before the hearing, respondent and Caltrans agreed to settle the adverse action. The SPB ALJ set forth the terms of the stipulated settlement in a Proposed Decision (Proposed Decision) dated October 4, 2010. As set forth in the Proposed Decision, the stipulated settlement included the following terms: (1) Caltrans agreed to withdraw the NOAA; (2) respondent was placed on paid Administrative Time Off (ATO) from the close of business on July 19, 2010, the effective date of his dismissal, to the close of business on December 31, 2010; (3) respondent could use any available leave credits, including sick leave, for any time period between January 1, 2011, through the close of business on July 31, 2011; (4) Caltrans agreed to make any necessary salary adjustments to provide respondent with paid ATO; (5) respondent withdrew his appeal from the NOAA; and (6) respondent agreed to resign from Caltrans effective the close of business on July 31, 2011.

6. As set forth in the Proposed Decision, the stipulated settlement also included the following paragraph:

[Respondent] agrees not to seek or accept employment with Caltrans or its successors at any time after July 31, 2011. Should [respondent] obtain employment with Caltrans at any time subsequent to that date, [respondent] agrees that [Caltrans] may summarily dismiss [respondent], and [respondent] hereby waives any right to appeal that dismissal in any forum whatsoever.

7. The SPB adopted the Proposed Decision as its final decision in a Decision Approving Stipulation for Settlement dated October 12, 2010.

*CalPERS's Challenge to Respondent's Application*

8. At hearing, CalPERS challenged respondent's Application, arguing that he was precluded from seeking disability retirement under the holdings of the court decisions 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*), and the precedential decision issued by CalPERS's Board of Administration (Board) in *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (October 16, 2013) Precedential Decision 13-01, Case No. 2012-0287, OAH No. 2012050989 (*Vandergoot*).

9. As set forth in the Legal Conclusions below, the courts in *Haywood* and *Smith* held that civil service employees may not apply for disability retirement if they have been dismissed from their civil service employment. These courts recognized two exceptions to this preclusion: (1) when the employee establishes that the dismissal was the ultimate result of a disabling condition; and (2) when the employee establishes that the dismissal preempted the employee's otherwise valid claim for disability retirement.

10. In *Vandergoot*, the Board determined that a stipulated settlement agreement in which an employee settled a dismissal action by agreeing both to resign and to give up all return rights was tantamount to a dismissal for purposes of applying the *Haywood* and *Smith* criteria.

*Respondent's Evidence and Arguments*

11. Respondent testified that he experienced "some depression" prior to his dismissal in July 2010, but that the NOAA "threw him over the top." He asserted that he was in a "deep depression" at the time of his scheduled SPB hearing. He also asserted that Caltrans did not have valid grounds to dismiss him and that he was going to contest the adverse action at the SPB hearing, but Caltrans offered him paid ATO and the ability to use his leave credits until he was old enough to apply for service retirement. Because he felt that he could never return to employment at Caltrans, he agreed to accept the terms of a settlement that required him to waive all his return rights.

12. Respondent submitted reports dated January 5, 2012, and September 3, 2013; written by Janak Mehtani, M.D., his psychiatrist.<sup>1</sup> Dr. Mehtani has treated respondent

---

<sup>1</sup> Dr. Mehtani's reports were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d), which, in relevant part, provides:

“continuously since August 16, 2011,” for “severe anxiety and depression caused by cumulative stress at his workplace.” According to Dr. Mehtani, respondent “cannot get over the fact that he was inappropriately and unfairly terminated from his job.” Dr. Mehtani opined that respondent is “clinically depressed” and that his “substantial incapacity goes back to July 2010 when he was forced into retirement.”

13. At hearing, respondent argued that his appeal is distinguishable from *Vandergoot* for the following reasons: (1) Caltrans withdrew the NOAA, placed him on paid ATO for six months, and allowed him to continue their employment relationship until July 31, 2011, by utilizing his sick leave so that he could service retire when he reached eligible age; and (2) since there was no *Skelly* hearing, there has been no finding that the NOAA was valid or that he engaged in any wrongdoing that would support a dismissal action against him.

14. In his closing brief, respondent asserted that: (1) Caltrans “lied in order to terminate” him; (2) Caltrans’s “willingness to lie in order to terminate [him] caused [his] already fragile mental state to become a severe mental disability”; (3) he appealed his termination; (4) his “disability combined with Caltrans[’s] inducements caused [him] to enter into” the stipulated settlement; (5) SPB approved the stipulated settlement; and (6) but for his disability, he “could have found another job with the State which would have rendered the resignation inoperative.”

He argued that his case is different from *Vandergoot*, because unlike in the other cases where the employees were terminated for good cause, in his case Caltrans “blatantly lied and made false allegations against” him. The “first false allegations led [him] to suffer mental stress starting in August 2009.” The “continued harassment caused [him] to seek mental health counseling in January 2010.” The “lies [Caltrans] used in the [NOAA] and being walked off the job in front of [his] peers and employees on July 9, 2010 caused [him] severe mental disability to the point that [he has] not returned to work.” According to respondent, it was not the NOAA “per se” that was the cause of his disability. Instead, it was the lengths Caltrans was “willing to go to, their willingness to lie and misrepresent the facts to terminate [him], that caused such severe disability that [he] was unable to return to work.”

Respondent also argued that unlike in his case, in the stipulated settlement in *Vandergoot*, there was “no wording that the resignation would be inoperative if [Vandergoot] got a job before the resignation took effect.” Respondent stated, however, that “due to [his] severe mental disability, [he] was unable to search for another job within the State which would have rendered [his] resignation inoperative.”

---

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Respondent argued further that Caltrans withdrew the NOAA and paid him ATO, which was “payment of full wages and all the benefits a normal employee would normally receive.” In addition, Caltrans provided him with “medical benefits, CalPERS retirement contributions, accrued annual leave, holiday pay, etc.” Respondent asserts that the “payment of ATO was a continuation of employment with all the rights of a normal employee.” Moreover, he was “never informed that voluntarily resigning would result in disqualification for disability retirement.” He asserts that he would not have settled if he had known this.

15. As set forth below, the arguments respondent raised at hearing and in his closing brief are not persuasive.

### *Discussion*

16. As explained in *Haywood, Smith, and Vandergoot*, in determining whether respondent should be allowed to apply for disability retirement, three questions must be answered: (1) whether respondent’s resignation and waiver of all return rights was tantamount to a dismissal under *Haywood* and *Smith*; (2) whether respondent established that his separation from service was the ultimate result of his disabling condition; and (3) whether respondent established that his separation from service preempted his otherwise valid claim for disability retirement.

17. As set forth in *Haywood* and *Smith*, subject to the two listed exceptions, civil service employees who have been dismissed from their civil service jobs may not apply for disability retirement. In *Vandergoot*, the Board held that a resignation of an employee was tantamount to a dismissal for the purposes of applying the *Haywood* and *Smith* criteria when the employee: (1) resigned pursuant to a settlement agreement entered into to resolve a dismissal action; and (2) agreed to waive all rights to return to his former employer.

18. In this case, 11 months before respondent filed his Application, he was served with an NOAA dismissing him from state service. Eight months before he filed his Application, he entered into a stipulated settlement to resolve the dismissal action. Pursuant to that settlement, respondent waived his right to return to employment at Caltrans. By giving up his right to return to Caltrans, respondent waived his reinstatement rights back into state service in the event he ever recovers from his alleged disability. As explained in *Vandergoot*, these facts establish that respondent’s resignation was tantamount to a dismissal under *Haywood* and *Smith*.

19. Respondent’s efforts at hearing and in his closing brief to distinguish his case from *Vandergoot* were not persuasive. The facts that, under the terms of the stipulated settlement, Caltrans withdrew the NOAA, placed respondent on paid ATO for six months, allowed him to accrue benefits during those six months, and agreed to continue their employment relationship until July 31, 2011, by allowing him to utilize his sick leave so that he could service retire when he reached eligible age, are not material. Similarly, the facts that respondent did not request a *Skelly* hearing and, consequently, did not receive an adverse *Skelly* determination are irrelevant. These facts do not constitute an admission by Caltrans

that its adverse action against respondent was not meritorious. The fact that respondent may dispute that Caltrans had valid grounds to dismiss him is not relevant for the purposes of this proceeding.

20. The salient facts in this case are that: (1) respondent resigned to settle a dismissal action against him; and (2) as part of the settlement, he gave up all return rights to Caltrans. Given these facts, in accordance with *Vandergoot*, respondent's resignation must be treated as tantamount to the dismissals at issue in *Haywood* and *Smith*.

21. There was no evidence to establish that respondent's Application falls into either of the two exceptions recognized in *Haywood* and *Smith*: (1) his separation from state service was not the ultimate result of his disabling condition; and (2) his separation from state service did not preempt an otherwise valid claim for disability retirement.

22. There was no evidence that respondent was disabled by his depression and anxiety before he was served with the NOAA. Although respondent may have felt some depression and stress prior to the service of the NOAA, respondent's Application, his testimony, and the reports of Dr. Mehtani all indicate that it was the dismissal itself and its consequences which allegedly caused his depression and anxiety to become disabling. In addition, there was no indication in any of the evidence that Caltrans was aware of respondent's alleged disability when it served the NOAA, or that it took any disciplinary action against respondent because of his disability. Because there was no evidence that Caltrans was aware of respondent's alleged disability either at the time it served the NOAA or when it entered into the stipulated settlement with him, respondent's argument that he was not told that the settlement would preclude him from filing for disability retirement is without basis or merit. Thus, respondent did not establish that his separation from service was the ultimate result of his disabling condition.

23. Similarly, respondent did not establish that his separation from state service preempted an otherwise valid claim for disability retirement. Respondent was dismissed effective July 19, 2010. He entered into the settlement agreement with Caltrans on October 4, 2010. As part of that agreement, he agreed to resign from Caltrans effective July 31, 2011. He did not file his Application until June 23, 2011.

The facts that Caltrans withdrew the NOAA, and that respondent filed his Application with CalPERS before the effective date of his resignation do not compel a different result. The employee in *Vandergoot* filed his disability retirement application in April 2010. His resignation pursuant to a stipulated settlement became effective on December 9, 2010.

In addition, the fact that respondent was on paid ATO and sick leave until the effective date of his resignation, in contrast to the employee in *Vandergoot* who was on unpaid leave, does not compel a different result. There was no evidence to suggest that respondent had a matured right to a disability allowance prior to the time he was dismissed by Caltrans. (*Smith, supra*, 120 Cal.App.4th at p. 206.)

There was no indication in any of the evidence that respondent's dismissal preempted an otherwise valid claim for disability retirement. In addition, there was no evidence to indicate that principles of equity should be applied to grant respondent the right to seek disability retirement.

24. In sum, when all the evidence and arguments are considered, respondent did not establish that he should be allowed to file an application for disability retirement. Consequently, the appeal of respondent to file for disability retirement must be denied.

## LEGAL CONCLUSIONS

1. In *Haywood, supra*, 67 Cal.App.4th at p. 1297, the court found that, 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." The court explained that the employee's dismissal in that case "constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement-the potential reinstatement of his employment relationship with the District if it ultimately is determined that he is no longer disabled." (*Ibid.*)

2. In *Smith, supra*, 120 Cal.App.4th at pp. 203-204, the same court reiterated the principles of the *Haywood* decision. The court further explained that a disability claim must have "matured" in order to find that a disciplinary action preempts the right to receive a disability retirement pension, and this maturation did 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. (*Id.* at p. 206.) The *Smith* 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.)

3. In *Vandergoot*, the Board held that a resignation of an employee was tantamount to a dismissal for the purposes of applying the *Haywood* and *Smith* criteria when the employee: (1) resigned pursuant to a settlement agreement entered into to resolve a dismissal action; and (2) agreed to waive all rights to return to his former employer. As explained in *Vandergoot*, "a necessary requisite for disability retirement is the potential reinstatement of the employment relationship" with the employer if it ultimately is determined that the employee is no longer disabled. (*Vandergoot, supra*, Precedential Decision 13-01 at p. 7, ¶ 18.)

4. As set forth in the Findings, before filing his Application, respondent agreed to settle a dismissal action served upon him by resigning and waiving his right to return to employment with Caltrans. Pursuant to the holding in *Vandergoot*, respondent's resignation under these circumstances was tantamount to a dismissal for the purposes of applying the *Haywood* and *Smith* criteria. Respondent did not establish either: (1) that his separation from state service was the ultimate result of his disabling condition; or (2) that his separation from

state service preempted his otherwise valid claim for disability retirement. In addition, respondent did not establish that there were any equitable principles that should be applied to grant him the right to seek disability retirement.

5. Pursuant to the holdings in *Haywood, Smith, and Vandergoot*, respondent is precluded from filing for disability retirement.

ORDER

The appeal of respondent Patrick Cancilla to be granted the right to file an application for disability retirement is DENIED.

DATED: February 18, 2014



---

KAREN J. BRANDT  
Administrative Law Judge  
Office of Administrative Hearings