

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of Application for Industrial
Disability Retirement of:

JACOB BERGHORST,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
DEUEL VOCATIONAL INSTITUTION,

Respondent.

Case No. 2012-0210

OAH No. 2013080044

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, State of California, on March 13, 2014, in Sacramento, California.

Christopher Phillips, Staff Attorney, California Public Employees' Retirement System, appeared on behalf of petitioner.

Respondent Jacob Berghorst appeared on his own behalf.

There was no appearance by, or on behalf of the California Department of Corrections and Rehabilitation, Deuel Vocational Institution.

Evidence was received, oral argument was heard and the record was closed. The matter was submitted for decision on March 13, 2014.

FACTUAL FINDINGS

1. Anthony Suine, Chief, Benefits Services Division, California Employees' Retirement System (CalPERS), made and filed the Statement of Issues in his official capacity.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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2. Jacob Berghorst (respondent) was employed by respondent California Department of Corrections and Rehabilitation, Deuel Vocational Institution (Department) as a Correctional Sergeant, effective October 26, 2002. By virtue of his employment, respondent became a state safety member of CalPERS subject to Government Code sections 21154.

3. On or about May 27, 2011, respondent signed an application for industrial disability retirement, which was received by CalPERS on May 31, 2011. In filing the application, disability was claimed on the basis of an orthopedic (herniation of lumbar disc/lumbar radiculopathy) injury that occurred on June 24, 2010.

4. Earlier, by letter from the Department dated October 28, 2010, respondent was informed of a Notice of Adverse Action (NOAA) against him pursuant to Government Code section 19574. The notice informed respondent that he was dismissed from his position as a Correctional Sergeant effective November 29, 2010. The NOAA included information advising respondent of his right to appeal the NOAA to the State Personnel Board (SPB) by written appeal, within 30 calendar days after the date of the NOAA.

Respondent filed an appeal with SPB, and a hearing was held before the SPB on June 20 and 21, 2011. By order dated September 28, 2011, the dismissal of respondent was sustained. The decision was adopted by the SPB by resolution dated September 20, 2011.

5. On November 21, 2011, respondent filed a Petition for Writ of Mandate in the San Joaquin County Superior Court, challenging the SPB decision. The court denied the Petition for Writ of Mandate on January 31, 2013.

6. CalPERS received and reviewed information and documents concerning respondent's termination from employment. CalPERS determined that respondent had been terminated for cause effective November 29, 2010, on the following grounds set forth in Government Code section 19572:

(d) Inexcusable neglect of duty.

[¶] ... [¶]

(f) Dishonesty.

[¶] ... [¶]

(m) Discourteous treatment of the public or other employees.

[¶] ... [¶]

(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.

7. CalPERS determined that respondent was barred from any entitlement to disability retirement because he was terminated for cause and the discharge was neither the ultimate result of a disabling medical condition nor preemptive of any otherwise valid claim for disability retirement. CalPERS notified respondent of its determination by letter dated December 23, 2011, which included notice that respondent could appeal.

8. Respondent filed an appeal by letter dated December 30, 2011, and requested a hearing. As noted in the Statement of Issues, the appeal is limited to the issue of whether respondent may file an application for industrial disability retirement based on an orthopedic condition, or whether his application and eligibility for disability retirement is precluded by operation of law. (See *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*).

Employment Background and Termination

9. Respondent was employed by the Department since October 2002. He was injured on June 24, 2010, when he was attacked by an inmate. He bases his application for industrial disability retirement on this incident and subsequent diagnoses of: 1) lumbosacral sprain and strain injury with herniated L3-4 disk to the left (status post L3-4 microdiscectomy, 10/26/11); and left inguinal hernia (status post left inguinal hernia repair, 2/14/12). Respondent has not worked since June 24, 2010. Medical records submitted by respondent indicate that he was on total disability resulting from these conditions from September 10, 2010, through April 21, 2011; and then again from October 18, 2011, through August 8, 2012.

10. The incident leading to the NOAA occurred on November 14, 2009. Respondent was involved in an off-duty incident in which he consumed alcohol and became drunk. He engaged in a physical altercation with his girlfriend, and operated a vehicle while intoxicated. He was subsequently arrested for corporal injury upon a spouse or cohabitant. After respondent's SPB hearing he was found to have made material misrepresentations to law enforcement officers designed to conceal his misconduct, and was also found to have attempted to coach or influence his girlfriend's testimony regarding an Office of Internal Affairs investigation into these matters. The SPB's decision found that respondent's conduct constituted violations of the provisions of Government Code section 19572 set forth in Finding 6, and further determined that his termination was just and proper. As noted, the SPB decision was upheld on appeal to the San Joaquin County Superior Court on January 31, 2013.

11. No findings are made in this case respecting the factual basis underlying the disciplinary action taken by the Department against respondent. The above matters were considered for the sole purpose of determining whether respondent's termination from

employment with the Department was the result of a disabling medical condition. CalPERS correctly determined that this was not the case.

Application of Haywood

12. The sole issue in this hearing is whether respondent may file an application for industrial disability retirement, or whether his application and eligibility for disability retirement is precluded by operation of *Haywood*. In *Haywood*, the employee “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 v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. 1295. The Court of Appeals concluded that the employee was not entitled to disability retirement, stating as follows:

As we shall explain, 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. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. Nor are they intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. In addition, 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.

In this case, Haywood challenged his employer’s authority and lost when, after a series of disciplinary actions, he was terminated for cause. The behavior which resulted in Haywood’s firing--his unwillingness to faithfully perform his duties--was not caused by a physical or mental condition, and Haywood had no valid claim for disability retirement which could have been presented before he was fired. Haywood’s firing for cause 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 no longer is disabled. Moreover, to award Haywood a disability pension would interfere with the District’s authority to discipline recalcitrant employees. Such an award in effect would compel the District to pension-off an employee

who has demonstrated unwillingness to faithfully perform his duties, and would reward Haywood with early retirement for his recalcitrance. In other words, granting Haywood disability retirement would override Haywood's termination for cause despite his inability to set aside the termination through the grievance process.

It follows that where, as here, 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.

(*Id.* at pp. 1296-1297, footnote omitted.)

13. Respondent does not contend that his termination was the result of a disabling medical condition. He does contend that the Department's action in terminating him was preemptive of his otherwise valid claim for disability retirement. He noted that he has not worked since the date of his June 24, 2010 injury, which predated the October 28, 2010 NOAA.

14. CalPERS, relying upon both the date of the incident (November 14, 2009) giving rise to the NOAA, its subsequent investigation following the incident, and the effective date of the NOAA (November 29, 2010), contends that respondent was properly terminated for cause. Respondent filed his application for industrial disability retirement on May 27, 2011, six months after the effective date of his dismissal. Respondent's employment relationship with the Department was essentially severed six months before he filed for industrial disability retirement.

15. Respondent contends that the Department's NOAA was preemptive of an otherwise valid claim for disability retirement. Where an agency dismisses an employee solely for a cause unrelated to a disabling medical condition, this will still not result in the forfeiture of a matured right to a pension allowance. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206.) "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. [Citations omitted.] Conversely, 'the right may be lost upon occurrence of a condition subsequent such as a lawful termination of employment before it matures...' (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749, ...)" (*Ibid.*)

16. Respondent had a vested right to apply for industrial disability retirement upon acceptance of employment with the Department. While the "right" to the benefits vests upon acceptance of employment, an employee would not be entitled to receive the benefit until all the conditions prescribed have been met. (*Dickey v. Retirement Board of the City and*

County of San Francisco (1976) 16 Cal.3d 745.) There is a marked difference between the vesting of a pension right and the accrual of a cause of action to enforce a vested right. "The right to a pension is a vested right; the amount of the pension may not always be ascertained until the last contingency has occurred." (*Id.* at p. 750; *Brooks v. Pension Board* (1938) 30 Cal.App.2d 118, 123.) The vested right to the pension benefit may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures, or because of the nonoccurrence of one or more conditions precedent. (*Id.* at p. 749.) Thus, the issue here is whether respondent's vested interest in disability retirement "matured" prior to his separation from employment.

17. A vested right matures when there is an unconditional right to immediate payment. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 206.) Typically, this arises at the time a pension board determines that the employee was no longer capable of performing his/her duties. (*Ibid*; *Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672.) Here, a CalPERS determination of eligibility does not antedate respondent's separation from employment. His right to industrial disability retirement has thus not matured.

18. *Smith* recognized that even where there has not yet been a determination of eligibility, there may be facts which a court, applying principles of equity, will deem an employee's right to a disability retirement. (*Id.* at pp. 206-207.) *Smith* then went through a number of situations where equitable principles might apply. They are also considered here. As in *Smith*, this is not a case where respondent had an impending ruling on a claim for a CalPERS disability pension that was delayed through no fault of his own. (*Id.* at p. 207.) Here, he did not even initiate the process for receiving an industrial disability retirement allowance until six months after he received the NOAA.

Nor was there "undisputed evidence" that respondent 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)." (*Ibid.*) The fact that he had been placed on total temporary disability leave on two occasions is not binding on the issue of eligibility for industrial disability retirement. As was the case in *Smith*, for purposes of the standard for disability retirement, the medical evidence here is not unequivocal. CalPERS would have a basis for litigating whether the evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. (*Ibid.*) CalPERS noted, for example, that respondent was able to drive himself to the hearing from Ripon, a distance of approximately 60 miles. CalPERS would have a basis for litigating whether respondent's injury merely made it difficult to perform his duties.

19. Respondent submitted an Agreed Medical Evaluation prepared by Stephen P. Abelow, M.D. on August 17, 2012, in support of his claim that the NOAA was preemptive of an otherwise valid claim for disability retirement. Dr. Abelow has opined that respondent was precluded from returning to work. However, he was applying workers' compensation guidelines and indicated that respondent "best fits into a 13% whole person impairment." While this may support a finding that respondent is substantially disabled from the

performance of his usual duties as a Correctional Sergeant, it is by no means a “foregone conclusion,” leading to certain approval of his application. CalPERS has considered countless applications for disability retirement based on orthopedic conditions. Not surprising, in these cases orthopedic surgeons examining the same individual often disagree on whether an orthopedic condition is disabling.

20. When the above matters are considered as a whole, respondent has not presented unequivocal medical evidence of such nature that approval of his application for disability retirement was a “foregone conclusion.” Any right to an industrial disability retirement allowance cannot be deemed to have matured in this case. For all these reasons, his application for disability retirement should be precluded by operation of *Haywood*.

LEGAL CONCLUSIONS

1. Government Code section 21152 reads, in pertinent part:

Application to the board for 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 reads, 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. On receipt of any application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, on its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

3. 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, termination of the employment relationship renders the employee ineligible for disability retirement. (*Haywood v. American River Fire Protection District* (1998) 67 Cal. App.4th 1292, 1297.) The Third District Court of Appeal explained that the dismissal

“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.*)

4. CalPERS has demonstrated that respondent’s separation from employment was a dismissal for cause for purposes of applying the *Haywood* criteria. (See Findings 4 through 11.) It was also established that respondent’s separation from employment was not the ultimate result of a disabling medical condition.

5. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 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.)

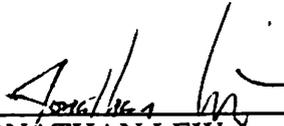
As noted in Findings 15 through 20, even where principles of equity are applied, this was not a case where there was undisputed evidence that respondent was eligible for a CalPERS industrial disability retirement allowance, such that a favorable decision on his claim would have been a “foregone conclusion.” Respondent’s vested interest in an industrial disability retirement allowance never “matured” prior to his separation from employment.

6. For all the above reasons cause exists to uphold CalPERS’ determination that respondent is not entitled to file an application for an industrial disability retirement allowance.

ORDER

The appeal of Jacob Berghorst to be granted the right to file an application for industrial disability retirement is DENIED.

Dated: March 26, 2014



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings