

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:

SERGIO GARCIA,

Respondent,

and

DEPARTMENT OF INDUSTRIAL
RELATIONS,

Respondent.

Case No. 2013-0644

OAH No. 2013080710

PROPOSED DECISION

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Glendale, California, on May 8, 2014.

Elizabeth Yelland, Senior Staff Attorney, represented Petitioner Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Mark Ellis Singer, Attorney at Law represented Sergio Garcia (Respondent).

Respondent Department of Industrial Relations (DIR) did not appear at the hearing.

Petitioner seeks to prevent Respondent from proceeding with his Application for Industrial Disability Retirement (Application) on grounds that the Application is barred by *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*), and *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Decision 13-01 (*Vandergoot*). Respondent argues that these cases are distinguishable and that the Application should be processed.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument. Initial argument was received on June 2, 2014, and reply argument was received on June 16, 2014. The matter was submitted for decision on June 16, 2014.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED July 8 20 14

Lissa R. Kuris

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity.
2. Respondent was employed by DIR as a Senior Special Investigator. By virtue of his employment, Respondent is a state safety member of CalPERS.
3. Respondent started working for DIR on July 23, 2007. On January 13, 2010, DIR filed and served on Respondent a Notice of Adverse Action (NOAA), seeking to dismiss Respondent for cause, effective January 20, 2010.
4. Respondent appealed DIR's NOAA. On March 6, 2012, the parties appeared for an evidentiary hearing before Jason A. Krestoff, Administrative law Judge, State Personnel Board. The parties entered into a stipulation, which formed the basis of Judge Krestoff's Proposed Decision. In pertinent part, the parties stipulated:

"3 Terms of Resignation and Withdrawal of Appeal [Respondent] desires to resign his employment with [DIR] in lieu of dismissal and to thereby waive the procedural protections set forth in Government Code sections 19574 and 19574.1 and waive his right to revoke his resignation pursuant to Government Code section 19996.1, and does hereby withdraw his appeal in SPB Case Number 10 0455[.] By agreeing to this Agreement [Respondent] submits his resignation from employment with [DIR], effective at the close of business on January 25, 2010[.] [Respondent] further agrees that said resignation shall be, and is, irrevocable, unless the SPB refuses to approve this Agreement in which case the parties are returned to the status quo ante[.] [Respondent] does hereby waive his right to revoke his resignation pursuant to Government Code section 19996.1, pending action on this Agreement with SPB[.] Once the SPB approves this Agreement [Respondent] agrees and understands that his resignation will become final and binding[.] [Respondent] will make a diligent search for his DOSH identification card and DOSH badges and if found will return the same to the [DIR]'s Office of Director, Legal Unit, to the attention of the Assistant Chief Counsel[.] [DIR] will reimburse [Respondent] for his cost of the badges upon [Respondent] providing a copy or copies of invoices for the badges.

"4 Agreement not to Seek or Accept Future Employment by the Labor and Workforce Development Agency [Respondent] agrees to never apply or reapply for employment or reemployment by [DIR], or for any appointing authority within the Labor and Workforce Development Agency (LWDA), which includes, but is not limited to the Department of Industrial Relations, the Employment Development Department, the Workforce Investment Act Board and the Agricultural Labor Relations Board, and never to take any steps to become so employed or reemployed and to refrain from accepting any offer of employment from any appointing authority within the LWDA[.] In the event any appointing authority within the LWDA hereafter employs [Respondent], [Respondent] agrees that the fact of such employment shall not be a waiver of any of the terms of this Agreement and shall be deemed a breach of this Agreement[.]

“5 Remedy in the Event of [Respondent]’s Breach In the event [Respondent] breaches this Agreement and hereafter seeks and/or becomes employed by any appointing authority within the LWDA, [Respondent] agrees that such appointing authority may immediately dismiss him based upon his violation of this agreement without serving him with a Notice of Adverse Action, otherwise required by Government Code section 19574, and without serving him *Skelly* documents pertaining to said dismissal[.] [Respondent] additionally waives any right to appeal such dismissal to the State Personnel Board and waives the procedural protections set forth in Government Code sections 19574 and 19574.1 as they pertain to such dismissal.

[¶] . . . [¶]

“12 No Admission This Agreement and compliance with this Agreement shall not be construed as an admission by any party of any liability whatsoever, or as admission by any party of any violation of the rights of any person, violation of any order, law[,] statute, duty, or contract.” (Exh. 10, at pp.2-7; emphasis in original.)

5. The settlement agreement stated that it had no impact on Respondent’s pending workers’ compensation claims or on DIR’s ability to defend against the claims. The paragraph containing such language, number 11, concludes with the following statement: “[T]his agreement shall have no effect on [Respondent]’s ability to pursue disability claims through PERS.” (Exh. 10, at p. 6.)

6. On March 8, 2012, the State Personnel Board approved Judge Krestoff’s Proposed Decision and the stipulated settlement between Respondent and DIR became final.

7. Respondent is 58 years old. On May 25, 2012, Respondent filed the Application, which was received by CalPERS on June 12, 2012. He asserts industrial disability due to injury to his right shoulder, head and finger sustained during an attack on August 28, 2008 by two security guards.

8. The parties stipulated at the hearing that Respondent’s separation from service with DIR was not the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim for disability retirement.

LEGAL CONCLUSIONS

1. A Cal PERS member may apply for disability retirement. (Gov. Code, § 21152, subd. (d)). Government Code section 20026 defines the following relevant terms: “ ‘Disability’ and ‘incapacity for performance of duty’ as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.”

2. Under Government Code section 21154, the application for disability retirement “[s]hall 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. . . .”

3. Government Code section 21156 provides, in pertinent part: “If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability. . . .”

4. In *Haywood*, the court upheld the denial of the disability retirement application of a firefighter whose employment had been terminated for cause. The court concluded that disability retirement statutes administered by CalPERS contemplate a continuing employer-employee relationship. The court noted that statutes permit an employer to require the employee to undergo testing to determine if the disability continues, and the employee may apply for reinstatement on the ground of recovery. The court stated: “[W]e conclude 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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed.” (*Haywood*, supra, 67 Cal.App.4th 1292, at p. 1308.) In *Napa*, another case involving a dismissal for cause, the court reaffirmed its ruling and clarified the circumstances under which the dismissal would be deemed preemptive of an otherwise valid claim for disability retirement.

5. In *Vandergoot*, the member’s employer issued a notice of adverse action pursuant to Government Code section 19574 on March 25, 2010, seeking to terminate his employment. On April 9, 2010, the member filed an application for industrial disability retirement. He also appealed his discharge to the State Personnel Board. On February 6, 2011, before a hearing on his appeal was held, the member and the state agency entered into a stipulated settlement. The parties agreed, without an admission of guilt or wrongdoing by either party, that the member would resign from his employment, for personal reasons, effective December 9, 2010.

As set forth in the *Vandergoot* decision, the stipulated settlement agreement stated: “[Member] agrees that he will not seek, transfer to, apply for or accept any employment in any capacity with [Agency] at any time in the future. If [Member] returns to employment with [Agency] in violation of the terms of this Stipulation for Settlement, [Agency] may dismiss [Member] at such time as is convenient to [Agency] and [Member] waives any right of appeal of said dismissal in any forum.” (*Vandergoot*, supra at p. 4.)

Administrative Law Judge Jonathan Lew, whose Proposed Decision CalPERS adopted, stated in his Proposed Decision: "In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*. This is because *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the District if it ultimately is determined that respondent is no longer disabled (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at pp. 1296 – 1297.) Such is not possible here. The employment relationship has not only been severed, but the terms of the Stipulation and Settlement Agreement expressly lock respondent out from being reinstated. . . ." (*Vandergoot, supra* at p. 7.) In denying the appeal, Judge Lew also concluded: "CalPERS demonstrated that respondent's separation from employment was tantamount to a dismissal for purposes of applying the *Haywood* criteria. (See Findings 16 through 19.) It was also established that respondent's separation from employment was not the ultimate result of a disabling medical condition." (*Vandergoot, supra* at p. 10.)

6. As set forth in *Haywood* and *Vandergoot*, Respondent's eligibility to file a disability retirement application is dependent on his having a continuing employment relationship with DIR. Respondent does not have such an employment relationship, and, accordingly, he is not eligible to file a disability retirement application. By the terms of the stipulated agreement he entered into, Respondent resigned his employment with DIR effective January 25, 2010, and agreed not to reapply for employment with that agency or any other within the Labor and Workforce Development Agency. Such resignation severed the employment relationship which *Haywood* and *Vandergoot* require for CalPERS to be able to process a disability retirement application, and Respondent's application, therefore, must be rejected.¹

7. Respondent nevertheless argues that he has an employment relationship with DIR because he has a right of reinstatement at DIR's option and he is not prohibited from seeking employment with other State agencies. However, his right may be an illusory one, and is, in any event, insufficient to satisfy the requirement of an employment relationship. While Respondent may apply for employment at DIR, just like any other individual who wishes to work at DIR can, his application would constitute a breach of the settlement agreement. It would then be entirely within DIR's discretion to ignore the breach and hire Respondent, neither of which circumstance is assured or within Respondent's control. Even if DIR hired Respondent, it could change its mind and terminate Respondent's employment, and Respondent would have no recourse to overturn such decision. Moreover, even if another State agency hires Respondent, this would not reinstate the severed employment relationship with DIR or make the new agency responsible for an industrial disability claim purportedly arising out of employment with another employer.

¹ As set forth in Government Code section 19996, a resignation constitutes a permanent separation from State service.

8. Respondent also argues that *Haywood* and *Vandergoot* are distinguishable because the rationale underpinning the cases does not apply to his case. Respondent points out that the court in *Haywood* found support for its holding on the ability of an agency to order reinstatement pursuant to Government Code section 21193.² Because the ability of an employer to order medical examinations pursuant to Government Code sections 21192 and 21193 is limited to situations in which the employee in question has not attained service retirement age, and since he has attained the service retirement age of 50 years of age pursuant to Government Code section 20160, Respondent argues that DIR could not order him to undergo examination and an employment relationship would therefore not be necessary. Respondent argues that since the rationale for the *Haywood* holding does not apply to him, neither should the holding. Respondent's argument amounts to an invitation to revisit the correctness of the *Haywood* and *Smith* holdings, which invitation must be declined. *Haywood* is not materially distinguishable from this case, but, rather, is controlling because the key fact in both cases is that the required employment relationship has been severed.

9. Respondent's resignation severed his employment relationship to DIR, and his resignation is no less final than the termination for cause in *Haywood*. In addition, in *Vandergoot*, CalPERS applied the *Haywood* holding to a case like Respondent's, concluding that a resignation with discipline pending was tantamount to a dismissal for cause.

10. The clause in paragraph 11 of the settlement agreement between Respondent and DIR, set forth in factual finding number 5, does not alter the foregoing conclusions. On its face, the clause merely preserves Respondent's ability to pursue a disability retirement claim with CalPERS. The provision does not, and cannot, mandate a specific outcome in any CalPERS review of the application.

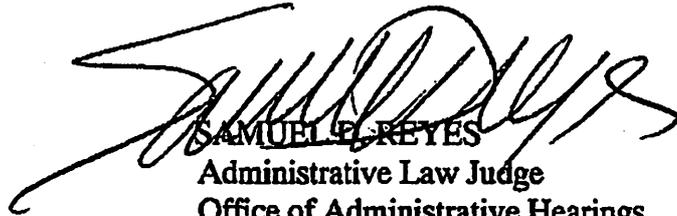
11. Accordingly, Respondent is not eligible to file a disability application and CalPERS must reject the Application, by reason of factual finding numbers 1 through 8 and legal conclusion numbers 1 through 10.

² Government Code section 21193 provides, in pertinent part: "If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system. . . ." Government Code section 21192, in turn, provides that an employer may require "any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to the member of his or her class to undergo medical examination. . . ."

ORDER

The application for disability retirement of Sergio Garcia is rejected.

DATED: 7/16/14


SAMUEL E. REYES
Administrative Law Judge
Office of Administrative Hearings