

ATTACHMENT C
RESPONDENT'S ARGUMENT

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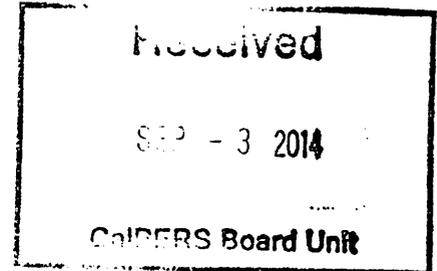
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August 28, 2014

SENT VIA FAX AND FIRST CLASS MAIL

Cheree Swendensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701



Re: GARCIA, SERGIO: PERS(SS) HEARING
File No: 17496.002
Agency Case No. 2013-0644
OAH No. 2013080710

Dear Ms. Swendensky:

Respondent Sergio Garcia hereby encloses "Respondent's Argument" in response to the "PROPOSED DECISION" of Administrative Law Judge Samuel D. Reyes. Please submit this argument to the CalPERS Board of Administration.

If you have any questions, please call me at (818) 755-8723 extension 113 or you may call my assistant, Kate Surman, at extension 112.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mark Ellis Singer".

MARK ELLIS SINGER

MES/ccs

cc: Elizabeth Yelland, Esq.
Sergio Garcia

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8 BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
9 FOR THE STATE OF CALIFORNIA

10 In the Matter of:) Agency Case No. 2013-0644
11 Application for Disability Retirement for:)
12 SERGIO GARCIA,) OAH No. 2013080710
Respondent.)
13 and) RESPONDENT’S ARGUMENT
14)
15 DEPARTMENT OF INDUSTRIAL) Board Meeting: September 17, 2014
RELATIONS,)
16 Respondent.)
_____)

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19 INTRODUCTION

20 Respondent Sergio Garcia (Garcia) hereby submits “Respondent’s Argument” in response
21 to the “PROPOSED DECISION” submitted by Administrative Law Judge Samuel D. Reyes.

22 The issue in this case is whether Garcia may file an application for an industrial disability
23 retirement or whether his application and eligibility for disability retirement is precluded by
24 operation of Haywood v. American River Fire Protection District (1998) 67 Cal.App.4th 1292.
25 Garcia will establish in this argument that both the Court of Appeal decision in Haywood and the
26 CalPERS precedential decision in In the Matter of the Application for Industrial Disability
27 Retirement of Robert Vandergoot (Vandergoot) are distinguishable on both legal and factual
28 grounds.

1 Garcia's application has been rejected because of the contention that if he were to be
2 found to be disabled initially, and he was later found not to be disabled, he would not be able to
3 be reinstated to his former position. This is due to his resignation from his position and his
4 agreement not to seek re-employment. He has been found not to have a continuing relationship
5 with his former employer. However, in the circumstances of this particular case, the requirement
6 for a continuing employment relationship is illusory. There are no circumstances under which
7 this so-called "continuing employment relationship" would be of any consequence. The ALJ has
8 failed to come to terms that under no circumstances could Garcia be reinstated to his former
9 position. That option is only available to individuals who have not reached retirement age. The
10 record clearly establishes that Mr. Garcia was beyond retirement age.

11 ARGUMENT

12 I.

13 **GARCIA'S INDUSTRIAL DISABILITY APPLICATION SHOULD NOT BE REJECTED** 14 **BECAUSE GARCIA'S CIRCUMSTANCES DO NOT MEET THE CRITERIA FOR THE** **DISMISSAL OF HIS APPLICATION.**

15 As recognized by CalPERS in its written argument in this matter, the Haywood case turns
16 on the "necessary requisite" for disability retirement—the potential reinstatement of his
17 employment if it is ultimately determined that he is no longer disabled. This cannot occur,
18 according to the Haywood court, because there is no continuing employment relationship. In this
19 particular situation, however, the issue would not come up because there is no "potential
20 reinstatement of his employment" in the first place. Since there is no "potential reinstatement of
21 his employment," the issue of whether he is otherwise eligible for reinstatement is moot.

22 The rationale of Haywood and Vandergoot is the inability to force reinstatement of the
23 members concerned if the member is no longer incapacitated. The Vandergoot decision, citing
24 Haywood, at page 7 paragraph 18 of Exhibit 12 explains, "Haywood makes it clear that a
25 necessary requisite for disability retirement is the potential reinstatement of the employment
26 relationship with the District if it ultimately is determined that respondent is no longer disabled."
27 [Citation of Haywood.] Such is not possible here. The employment relationship has not only
28 been severed, but the terms of the Stipulation and Settlement Agreement expressly lock

1 respondent out from being reinstated.

2 Vandergoot at page 7 then quoted Haywood, “Disability retirement laws contemplate the
3 potential reinstatement of that relationship if the employee recovers and no longer is disabled.
4 Until an employee on disability retirement reaches an age of voluntary retirement, an employer
5 may require the employee to undergo a medical examination to determine whether the disability
6 continues. Section 21192. And an employee on disability retirement may apply for reinstatement
7 on the ground of recovery. (Ibid.) If an employee on disability retirement is found not to be
8 disabled any longer, the employer may reinstate the employee, and his disability allowance
9 terminates Section 21193.”

10 Haywood and Vandergoot both rely on Government Code Sections 21192 and 21193
11 which provide a means under certain circumstances for “the potential reinstatement of his
12 employment relationship with the District if it is ultimately determined that he no longer is
13 disabled.” As both cases note, under Section 21192, an employer may require the employee to
14 undergo a medical examination to determine whether the disability continues, “until an employee
15 on disability retirement reaches an age of voluntary retirement.” In other words, that statutory
16 reinstatement scheme may not be implemented after an employee on disability retirement reaches
17 an age of voluntary retirement.

18 In the case of Garcia under no circumstances could these statutory procedures be set into
19 motion even to raise the issue of the need for reinstatement. As provided in Government Code
20 Section 21060, the retirement age for Garcia’s position is 50 years of age. Garcia had already
21 reached the age of voluntary retirement when his industrial disability retirement application was
22 filed. As noted in Factual Finding 7 he is 58. He was 56 in May 2012 when he filed his
23 application. Since he has already exceeded the age of voluntary retirement the mechanism that
24 could ultimately force his reinstatement cannot be effectuated. Therefore the reinstatement issue
25 is moot. Since the reinstatement issue is moot, the rationale underlying Haywood and
26 Vandergoot is not applicable here. As provided in Civil Code Section 3510, “When the reason of
27 a rule ceases, so should the rule itself.”

28

1 The ALJ did not fully consider the ramifications of the provisions of Sections 21192.
2 The ALJ does not recognize that the reinstatement provisions may be effectuated only “Until an
3 employee on disability retirement reaches an age of voluntary retirement.” An employer may
4 require the employee to undergo a medical examination to determine whether the disability
5 continues only until an employee reaches an age of voluntary retirement. Garcia is beyond the
6 age of voluntary retirement.

7 Garcia has not asked the ALJ or the CalPERS Board to revisit the correctness of the
8 Haywood decision, as alluded to in LEGAL CONCLUSION 8. Haywood decries the inability to
9 reinstatement a terminated employees in those situations in which reinstatement is a viable and even
10 mandatory option. In this case there is no possibility of reinstatement. Therefore the inability to
11 reinstatement is of no legal consequence. The circumstances of this case constitute an exception to
12 the holdings of both Haywood and Vandergoot.

13 Garcia disputes the conclusion that there was a complete severance of his employment.
14 First of all, the only possible reinstatement precluded is reinstatement to a Senior Special
15 Investigator with the Labor and Workforce Development Agency (LWDA.) There are
16 circumstances under which he could be reinstated to, and re-employed, by the LWDA.

17 Garcia disagrees that his resignation severed his employment relationship as set forth in
18 LEGAL CONCLUSION 9. In this case Garcia was eligible to obtain the position of Senior
19 Special Investigator in other departments with the State of California. As such, if the issue of
20 reinstatement from retirement ever could be raised, there would still be the option of
21 reinstatement to a position in the same classification. This is an option provided in Government
22 Code Section 21193 if he cannot be reinstated to the position held when retired for disability.

23 In addition, in Vandergoot there is no mention that the agreement was to have no effect
24 on his right to apply for disability retirement. In this case there was an explicit provision
25 emphasizing Garcia’s right to apply for disability retirement benefits. There was an explicit
26 agreement that the settlement agreement would not impact on his disability retirement rights.
27 Garcia’s retention of his right to apply was an integral part of the entire rationale for the
28 settlement. This is yet another basis on which Garcia’s situation is distinguishable from the

1 situation in Vandergoot.

2 **CONCLUSION**

3 As pointed out above the so-called "necessary requisite" for disability retirement--the
4 need for a continuing employer-employee relationship to allow for the potential reinstatement of
5 an employee if it ultimately is determined that the employee is no longer disabled-- does not exist
6 for employees above the age of voluntary retirement. Since he could not be reinstated in the first
7 place, his alleged lack of eligibility to be reinstated is of no legal consequence. Therefore it
8 cannot serve as a bar to respondent's application.

9 Furthermore, unlike the cases of Haywood and Vandergoot, there is no complete
10 severance of the employer-employee relationship. Under the terms of the SPB decision Garcia
11 retained the right to be re-employed and there were positions in his classification to which he
12 could be reinstated. Finally, unlike the situation in Vandergoot, Garcia's agreement explicitly
13 proved that the agreement shall have no effect on Garcia's ability to pursue disability claims
14 through PERS.

15 Based on the foregoing, Garcia requests that the Board of Administration decline to adopt
16 the Proposed Decision of Administrative Law Judge Samuel D. Reyes and make its own decision
17 that Garcia may file an application for an industrial disability retirement.

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19 DATED: August 28, 2014

FAUNCE, SINGER & OATMAN

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MARK ELLIS SINGER
Attorneys for Applicant Sergio Garcia

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