

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of Accepting the Application
for Industrial Disability Retirement of:

GABRIEL ARRIAGA,

Respondent,

and

CALIFORNIA DEPARTMENT OF
FORESTRY AND FIRE PROTECTION,

Respondent.

Case No. 2013-0616

OAH No. 2013080613

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter on June 17 and July 23, 2014, in Sacramento, California.

Senior Staff Attorney Elizabeth Yelland represented complainant Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System.

Respondent Gabriel Arriaga appeared and represented himself on June 17, 2014. On July 23, 2014, Linh T. Nguyen, Attorney at Law, represented respondent, who was present.

Senior Staff Counsel Bruce A. Crane appeared on behalf of California Department of Forestry and Fire Protection.

The record was held open to allow the parties to present written briefs, which were timely filed. Complainant's closing brief was marked Exhibit 18, respondent's closing brief was marked Respondent's Exhibit 16, and complainant's reply brief was marked Exhibit 19. The record closed and the matter was deemed submitted on August 21, 2014, the date complainant's reply brief was filed.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Sept 19 20 14
Ally M. Morris

FACTUAL FINDINGS

1. Anthony Suine, acting in his official capacity as Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS), made the statement of issues on August 14, 2013. It alleges that the application for industrial disability retirement filed by respondent Gabriel Arriaga (respondent) is barred under the Court of Appeal's decisions in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194. Those cases hold that, unless certain exceptions apply, the termination of a member for cause extinguishes his right to apply for disability retirement. Respondent appealed and this hearing followed.

2. Respondent is a former Fire Captain for respondent California Department of Forestry and Fire Protection (CalFire). He started work as a seasonal firefighter in 1987, became a limited term firefighter in 1990, became a permanent employee of CalFire in 1995, and was promoted to Fire Captain in 1999. At the time respondent last worked in 2012, he was assigned to the Fresno-Kings Unit of CalFire.

3. On January 7, 2012, CalFire investigators interviewed respondent in connection with his alleged use of a state credit card to fuel his personal vehicle in the early morning hours of December 29, 2011. The investigators told respondent why he was being interviewed, informed him of his rights, and informed him of the rules he was alleged to have violated. Respondent was accompanied by his union representative.

4. On February 14, 2012, respondent filed two workers' compensation claim forms, one alleging an injury to his groin on July 15, 2011, and the other alleging an injury to his psyche, which he wrote was due to cumulative trauma since 1987. Respondent stopped working the day he filed the claims. Respondent testified that he first noticed pain in his groin area, which he describes as bilateral hernias, in July 2011. In or around 2009, respondent testified, he started noticing what he describes as "personality changes" regarding his emotions, his ability to stay focused, to sleep and to make decisions. He testified that he was having severe anxiety attacks and that his mind was "a mess." Respondent stated that he attributed these emotional problems to work.

5. The February 14, 2012 claim forms are the first evidence of a disability claim by respondent. On the portion of the claim form that is filled out by the employer, CalFire stated that it first learned of these claims on February 13, 2012.

6. On April 2, 2012, CalFire issued to respondent a Notice of Adverse Action, terminating his employment effective April 18, 2012, due to dishonesty, willful disobedience, and misuse of state property. Respondent appealed.

7. A week later, on April 9, 2012, respondent obtained from CalPERS an estimate of his benefits if he were to retire for industrial disability. Then, on April 18, 2012, respondent signed and filed an application for industrial disability retirement with CalPERS.

Respondent described his disability as “Psyche, heart & cardiovascular system, hypertension, lower back, hearing loss, hernia.”

8. Respondent’s appeal from his termination was set for hearing on November 26, 2012. On that day, respondent and CalFire entered into a tentative settlement agreement that was later approved by State Personnel Board. The settlement agreement provided, in relevant part, as follows:

1. [CalFire] agrees to withdraw the [Notice of Adverse Action] and to remove the Notice and all accompanying documents from [respondent’s] Official Personnel File . . . within 10 days of the date the SPB approves the Agreement. [CalFire] further agrees to pay [respondent] the sum of \$25,000.00

2. [Respondent] shall be placed on an unpaid leave of absence, effective at the close of business April 18, 2012. [Respondent] has applied for industrial disability retirement benefits before the Public Employees Retirement System (PERS). In the event [respondent’s] application for industrial disability retirement benefits is granted [respondent] agrees to waive any permissive or mandatory reinstatement rights he might thereafter have to any position with [CalFire]. In the event [respondent’s] application for industrial disability retirement benefits is denied by PERS or is withdrawn by [respondent], [respondent] shall be deemed to have resigned from his employment with [CalFire] effective as of the date that [respondent]’s application for disability retirement benefits is denied by PERS or is withdrawn by [respondent] and this Agreement shall serve as [respondent’s] resignation from his employment with [CalFire]. [Respondent] shall remain on unpaid leave of absence during the period that [respondent’s] application for industrial disability retirement benefits is pending before PERS.

3. [Respondent] agrees not to apply for, or to accept, any future employment with [CalFire]. Should [respondent] apply for or accept employment with [CalFire], [respondent] will be dismissed by [CalFire] without any right to appeal said dismissal. If [CalFire] inadvertently offers [respondent] employment or hire [respondent], [respondent] will be dismissed by [CalFire] without any right to appeal said dismissal.

4. [Respondent] withdraws his appeal in SPB Case No. 120-0691.

9. Contending that respondent's application is barred by the *Haywood* and *Smith* decisions, CalPERS has refused to act on respondent's disability retirement application.

10. At hearing, respondent testified that he had contemplated a disability retirement based on his emotional condition for some time, before he was terminated, and that he had made inquiries about a disability retirement to CalPERS. CalPERS records reveal that respondent requested a disability retirement estimate in July 2010.

LEGAL CONCLUSIONS

1. The ultimate issue is whether the circumstances of respondent's separation from service bar his application for disability retirement. Resolution of the issue turns on the Court of Appeal's decisions in *Haywood* and *Smith*, and by CalPERS's decision *In the Matter of Robert Vandergoot* (Case No. 2012-0287), which was made precedential by the CalPERS Board of Administration on October 16, 2013.

2. In *Haywood*, a CalPERS member who had been terminated for cause applied for industrial disability retirement. The court noted that a disability retirement contemplates the potential reinstatement of the employer-employee relationship if the employee recovers: under Government Code section 21192, the employer can require the employee to undergo a medical examination to see whether his disability continues, and under Government Code section 21193, the employee can apply for reinstatement on the ground that he has recovered. An employee who is not disabled can be reinstated, and his disability retirement allowance is then terminated. But, the court reasoned, when an employee is terminated for cause, it results in a complete severance of the employment relationship. Therefore, the court held,

where . . . an employee is fired for cause and the discharge is neither the ultimate result of a disabling 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 at p. 1307.)

In *Smith*, the court followed and elaborated on its holding in *Haywood*. Smith worked as a firefighter for the City of Napa for almost 20 years. He had a history of back problems for which he had obtained a permanent disability award from the Workers' Compensation Appeals Board. Smith applied for disability retirement, based on his back condition, on the same day he was terminated for cause. The City of Napa refused to consider the merits of Smith's disability retirement application. Citing *Haywood*, Napa informed Smith that he was

ineligible for disability retirement because of his dismissal for cause. Smith sued to compel Napa to consider his application.

The court ruled in favor of the City of Napa and against Smith. Smith argued that by terminating his employment, the city had preempted his claim for disability retirement. He pointed to his history of back problems and his prior WCAB award, and asserted that the performance deficiencies for which he was terminated were due in part to his back condition. The court rejected Smith's arguments. It was Smith's obligation, the court reasoned, to demonstrate that his claim to a disability retirement had "matured" prior to his termination. The court held that the right to a disability retirement does not mature until CalPERS determines that a member is entitled to disability retirement. The court recognized that equitable considerations may require CalPERS to consider an application that had not been approved prior to a member's termination, but found no such considerations to be present in Smith's case. The court noted that there was no "impending ruling" on Smith's application that had been delayed through no fault of his own, nor was it a "foregone conclusion" that his claim would be granted. The court concluded that Napa had not preempted Smith's claim for disability retirement by terminating him for cause, and that the termination extinguished Smith's claim.

In *Vandergoot*, CalPERS considered whether the principles of *Haywood* and *Smith* apply to an employee who resigns from employment pursuant to a settlement of a disciplinary matter. After receiving a Notice of Adverse Action from CalFire that terminated him for cause, Vandergoot applied for industrial disability retirement. He also appealed his termination, and entered into a settlement agreement of that appeal with CalFire. Under the settlement agreement, CalFire agreed to withdraw the Notice and remove the adverse action from his personnel file, and Vandergoot agreed to resign. The parties agreed that Vandergoot would not seek or accept any future employment with CalFire at any time in the future, and agreed that if he were employed by CalFire in violation of the settlement agreement, he could be dismissed by the department without right of appeal.

CalPERS concluded that, under the rationale of *Haywood*, Vandergoot's resignation should be viewed as a termination:

. . . *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship . . . if it ultimately is determined that respondent is no longer disabled. [Citation omitted.] 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. Such a circumstance must be viewed as whole inconsistent with the policy behind and rationale for disability retirement

Were respondent to receive a disability retirement allowance, he would have no employer who could require him to undergo a

medical examination under Government Code section 21192. And it is no longer possible for him to be reinstated under Government Code section 21193. These necessary prerequisites for receiving a disability retirement allowance are simply not present in this case. For this reason alone, CalPERS can fairly consider the terms of the Stipulation for Settlement of respondent's [State Personnel Board] case as being tantamount to a dismissal for purposes of applying the *Haywood* criteria.

3. Respondent attempts to distinguish this case from *Haywood, Smith* and *Vandergoot*, but his arguments are not persuasive.

Respondent argues that he does in fact have reinstatement rights to CalFire, but "he simply agreed to waive them" if his disability retirement is granted. That, however, is the point of *Vandergoot*: just as a termination for cause severs the employer-employee relationship, the terms of respondent's settlement with CalFire sever his employer-employee relationship with CalFire if he is retired for disability.

Respondent argues that even if he has severed his employment with relationship with CalFire, the State of California uses the firefighter classification in the Department of Corrections and Rehabilitation, and the California State Hospitals. His argument seems to be that if he is retired for disability, these agencies could compel him to take a medical examination to see if his disability had resolved, and he would have the right to "reinstatement" to these agencies if his disability resolved. No evidence or authority was provided to support respondent's argument on these points.

4. This case is indistinguishable from *Vandergoot*. Respondent's settlement agreement with CalFire is identical in all material respects to *Vandergoot*'s. If anything, respondent's agreement is even more explicit in eliminating any potential reemployment rights, as it expressly precludes respondent from ever being employed by CalFire in the future and provides for his mandatory dismissal if he is inadvertently employed. The terms of respondent's settlement of his disciplinary action are equivalent to a termination for cause under *Haywood, Smith* and *Vandergoot*. Respondent's application for industrial disability retirement is barred unless he can demonstrate that he falls within one of the exceptions recognized by *Haywood* and *Smith*.

5. This case does not fall within any of those exceptions. The evidence does not establish that respondent's termination was the result of his claimed disability. CalFire began its investigation into respondent's alleged misconduct before respondent claimed that he was disabled. Despite asserting that he had suffered from disabling conditions for years, respondent did not claim that he was disabled from performing his duties until a month after he was interviewed by agency investigators about his alleged misconduct.

Respondent's claim for disability retirement had not matured prior to his termination. He had not been found eligible for disability retirement before he was served with the Notice of Adverse Action; he did not even apply for disability retirement until after the Notice was issued. The equitable considerations in this case are weaker than those the court found insufficient in *Smith*. Unlike *Smith*, respondent had no disability award from the WCAB award before he became the subject of disciplinary action; again, before that, he did not claim that he was disabled. Respondent argues that Haywood, *Smith* and Vandergoot were "gaming the system," while he was a motivated employee who would have continued working, but for his disability. There is, however, no evidence, and in particular no medical evidence, that respondent was disabled for the performance of his duties before he became the subject of disciplinary action.

Respondent does not fall within any of the equitable exceptions recognized by *Haywood* and *Smith*.

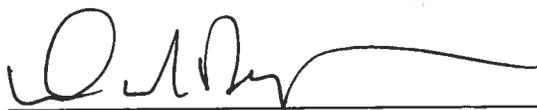
6. Respondent asserts that one of the purposes of a public pension plan is to "provide subsistence for disabled . . . employees and their dependents," and that public pension legislation must be construed liberally in favor of the applicant. This is not a case of statutory construction. Even if it were, however, that rule would not relieve respondent of his burden to show that he falls within one of the exceptions recognized by *Haywood* and *Smith*. (See *Mansperger v. Board of Administration* (1970) 6 Cal.App.3d 873, 877.)

7. Under *Haywood*, *Smith* and *Vandergoot*, the terms of respondent's settlement agreement with CalFire are tantamount to a termination for cause. His application for industrial disability retirement is barred.

ORDER

The appeal of respondent Gabriel Arriaga, from the determination by CalPERS that the system cannot accept his disability retirement application, is denied.

DATED: September 16, 2014



DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings