

ATTACHMENT A
THE PROPOSED DECISION

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

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

DEANNA C. LEWIS,

Applicant/Respondent,

and

CITY OF SOUTH LAKE TAHOE,

Respondent.

Agency Case No. 2014-0859

OAH No. 2014090663

PROPOSED DECISION

Ann Elizabeth Sarli, Administrative Law Judge (ALJ) of the Office of Administrative Hearings, State of California, heard this matter on January 16, 2015, in South Lake Tahoe, California.

Complainant, California Public Employees' Retirement System (CalPERS), was represented by Rory J. Coffey, Senior Staff Attorney.

Applicant, Deanna C. Lewis, appeared and was represented by Steven W. Welty, Esq. of Mastagni Holdstedt.

There was no appearance on behalf of the City of South Lake Tahoe, and a default was taken against this respondent, pursuant to Government Code section 11520.

Evidence and argument were received. The record remained open to allow applicant to file a closing brief. Complainant's opening brief was considered its closing argument and was marked for identification as Exhibit 30. Applicant filed her closing brief on February 14, 2015, which was marked for identification as Exhibit A. The matter was submitted and the record was closed on February 16, 2015.

FACTUAL FINDINGS

1. Applicant was hired by the City of South Lake Tahoe (City) in March 1995 as a Community Service Officer. She was promoted to full-time Dispatcher in November 1995 and served in that capacity until September 1999. In September 1999, she became a Police Officer Trainee and, after a three-month training, she was promoted to full-time Police Officer. In 2001, applicant hurt her back in an accident and filed a Worker's Compensation claim. Seven to eight years later, when the pain returned, she had to work without her gun belt. In September or October 2012, she was placed on light duty and remained on it for about a month. Applicant filed a worker's compensation claim for back injury at the end of September 2012.

2. At some point, not in the record, an internal affairs investigation was commenced against applicant. She was placed on paid administrative leave. On April 21, 2013, applicant was served with a Notice of Intent to Terminate-Internal Affairs Investigation #12-005 (Notice). That Notice was prepared by Police Chief Brian Uhler (Uhler). Uhler wrote that the intended discipline was based upon his review of Internal Affairs Investigation #12-005 and the findings of Lieutenant Brian Williams (Williams).

3. The Notice alleged multiple acts of misconduct stemming from violations of the City Police Department Manual. Two of the charges related to failure to fully investigate and appropriately document suspected elder abuse. Four of the charges related to unsatisfactory work performance. One charge related to disobedience by failure to follow lawful directives. One charge related to violating provisions of the Department manual by failing to follow supervisor orders. And, one charge related to giving false or misleading statements to a person in position of authority in connection with an investigation. It appears that all of the charges relate to applicant's failure to follow orders in respect to calling the elder abuse victim and preparing reports in a single matter, and her alleged dishonest explanations for this failure.¹

4. Uhler wrote in the Notice:

I have taken into account your previous discipline for the same type of insubordinate conduct and inadequate work performance, along with the totality of your service to the City as reflected in your personnel file... Your repetitive insubordinate conduct and inept performance is entirely inconsistent with the standards of integrity and professional service expected of a Police Officer for the City of South Lake Tahoe. You have refused to respond to many prior disciplinary measures brought to bear in order to bring your performance

¹ The Notice incorporated the Internal Affairs Investigation and the Findings and Recommendations of Williams. These documents were not included with the Notice submitted in evidence.

into compliance in alignment with the mission of this agency. Your habitual insubordination and inefficiency have eroded your professional reputation and has harmed the public service. This cannot be tolerated any further. In prior letters of discipline it has been plainly stated to you that such continued conduct would not be tolerated and may result in discipline up to and including termination. Because you have not heeded this warning but rather continued in the same repetitive insubordinate conduct and substandard work behavior, it is now my intent to separate you from the South Lake Tahoe Police Department to avoid further damage to our public service.

5. Applicant requested a Skelly² hearing to respond to the charges before any final decision was made. The Skelly hearing was held before the City Manager, Nancy Kerry (Kerry) on June 3, 2013. Uhler submitted a written response to applicant's arguments that termination of employment was excessive. He noted that applicant had a history of poor performance as documented in evaluations and Performance Improvement Plans; that she had been suspended for insubordination on two previous occasions; and that one suspension was for 12 hours and another for 80 hours. He noted that she also had another suspension for 80 hours for poor performance in 2011.

6. On June 17, 2013, Kerry issued a written memo advising that she was upholding the decision to terminate applicant's employment. She detailed her investigation into applicant's claim that she did not have any time to work on the elder abuse investigation at issue and determined that applicant had not been truthful or forthcoming. She noted that termination was not an excessive discipline for violating a direct order to perform three tasks in relation to that matter. She noted applicant had "plenty of opportunities" to improve her work performance and had been provided progressive discipline. She noted "[T]ermination is the appropriate and necessary disciplinary action for the safety and security of our residents." The memo advised applicant of her appeal rights in accordance with the Memorandum of Understanding between the City and the Police Officers Association. (MOU). Applicant was served with a Notice of Termination on May 8, 2013.

7. Applicant, through her counsel, filed an appeal pursuant to the MOU on June 18, 2013. During the pendency of the appeal, on August 20, 2013, applicant filed a Disability Retirement Election Application seeking industrial disability retirement for orthopedic conditions stemming from a work traffic accident in November 2001 and cumulative injuries from wearing a gun belt through September 21, 2012.

8. In a letter dated August 28, 2013, CalPERS contacted the City and advised that applicant had filed an application for industrial disability retirement and that Government Code sections 21154 and 21156, required the City to make a determination of the applicant's disability. The letter further advised that the Workers' Compensation

² *Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194.

Appeals Board would resolve any disputed questions regarding the industrial causation of any disabling injury. In the event there was no dispute about industrial causation, that finding could be made by the City. The letter went on to advise the City about the standards and process required to determine disability and industrial relationship. CalPERS also wrote to applicant on August 28, 2013, advising that it had contacted the City and that the City was required to make a determination of disability within six months.

9. On December 13, 2013, applicant signed a Liability Claim against the City, alleging wrongful termination and seeking one million dollars in lost wages and benefits, lost earning capacity and general and special damages. The Liability Claim alleged that applicant was "terminated by the City wrongfully, specifically, but not limited to violation of public policy, retaliation, protected class, discrimination, and/or good faith and fair dealing."

10. On January 14, 2014, City Human Resources Manager Janet Emmett (Emmett) wrote a letter to applicant advising her that she had been waiting for a long time to receive medical information regarding applicant's industrial disability retirement claim. She wrote "at this time, the most recent medical information regarding your workers compensation claims is that you were able to work in a temporary modified duty assignment while further treatment/evaluation is completed. There is no finding that you are unable to return to the duties of Police Officer due to medical reasons." She advised applicant to request an extension of the six-month period by which the City was required to make a disability determination. With approval from applicant's counsel, the City wrote a letter to CalPERS seeking an extension of the six-month timeline for the City to make a determination of industrial disability. She noted that she had three other pending applications and it had been several years since the City had processed a safety disability retirement, so she wanted to ask a few questions about the process.

11. At the time Emmett advised applicant that she had little medical evidence of disability and needed more time to make a determination, applicant and the City were engaged in settlement negotiations over the pending disciplinary matter and wrongful termination claim. On February 25, 2014, applicant signed a document entitled "Resignation" in which she voluntarily resigned her employment and agreed "to waive and relinquish any and all reinstatement rights I may have." She also agreed to "withdraw any and all grievances, civil legal actions and all other actions, if any, whether filed or unfiled, which seek reinstatement of my employment, back wages, and all other forms of damages whether monetary or otherwise from the City of South Lake Tahoe and/or individuals employed and/or retained by said City." The Resignation concludes as follows: "This resignation is contingent upon the settlement agreement to which this exhibit is attached and the fulfillment of each and all of the settlement terms by the City of South Lake Tahoe and Deanna Lewis."

On March 12, 2014, applicant signed a Release and Settlement Agreement in which she agreed to resign and to release the City from all liability concerning her termination, as well as any and all civil actions and/or grievances relating to employment issues with the City, with the exception of the workers' compensation claims. Applicant also agreed that she

was not entitled to back pay and acknowledged that she had been on unpaid leave from the date of separation until the date on which she was to resign. In exchange for applicant's resignation and release of all claims for damages or compensation, the document provided that the City agreed as follows: "also, CITY OF SOUTH LAKE TAHOE will approve the Industrial Disability Retirement (IDR) application filed by DEANNA LEWIS and provide CalPERS with all necessary documentation regarding such determination." (Capitalized in original)

12. Pursuant to the Release and Settlement Agreement, applicant submitted her letter of resignation, withdrew her appeal of the termination and did not pursue a wrongful termination action or other claim. The City changed its employment records to reflect that it reinstated applicant and that she was on unpaid leave until she resigned on February 25, 2014. The City approved applicant's industrial disability retirement application, representing that she was disabled from her position as a Police Officer and that the disability was caused by her employment.

13. CalPERS wrote the City on April 2, 2014, advising that it was unable to determine whether it could accept the application for disability retirement because it appeared that applicant had been terminated for cause. It explained that, "pursuant to *Haywood v American River Fire Protection District* (1998) 67 Cal App 4th 1292, [*Haywood*] where 'an employee is terminated for cause and the discharge is neither the ultimate result of the 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.'" CalPERS requested documentation related to the disciplinary action.

14. Ms. Emmett, the Human Resources Manager, responded and supplied the requested documentation. She wrote: "Ms. Lewis was on modified duty for several months prior to her last day on pay status, she was unable to perform the essential functions of Police Officer and was working in a temporary modified duty capacity in the Dispatch division. The City has evaluated her circumstances and has submitted documentation supporting an Industrial Disability Retirement. The City continues to support approval of an industrial disability retirement for Ms. Lewis.... At the time of her being placed on unpaid leave, she was still in a modified duty capacity and there was no known expectation regarding her ability to return to her regular duties. At the time of her voluntary resignation, there continued to be no expectation regarding her ability to return to the duties of Police Officer. There is no medical documentation available indicating she can return to full duty."

15. CalPERS reviewed the documents related to applicant's termination, settlement, reinstatement and resignation and advised her in writing that CalPERS was unable to accept her application pursuant to the holdings in *Haywood, Smith vs. City of Napa* (2004) 120 Cal App.4th 194 [*Smith*] and the CalPERS Precedential Decision 13-01 *In the Matter of Application for Disability Retirement of Robert C. Vandergoot and California Dept of Forestry Protection* (2013) [*Vandergoot*].

16. CalPERS canceled applicant's application for industrial disability retirement and she appealed. CalPERS filed a Statement of Issues in September 18, 2014, and this hearing ensued.

17. The issue at hearing is whether applicant is precluded from filing an application for disability retirement because she was terminated from employment and does not meet the exceptions set forth *Haywood, Smith and Vandergoot*.

Discussion

18. *City's Approval of Industrial Disability Application:* There is no dispute that the City agreed to approve applicant's industrial disability retirement (IDR) application in exchange for her dismissal of all claims and her resignation. Applicant "resigned because the local contracting agency, the City, who was a party to the settlement, agreed to approve her IDR... the sole reason for agreeing to resign was to receive her IDR." (Applicant's closing brief pg 9 lines 8-13.)

19. Government Code³ section 21156 provides:

(a) (1) If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, the governing body of the contracting agency employing the member, 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, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

(2) In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and *shall not use disability retirement as a substitute for the disciplinary process*.

(b) (1) The governing body of a contracting agency upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated.

³ All statutory references are to the Government Code unless otherwise indicated.

(2) The local safety member may appeal the determination of the governing body. Appeal hearings shall be conducted by an administrative law judge of the Office of Administrative Hearings pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of this title.

(Italics added.)

20. The evidence is clear that the City allowed applicant to reinstate from her termination and resign, and approved her IDR, in settlement of the disciplinary process and related civil claims. The evidence is that the City was only beginning to review applicant's disability status and had no evidence of permanent incapacity at the time the proposal was made in settlement negotiations to grant applicant IDR in exchange for releasing the City from liability and securing applicant's resignation. The City agreed to the arrangement and bound itself to finding that applicant had sustained a permanent industrial disability. The City's actions were in contravention to the prohibition of section 21156, subdivision (2) against using approval of IDR as a substitute for the disciplinary process.

21. *Application of Haywood, Smith and Vandergoot*: In *Haywood*, the appellate court found: "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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed." The court explained that: "A firing for cause constitutes a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement-the potential reinstatement of [the employee with the employer] if it is ultimately determined that he is no longer disabled ... The disability provisions of the PERS law contemplate a potential return to active service and a terminated employee cannot be returned to active service." (*Haywood, supra*, 67 Cal. App. 4th at 1306-1307.)

22. More recently, the court in *Smith* expanded the holding in *Haywood*. The *Smith* court held that dismissal for cause extinguishes the right to disability retirement, except if a plaintiff were able to prove that the right to 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. (*Smith, supra*,) 120 Cal App.4th at 206.) The court identified the key issue as whether the right to the disability retirement matures before the date of separation from service. It found that a vested right matures when there is an unconditional right to immediate payment. And, in the case of CalPERS disability retirement, there is no unconditional right to immediate payment without a finding by CalPERS that there is a right to a disability retirement pension. (*Ibid.*)

23. In *Smith*, the court pointed out that in its *Haywood* ruling:

We took pains to exclude from our holding in *Haywood* a party otherwise entitled to a disability retirement before a dismissal

for cause.... The distinction with which we were concerned is between employees dismissed for cause and employees unable to work because of a medical disability.... We repeatedly cautioned that our holding would not apply where the cause for dismissal was the result of a disabling medical condition, or where the dismissal would be 'preemptive of an otherwise valid claim for disability retirement.' This caveat flows from a public agency's obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability (citing *Haywood*) or indirectly through cause based on the disability Our use of the term 'preempt' admittedly could lead one to the interpretation that both defendants have embraced: an intent to thwart an otherwise valid claim for disability. However, as the plaintiff has correctly attempted to argue throughout the CalPERS proceedings, even if an agency dismisses an employee *solely* for a cause *unrelated* to a disabling medical condition, this cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect ... 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... Conversely, the right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures... In the present case, a CalPERS determination of eligibility did not antedate the unsuccessful certification on the ladder truck. His right to a disability retirement was thus immature, and his dismissal for cause defeated it. (Italics in original.)

Conceivably, there may be facts under which a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause. This case does not present facts on which to explore the outer limits of maturity, however. It is not as if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal. Rather, he did not even initiate the process until after giving cause for his dismissal. Nor, for that matter, is there undisputed evidence that the plaintiff 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). At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers' compensation claims. But a workers'

compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different. And for purposes of the standard for a disability retirement, the plaintiff's medical evidence is not unequivocal. (*Smith vs. City of Napa* (2004) 120 Cal App.4th 194, 205- 206.)

The defendants would have a basis for litigating whether this evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862, 143 Cal.Rptr. 760; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877, 86 Cal.Rptr. 450; *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.) Thus, an *entitlement* to a disability retirement cannot rest on the medical evidence of the plaintiff. (*Id.* at 207, FN 13.)

24. 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 resigned pursuant to a settlement agreement entered into to resolve a dismissal action, and 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. (CalPERS Precedential Decision 13-01 *In the Matter of Application for Disability Retirement of Robert C. Vandergoot and California Dept of Forestry Protection* (2013) p. 7, ¶ 18.)

25. Applicant maintains that she was not terminated from employment, as were the applicants in *Haywood* and *Smith*, because she was reinstated after termination and then voluntarily resigned. Applicant also maintains that, unlike the applicant in *Vandergood*, she did not enter into a settlement agreement wherein she gave up rights to reapply for employment with the City. Thus, she maintains that these decisions do not apply because there is a potential for reinstatement of the employment relationship if it is subsequently determined that she is no longer disabled.

26. Applicant's argument is not persuasive. Applicant resigned in lieu of termination and in exchange for City approval of an industrial disability pension. The employment relationship was severed. The settlement agreement applicant executed did not contain explicit language acknowledging that applicant was barred from seeking employment in any capacity with the City Police Department. However, applicant's Resignation letter, which was attached to the settlement agreement and "contingent upon the settlement agreement," provided that applicant "agree[s] to waive and relinquish any and all reinstatement rights I may have." The Resignation Letter also states that applicant agrees to "withdraw any and all ... actions... whether filed or *unfiled*, which seek reinstatement of my

employment.” (Italics added.) (Finding 11.) Applicant thus does not have any present or potential right to reinstatement should she be determined to be fit for return to work. The holdings in *Haywood*, *Smith* and *Vandergoot* bar applicant from eligibility for a disability retirement.

27. Applicant’s counsel implied that her termination was the result of her inability to perform her job, due to physical limitations. There is no evidence in the record to support this claim. Applicant’s termination was based upon her insubordinate failure to follow orders to call a victim and to write a report, as well as her dishonesty regarding the reasons she did not complete these tasks. Her termination was also predicated on the fact she had a history of insubordination and poor performance.

28. Applicant maintains that she was preempted by her termination from filing a valid claim for disability retirement. She was on light, modified duty and unable to perform the duties of a Police Officer at the time of her termination. However, applying *Haywood* and *Smith*, the termination did not have the effect of preempting an otherwise valid claim for disability retirement. Applicant’s claim for disability retirement, if any, had not matured at the time of her separation from service. Applicant did not hold an unconditional right to immediate payment, as there was no finding that there was a right to a disability retirement pension. At the time applicant was separated from employment, the City had not determined whether applicant demonstrated a substantial inability to perform her duties, as the Human Resources Officer herself noted. Even applicant’s treating worker’s compensation physician had not found her permanently disabled, and no other medical evidence established a matured right to disability retirement. The City’s ultimate “determination” that applicant was disabled, and that the disability was industrial, was made post-termination and was improperly made as a “quid pro quo” for her resignation and dismissal of a million dollar claim. Applicant’s right to a disability retirement was thus immature at the time she was terminated and at the time she was subsequently reinstated and then resigned. Her termination and subsequent resignation extinguished any right to a disability retirement pension.

LEGAL CONCLUSIONS

1. By virtue of applicant’s employment by the City of South Lake Tahoe as a Police Officer, applicant became a local safety member of CalPERS subject to Government Code sections 21151 and 21156.

Government Code section 21151 provides in pertinent part:

(a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

[¶]...[¶]

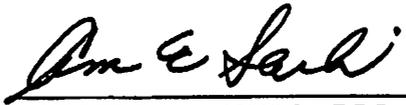
2. Government Code section 21156 is set out in Finding 19.

3. As set forth in the Findings, applicant's application for disability retirement is precluded by the holdings in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, *Smith vs. City of Napa* (2004) 120 Cal App.4th 194 and the CalPERS Precedential Decision 13-01, *In the Matter of Application for Disability Retirement of Robert C. Vandergoot and California Dept of Forestry Protection* (2013). Applicant's termination from employment and subsequent reinstatement and resignation extinguished any right to file a Disability Retirement Election Application.

ORDER

The determination of CalPERS that Deanne C. Lewis may not file a Disability Retirement Election Application is Affirmed. Deanne C. Lewis's appeal is Denied.

DATED: March 13, 2015



ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings