

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA

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

DOHN V. SALVADOR,

Respondent,

and

SAN QUENTIN STATE PRISON,  
CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,

Respondent.

Case No. 2014-0441

OAH No. 2015040818

**PROPOSED DECISION**

Administrative Law Judge Regina Brown, Office of Administrative Hearings, State of California, heard this matter on June 29, 2015, in Oakland, California.

John A. Mikita, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Dohn V. Salvador represented himself and was present throughout the hearing.

No one appeared on behalf of respondent San Quentin State Prison, California Department of Corrections and Rehabilitation.

The record was closed and the matter submitted for decision on June 29, 2015.

**ISSUE**

Whether respondent Dohn V. Salvador may file an application for industrial disability retirement with CalPERS, or whether his application for disability retirement is precluded by operation of case law.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

*July 30, 2015*  
*Kathleen Schatz*

## FACTUAL FINDINGS

### *Factual Background*

1. Respondent began his employment as a licensed vocational nurse with San Quentin State Prison (SQSP), California Department of Corrections and Rehabilitation (CDCR) in 2007. He became a state safety member of CalPERS by virtue of his employment.
2. On February 21, 2013, SQSP served respondent with a Notice of Adverse Action alleging inexcusable neglect of duty, dishonesty, and other failure of good behavior and terminating his employment as a licensed vocational nurse. The underlying allegations in the Notice of Adverse Action were that on five occasions, on February 24, 25, 27, and March 2 and 10, 2010, respondent failed to return or document as wasted the prescribed medications for inmate-patients. The effective date of his dismissal was March 1, 2013.
3. Prior to the effective date of the dismissal, respondent submitted a letter of resignation to SQSP, on February 27, 2013, resigning from his position as a licensed vocational nurse for personal reasons, effective February 28, 2013.
4. On April 3, 2013, CalPERS received respondent's application for industrial disability retirement. He claimed disability on the basis of post-traumatic stress disorder condition, for an injury which occurred at work on October 14, 2011. In particular, earlier that morning, on October 14, 2011, there had been a riot in the prison. The medical clinics were closed, but it was decided to proceed with giving flu vaccinations to inmates in their cells. When a guard opened a gate to allow respondent to dispense flu vaccinations, another guard was escorting an inmate down the tier. The inmate moved past the guard on his way to attack another inmate, and pushed appellant slamming his hand and back onto the guard railing. Respondent was in shock after the incident. He was taken to the emergency room for observation, and informed that he might later experience symptoms of post-traumatic stress. Respondent returned to work, but he eventually sought assistance at the Trauma Stress Recovery Center. His last day of work at SQSP was in November 2011.
5. On March 13, 2014, Anthony Suine, Chief of the Benefit Services Division of CalPERS, wrote a letter to respondent canceling his application for industrial disability retirement. Suine wrote, in pertinent part:

Following a review of your application and file, it has been determined that the facts of your case fit within the *Haywood* [*Haywood v. American River Fire Protection District* (1999) 67 Cal.App.4th 1292] case. You were dismissed from employment for reasons which were not the result of a disabling medical condition. Additionally, the dismissal does not appear to be for the purpose of preventing a claim for disability retirement.

Therefore, under the *Haywood* case, you are not eligible for disability retirement. For that reason, CalPERS cannot accept his application for disability retirement.

The application has been canceled. You will not be eligible to apply for disability retirement in the future unless you return to work for a CalPERS-covered employer and subsequently become unable to perform your job duties because of a physical or mental condition.

6. On March 19, 2014, respondent timely appealed CalPERS's cancellation of his application for industrial disability retirement.

7. Anthony Suine, acting in his official capacity Chief of the Benefit Services Division of CalPERS, signed the Statement of Issues in this matter.

8. Andrew Deems, Chief Executive Officer for California Correctional Health Care Services at SQSP, testified at hearing. Deems signed the Notice of Adverse Action concluding that respondent had failed to correctly and appropriately document medications dispensed (or not dispensed) to inmate patients. There were no allegations that respondent personally used the drugs. Deems confirmed that respondent did not request a *Skelly* hearing and never filed an appeal with the State Personnel Board.

According to Deems, respondent cannot be reinstated for employment with CDCR. However, Deems is not aware if the Notice of Adverse Action ever made it into respondent's personnel file.

9. According to a Notice of Personnel Action, Report of Separation, dated March 28, 2014, respondent's official employment history record indicates that his effective date of separation was February 28, 2013, and the type of separation was "resignation without fault," and the reason for separation was "personal reasons." The document also indicated that he had "permissive reinstatement eligibility" where he could return to civil service employment in the same classification that he left.

#### *Respondent's Evidence*

10. In 2012, respondent's doctor told him to apply for disability retirement and that he should not return to work at SQSP.

In December 2012 or January 2013, respondent sought information from SQSP about how to apply for disability retirement. He was informed that he should contact CalPERS for an application.<sup>1</sup>

Respondent explained that he applied for disability retirement because he was no longer receiving disability compensation payments. Respondent believes that after he asked for help obtaining disability retirement, “all of a sudden” he was given the Notice of Adverse Action.

*Application of Haywood, Smith, and Vandergoot*

11. CalPERS contends that this matter is controlled by the appellate decisions in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*). According to CalPERS, these decisions support its conclusion that respondent’s dismissal from state service renders him ineligible to apply for industrial disability retirement benefits.

12. 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 appellate court concluded that the employee was not entitled to disability retirement, stating the following:

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.

---

<sup>1</sup> Respondent appears to suggest that the Notice of Adverse Action was SQSP’s attempt to preempt his disability claim given that it was almost three years from the date of the underlying conduct before the action was served. Also, the Notice of Adverse Action was not issued until he initiated discussions with staff at SQSP about the process to apply for disability retirement.

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've 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 determination 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; italics original; footnote omitted.)

13. Here, respondent was never actually terminated by SQSP. While the process to terminate his employment had begun, the effective date of his resignation (February 28, 2013) occurred prior to the effective date of the proposed termination of his employment (March 1, 2013). Since respondent's resignation constituted a permanent separation from state service (see, Cal. Code Regs., tit. 2, §§ 446; 599.826), there was no "State service" from which the Notice of Adverse Action could dismiss him, effective March 1, 2013. Accordingly, the decision in *Haywood* is not applicable.

14. In *Haywood*, the appellate court made it clear that its holding does not apply to those instances where a disabling condition is the cause for termination or the termination would preempt "an otherwise valid claim for disability retirement." (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. at p. 1307.) In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the same appellate 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 does not occur at the time of the injury, but rather when the pension board determines that the employee is 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.) However, for the same reasons that *Haywood* is not applicable, *Smith* is not applicable.

15. CalPERS requested official notice of its Decision in *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (Precedential Decision 13-01, OAH No. 2012050989)<sup>2</sup> (Vandergoot). This Decision concluded that the principles of the *Haywood* decision apply when a member’s termination for cause is withdrawn in exchange for his resignation and permanent waiver of future reinstatement.

In *Vandergoot*, the employee applied for industrial disability retirement after he had been served with a Notice of Adverse Action, but before he appealed the termination to the State Personnel Board. While his appeal was pending before the State Personnel Board, the employee and his employer reached a settlement agreement, whereby the employer agreed to withdraw the Notice of Adverse Action in exchange for the employee’s agreement to resign and not to seek, transfer to, apply for, or accept any employment in any capacity with his employer at any time in the future. CalPERS determined that Vandergoot was ineligible for disability retirement because he was terminated for cause and the termination was neither the ultimate result of a disabling medical condition nor preemptive in any otherwise valid claim for disability retirement.

CalPERS contends that respondent did not initiate the process until after he received the Notice of Adverse Action. Moreover, CalPERS contends that this case is similar to *Vandergoot* where it was determined that but for the pendency of the disciplinary action, Vandergoot would not have entered into a settlement agreement with CDCR resigning from his position which resulted in a termination for cause.

## LEGAL CONCLUSIONS

1. Government Code section 21154 provides the following deadlines by which a member must file his application for disability retirement benefits:

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,

---

<sup>2</sup> Government Code section 11425, subdivision (b) empowers state agencies to designate decisions or parts of decisions as precedent where the decision contains significant legal or policy determinations of general application that are likely to recur.

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 an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of 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.

2. A bright line distinction is not needed in determining when and under what circumstances a resignation become a termination for purposes of applying *Haywood*. A necessary requirement under *Haywood* is the potential reinstatement of the employment relationship with CDCR if it is ultimately determined that respondent is no longer disabled. (*Haywood v. American River Fire Protection Dist.*, *supra*, 67 CalApp.4th at pp. 1296-1297.)

3. Respondent filed his application for industrial disability retirement after voluntarily resigning from state service. (Factual Findings 2 through 4.) Respondent's employment with SQSP was never terminated. Instead, he separated from state service when he resigned for personal reasons, effective February 28, 2013. Unlike *Haywood*, *Smith*, and *Vandergoot*, CDCR did not finalize the termination and respondent was not required to file an appeal with the State Personnel Board. Neither were there any stipulated settlements establishing that respondent's employment relationship was severed for cause.

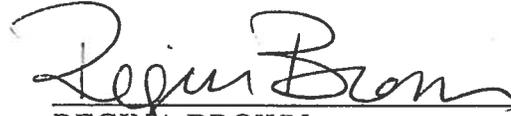
His voluntary resignation resulted in his permanent separation of service from CDCR. (Gov. Code section 19996; Cal. Code Regs., tit. 2, § 599.826. see also *Collins v. County of Los Angeles* (1976) 55 Cal.App.3d. 594, 597.) But, it did not foreclose the possibility of future reinstatement. An appointing power, in his or her discretion, may reinstate any person who was separated from his or her position by resignation. (Gov. Code, § 19140.) Respondent's employment records indicate that he is eligible to be reinstated into state service because there is no evidence of respondent's termination of cause.

4. No cause exists to uphold CalPERS's determination that respondent is not eligible to file an application for industrial disability retirement for all the reasons discussed above.

ORDER

The appeal of Dohn A. Salvador to be granted the right to file an application for industrial disability retirement is GRANTED.

DATED: July 23, 2015

A handwritten signature in cursive script, appearing to read "Regina Brown".

REGINA BROWN  
Administrative Law Judge  
Office of Administrative Hearings