

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:

EVELLO FERNANDO,

Respondent,

and

COUNTY OF MONTEREY,

Respondent.

Case No. 2014-0899

OAH No. 2015051046

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter on July 15, 2015, in Walnut Creek, California.

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

Respondent Evello Fernando was present. He was not represented by an attorney.

Deputy County Counsel Janet L. Holmes appeared on behalf of respondent County of Monterey.

The record closed and the matter was submitted on July 15, 2015.

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 May 6, 2015. It alleges that the application for industrial disability retirement filed by respondent Evello Fernando is barred under the Court of Appeal's decision in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292. That case, and a subsequent case of *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, together hold

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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 Correctional Cook II for the Monterey County Sheriff's Office.

3. On May 31, 2011, the Internal Affairs Division of the Sheriff's Office opened an investigation into respondent's conduct while on duty on May 22, 2011. The subject of the investigation was whether respondent, while working in the jail on May 22, had failed to answer his radio, and was rude and disrespectful to other staff members. The Internal Affairs Division summarized the results of its investigation in a report dated September 7, 2011.

4. In a letter dated October 31, 2011, Sheriff Scott Miller informed respondent of his decision to terminate respondent's employment effective upon the close of business that day. The action was taken based upon the Sheriff's conclusion that respondent was not carrying a radio as required on May 22, 2011; that he was unprofessional and rude to other staff members; and that respondent had a prior history of what the Sheriff described as "very poor performance" and a failure to respond to counseling. Respondent appealed.

5. A hearing on the appeal was set for January 17, 2013. Respondent and the county, however, resolved their dispute without a hearing by entering into a settlement agreement on February 26, 2013. Under that agreement, the county agreed to pay respondent \$43,000 in back pay, and respondent agreed to "voluntarily resign his service" to the county effective on or about September 14, 2012. Respondent further agreed that he "will not seek employment with the County in the future."

6. On August 1, 2013, respondent signed and submitted to CalPERS an application for service pending disability retirement.¹ He stated his disability as "depressive disorder, low back injury, was marked disabled by Monterey Sheriff." In response to the question, "When did the disability occur?" respondent stated "September 15, 2012."

7. On June 13, 2014, complainant wrote to respondent and informed him that, in the view of CalPERS, his disability retirement application was barred by the *Haywood* and *Smith* decisions. CalPERS has refused to act on respondent's application.

8. Respondent appealed. In his appeal letter dated July 4, 2014, respondent wrote that he had over 10 years of employment with Monterey County until he was "wrongfully terminated" and not given a *Skelly* hearing. Respondent wrote that "[e]ver since I was terminated my mental health became [worse] due to depression and this is in connection [with the] wrongful termination." This hearing followed.

9. At hearing, respondent reiterated that he should not have been terminated; that he did not commit any of the misconduct he was accused of; that he was terminated because

¹ This case concerns only respondent's disability retirement application.

he could not do the job; and that the termination has caused him severe depression. Respondent did not explain what he meant when he said he could not do the job; it appears that he was working at least until May 22, 2011. There is no evidence that respondent was disabled before May 22, 2011, or before he was given the notice of termination on October 31, 2011.

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. This case is indistinguishable from *Vandergoot*. In accordance with the terms of his settlement agreement, respondent resigned from county service and agreed to never again seek employment with the county. 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*.

4. 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. The first evidence of any claim of disability is respondent's disability retirement application, which he filed 22 months after the October 2011 notice of termination, 11 months after his resignation date, and six months after his settlement agreement.

Respondent's claim for disability retirement had not matured prior to his termination. He did not apply for disability retirement until almost two years after he was terminated. It appears that respondent's disability claim is based on the consequences of his termination, as opposed to conditions that predated his application. On his disability retirement application, and in his letter appealing CalPERS's determination, respondent states that his disability is based on the emotional consequences of what he believes to have been his wrongful termination. There is 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*.

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

ORDER

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

DATED: August 6, 2015



DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings