

**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:

ERLINDA VELASQUEZ,

Respondent,

and

SAN JOSE COMMUNITY COLLEGE  
DISTRICT,

Respondent.

Case No. 2013-0081

OAH No. 2014040788

**PROPOSED DECISION**

Administrative Law Judge Jill Schlichtmann, Office of Administrative Hearings, State of California, heard this matter on October 15, 2015, in Oakland, California.

Beverly R. Meyers, Deputy Attorney General, and Allan Acevedo, Certified Law Clerk, represented the California Public Employees' Retirement System.

Respondent Erlinda Velasquez represented herself and was present throughout the hearing.

No appearance was made by or on behalf of respondent San Jose Community College District.

The matter was submitted for decision on October 15, 2015.

**FACTUAL FINDINGS**

1. Anthony Suine, Chief of the Benefit Services Division, California Employees' Retirement System (CalPERS), made and filed the Statement of Issues in his official capacity.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED *Oct 23, 2015*

*Rodney Rodley*

2. Erlinda Velasquez (respondent) was employed by the San Jose Community College District (District) as a payroll technician. By virtue of her employment, respondent is a local miscellaneous member of CalPERS, and subject to Government Code section 21150.

3. On September 25, 2009, the District served respondent with a notice that she was being placed on administrative leave pending an investigation concerning her receipt, distribution and processing of court-ordered garnishments for her nephew and coworker, Jesse Velasquez.

4. On October 20, 2009, the District served respondent with a notice of proposed discipline to terminate her employment. The notice alleged that respondent had exhibited inefficiency, willful misconduct, negligence in the performance of duty, dishonest acts, falsifying information supplied to the District, insubordination and willful violation of the laws of the State of California.

The factual basis for the proposed discipline concerned respondent's failure to process a wage garnishment order brought to the District's payroll office. The subject of the wage garnishment was respondent's coworker and nephew, Jesse Velasquez. The District contended that respondent had a conflict of interest which prevented her from processing the wage garnishment. Instead, the District alleged, respondent prepared a response under penalty of perjury, signing her name as Erlinda Sanchez, indicating that the garnishment was unenforceable because Velasquez had filed a bankruptcy action. The District contended further that no bankruptcy action had been filed and respondent had failed to bring the matter to her supervisor's attention and handled it dishonestly.

5. Respondent requested a *Skelly* hearing,<sup>1</sup> which took place on October 28, 2009. On November 4, 2009, the *Skelly* Officer recommended that the proposed discipline be upheld.

6. On November 5, 2009, the District served respondent with a notice of termination of her employment effective November 6, 2009. Respondent appealed the disciplinary action and pursuant to the terms of the collective bargaining agreement between the parties, the matter proceeded to arbitration. The parties agreed that the arbitrator's decision was a recommendation to the District's Board of Trustees.

7. On September 13, 2010, following an evidentiary hearing, the arbitrator rendered his decision. The arbitrator found that, at a minimum, respondent acted unilaterally, and without approval, when she elected to report that Jesse Velasquez had filed a Chapter 7 Bankruptcy; that she compounded her error when she signed and returned the form to the levying officer and identified herself as Erlinda Sanchez, not Erlinda Velasquez; that it was apparent that respondent was intending to assist her nephew by avoiding having

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<sup>1</sup> See *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

the levy filed and relied solely on his statement that he had filed bankruptcy; and that, at a minimum, she used poor judgment in the manner in which she chose to act that day. Based on these facts, the arbitrator found the District had just cause to impose discipline.

However, based on respondent's 10 years of employment with the District with no previous discipline, the arbitrator recommended that the disciplinary action be reduced from termination to a three-month suspension with loss of pay and benefits, and that she be placed on a Last Chance Agreement for a one-year period.

8. The District's Board of Trustees considered the arbitrator's decision and recommendation at its meeting on November 9, 2010. Respondent attended the meeting and submitted additional materials for the members of the Board of Trustees to consider. On November 9, 2010, the Board of Trustees adopted the factual findings of the arbitrator's decision; however, the Board of Trustees rejected the arbitrator's recommendation of discipline. Instead, the Board of Trustees affirmed respondent's termination.

9. On January 4, 2011,<sup>2</sup> CalPERS received a disability retirement application signed by respondent, and identifying mental distress, anxiety and depressive disorder as the disabling conditions.

10. On October 5, 2012, CalPERS notified respondent that because she had filed her application for disability retirement after being terminated for cause, based on the decision in *Haywood v. American River Fire Protection District* (1999) 67 Cal.App.4th 1292, she was ineligible for disability retirement. CalPERS thereafter cancelled respondent's retirement application.

11. Respondent argues that because the arbitrator recommended a suspension rather than termination, she is eligible to apply for disability retirement.

## LEGAL CONCLUSIONS

1. The applicant for a benefit has the burden of proof to establish the right to the claimed benefit; the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; Evid. Code, § 115.)

2. By virtue of her employment, respondent is a local miscellaneous member of CalPERS, and subject to Government Code section 21150, which states in pertinent part:

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<sup>2</sup> Respondent asserts that she filed her disability retirement application in December 2010, but was unable to locate a copy of that application. However, respondent produced a letter from CalPERS dated December 7, 2010, estimating her disability retirement allowance. Whether respondent filed her disability retirement application in December 2010 or January 2011 is immaterial to this decision.

- (a) A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age. . . .

3. The issue involved in this matter is whether respondent is eligible to apply for disability retirement after being terminated by the District for cause. 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, termination of the employment relationship renders the employee ineligible for disability retirement. (*Haywood v. American River Fire Protection District, supra*, 67 Cal. App.4th 1292, at p. 1297; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206.)

4. The evidence established that respondent was terminated for cause as a result of her handling of a wage garnishment request involving her nephew and coworker. (Factual Findings 4 through 8.) Respondent's termination did result from a disabling medical condition.

5. Respondent did not establish that the District terminated her for the purpose of preempting an otherwise valid claim for disability retirement. Respondent had a vested right to apply for industrial disability retirement upon acceptance of employment with the District. While the "right" to the benefits vests upon acceptance of employment, an employee would not be entitled to receive the benefit until all the conditions prescribed have been met. (*Dickey v. Retirement Board of the City and County of San Francisco* (1976) 16 Cal.3d 745.) A vested right matures when there is an unconditional right to immediate payment. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 206.) Typically, this arises at the time a pension board determines that the employee was no longer capable of performing his/her duties. (*Ibid*; *Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672.) Here, respondent did not file her application for disability retirement until after she was terminated. (Factual Findings 8 and 9.) Thus, a CalPERS determination of eligibility does not antedate respondent's separation from employment. Her right to disability retirement had therefore not matured. The evidence therefore did not establish that the District terminated respondent in an attempt to preempt respondent's disability retirement application.

6. Respondent's argument, that because the arbitrator recommended a lesser penalty than termination she is eligible to apply for disability retirement, is rejected. The Board of Trustees had the authority to accept or reject the arbitrator's recommendation regarding discipline. (Factual Finding 6.) The Board of Trustees rejected the arbitrator's recommendation and affirmed respondent's termination. (Factual Finding 8.) The arbitrator's recommendation of a lesser penalty does not alter the fact that respondent was terminated for cause, which bars her application for disability retirement in this case.

7. CalPERS correctly determined that respondent is not eligible to apply for disability retirement, and therefore respondent's appeal must be denied.

ORDER

Respondent Erlinda Velasquez's appeal is denied.

DATED: October 21, 2015

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*Jill Schlichtmann*  
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JILL SCHLICHTMANN  
Administrative Law Judge  
Office of Administrative Hearings