

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

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

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

KEVIN DAVEY,

Respondent,

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS CORRECTIONAL  
INSTITUTE,

Respondent.

Case No. 2013-0987

OAH No. 2014120371

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on October 13, 2015, in Sacramento, California.

Preet Kaur, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Attorney Thomas J. Wicke of the law firm Lewis, Marenstein, Wicke, Sherwin & Lee, LLP, represented respondent Kevin Davey.

No one appeared for or on behalf of respondent California Department of Corrections Correctional Institute (CDCR), its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to the CDCR.

Evidence was received, and the record was left open for the parties to submit simultaneous closing and reply briefs. The parties' closing briefs are marked as Exhibits 13 (CalPERS's)<sup>1</sup> and W (Mr. Davey's), and their reply briefs are marked as Exhibits 14

<sup>1</sup> CalPERS's closing brief included a request that official notice be taken of two decisions issued by the Board of Administration, neither of which has been designated as precedential. The request is denied on grounds of relevancy.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM

FILED 30 Dec 20 15

*Atty. K. Kaur*

(CalPERS's)<sup>2</sup> and X (Mr. Davey's). The record was closed, and the matter was submitted for decision on December 11, 2015.

## SUMMARY

The sole issue on appeal is whether Mr. Davey is ineligible for industrial disability retirement by operation of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292. The evidence established that there was “a complete severance of the employer-employee relationship” between Mr. Davey and the CDCR, his former employer, which was precipitated solely by his voluntary resignation and waiver of any right to reinstatement. Severance of that relationship did not effectuate a forfeiture of a matured right to a disability retirement because he did not apply for industrial disability retirement until more than three and one-half years later. Therefore, Mr. Davey is ineligible for industrial disability retirement, and his application should be canceled.

## FACTUAL FINDINGS

### *Employment History*

1. Mr. Davey began working as a Registered Nurse I for the CDCR sometime prior to April 17, 2006. On April 17, 2006, he was promoted to Supervising Registered Nurse II. He was at all times assigned to work at The California Correctional Institution at Tehachapi, a correctional facility over which the CDCR has jurisdiction. (Pen. Code, § 5003, subd. (i).) As a result of such employment, Mr. Davey was a state safety member of CalPERS, and subject to Government Code section 21151, subdivision (a), which provides: “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. Mr. Davey's duties as a Supervising Registered Nurse II included supervising approximately 12 other registered nurses and 26 licensed vocational nurses, creating their work schedules, and providing patient care when needed. His working hours were Monday through Friday, from 8:00 a.m. to 5:00 p.m. He was also required to work one “on-call” shift one weekend each month. At hearing, Mr. Davey described his job as “strenuous” because it was often difficult to find sufficient nursing staff to cover any given shift, and he was responsible for conducting investigations into suspected employee wrongdoing.

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<sup>2</sup> CalPERS's reply brief included a request that portions of Mr. Davey's closing brief be stricken and not considered because he addressed issues beyond those for which the ALJ requested briefing. The request is denied, and both parties' closing and reply briefs were considered in their entirety.

*Application for Industrial Disability*

3. Mr. Davey signed, and CalPERS received, an Application for Industrial Disability Retirement on December 27, 2012. He identified his specific disability as:

(Stress abdomen and internal). I have been diagnosed with Gastric Ulcers, Hiatus Hernia and Barrett's Esophagus. Additionally, I have been given a psychological diagnoses which I cannot recall [*sic*].

He indicated he became disabled on June 8, 2008, explaining:

As a result of cumulative trauma resulting from stress over the course of my career, I began to experience nausea, vomiting and other stress related symptoms including ulcers, which have resulted in surgery and will require additional surgery in the future.

Mr. Davey wrote that his disability prevents him from working in a correctional setting, or any other stressful environment, and makes it necessary for him to avoid excess stress and situations that could induce stress, and to have the ability to rest for indeterminate periods of time when necessary. He further stated that his psychological and physical conditions prevent him from performing the essential functions of his job and render him unable to continue performing in his "usual and customary capacity."

4. On August 19, 2013, CalPERS sent Mr. Davey correspondence stating his application for industrial disability retirement was being canceled because:

The case of *Haywood v. American River Fire Protection District* (1998) 67 Cal App 1292 79 Cal 79 Cal Rptr 2d 749 holds that where an employee is terminated for cause and the discharge is neither the ultimate result of the disabling medical condition or preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement." [*Sic.*]

5. Mr. Davey timely appealed CalPERS's decision to cancel his application. On October 21, 2014, Anthony Suine, Chief of the Benefit Services Division of CalPERS, signed the Statement of Issues, solely in his official capacity.

*Evidence Regarding the Onset of Mr. Davey's Disability*

6. According to Mr. Davey, his disability occurred on June 8, 2008. That day was his seventh consecutive day of being on-call, and was also his third consecutive day of working a 24-hour on-call shift.

7. At that time, a nurse who was unable to report for his assigned shift called a designated telephone number, left a message stating he was not able to report to work, and Mr. Davey was able to retrieve the message and attempt to find another nurse to cover for the absent nurse. On June 8, 2008, however, the telephone lines were “messed up,” and Mr. Davey was unable to retrieve any of the messages left by nurses who had called in. Therefore, he had no advance notice of how many of the nurses scheduled to work that day were not going to show up. Once he realized he was short-staffed, he called the watch commander and other supervisors, but was unable to reach anyone.

8. Mr. Davey later reported that the stress of June 8, 2008, made him feel like he had a “red hot [*sic*] poker stuck in my stomach,” and he began experiencing diarrhea at different intervals throughout the day. He tried to continue working, but eventually went home sick. He was unable to report to work the following day, and instead stayed home in bed.

9. Mr. Davey returned to work when his nausea, abdominal pain, vomiting, and diarrhea resolved after a few days. Those symptoms, however, would return whenever he encountered a stressful situation at work, such as witnessing an altercation between a colleague and his supervisor. Mr. Davey was interviewed about that altercation by the prison’s disciplinary committee, and his version of events contradicted that of his supervisor. After that interview, he felt his supervisor began retaliating against him for not supporting her version of events, and the acts of retaliation caused Mr. Davey additional stress.

10. Mr. Davey eventually filed a workers’ compensation claim on July 25, 2008, based on the physical and mental symptoms he believed he was experiencing due to his stressful working conditions. He first treated with Susan Cribbs, D.O., a family practitioner certified by the American Osteopathic Board of Family Physicians, on August 11, 2008. The following month, he began treating with Kathleen Murphy, PhD, a licensed clinical psychologist. He eventually began treating with Sinnadurai Moorthy, M.D., a board-certified internist and gastroenterologist, and Steven DeMester, a board-certified thoracic surgeon. During the course of Mr. Davey’s medical treatment, one of his healthcare providers took him off of work, effective July 25, 2008.<sup>3</sup> He was scheduled to return to work on April 20, 2009, but never did due to his incarceration in the San Diego County Jail for the reasons discussed below.

11. Mr. Davey’s workers’ compensation claim was resolved in its entirety on October 1, 2013, when the Workers’ Compensation Appeals Board entered an Award based on the Stipulations with Request for Award signed by the necessary parties.

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<sup>3</sup> It was unclear whether the July 25, 2008 date was an error since Mr. Davey did not begin medical treatment for his workers’ compensation claim until almost two weeks later. Nonetheless, the important date was the date on which he was scheduled to return to work, and it was undisputed that date was April 20, 2009.

### *Severance of the Employer-Employee Relationship*

12. Mr. Davey went to visit a friend in San Diego the week prior to his scheduled return from medical leave. That Friday night (April 17, 2009) he was unable to sleep, so he took Restoril – a prescription medication for insomnia. Still unable to sleep, he took a second dose. Mr. Davey eventually got out of bed, went for a drive, and ended up at a bar. After drinking three beers, he drove back to the hotel. While he was unable to recall at hearing specifically what happened while driving to the hotel, he explained he was arrested for commercial burglary, possession of a gun, and driving under the influence of alcohol. Ultimately, he pled guilty to a misdemeanor (he did not specify which particular crime), was placed on informal probation for three years, was given credit for the time he had already spent in the San Diego County Jail (approximately 10 days), and was not ordered to serve any additional jail time. The conviction has since been expunged from his record.

13. It was undisputed that Mr. Davey did not report to work on Monday, April 20, 2009, because he was still incarcerated in the San Diego County Jail. On April 27, 2009, the CDCR issued him a Notice of Automatic Resignation by Absence Without Leave (AWOL) informing him that the CDCR “intends to invoke the AWOL Statute in accordance with Government Code Section 19996.2,<sup>4</sup> because you have been absent without leave (AWOL) for at least five (5) consecutive working days.” The Notice advised that the effective date of his resignation would be the close of business on May 11, 2009. The Notice explained Mr. Davey’s right to request a “*Coleman*”<sup>5</sup> hearing, file an appeal with the Department of Personnel Administration, and provided the procedures for doing each.

14. Mr. Davey timely requested a *Coleman* hearing, which was held on May 7, 2009. Later that day, he was given the results of that hearing which were to sustain the CDCR’s decision to invoke Government Code section 19996.2.

15. Mr. Davey timely filed an appeal with the Department of Personnel Administration. He later settled his appeal by entering into a stipulation and release, which was subsequently approved by the Department of Personnel Administration. The stipulation and release provided, in part:

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<sup>4</sup> Government Code section 19996.2, subdivision (a), provides, in relevant part: “Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked.”

<sup>5</sup> *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102 [due process requires that an employee be given notice and opportunity to respond before his employer invokes the provisions of Government Code section 19996.2].

- 1 APPELLANT,<sup>6</sup> by his signature on this document, agrees to withdraw his Appeal of the NOTICE OF AUTOMATIC RESIGNATION BY ABSENCE WITHOUT LEAVE (AWOL) effective close of business April 17, 2009, and to waive any right he may have to appeal the NOTICE OF AUTOMATIC RESIGNATION BY ABSENCE WITHOUT LEAVE either before the DPA or any court of law which may have jurisdiction over the matter. Specifically, APPELLANT waves any rights he may have as set forth in the fourth paragraph of the NOTICE OF AUTOMATIC RESIGNATION BY ABSENCE WITHOUT LEAVE.
- 2 APPELLANT by his signature on this document agrees not to apply for and/or accept reemployment with RESPONDENT or its successors in interest. APPELLANT also agrees not to perform services for RESPONDENT or its successors, including but not limited to registries in a capacity which permits APPELLANT to touch upon or in any manner impact the CDCR, its successors in interest or adults and/or juvenile inmates. This provision in no way limits the APPELLANT's ability to work for or accept employment with a registry or staffing agency, etc. in a capacity that does not impact the CDCR, its successors in interest for adult and/or juvenile inmates.
- 3 In the event that RESPONDENT or a successor in interest, inadvertently hires APPELLANT, APPELLANT will be dismissed with cause and hereby waives all rights of appeal (in any forum be it administrative or judicial) from said dismissal.
- 4 RESPONDENT agrees to modify the Resignation by Absence Without Leave to a Resignation for Personal Reasons and Appellant agrees to resign effective close of business April 17, 2009.
- 5 RESPONDENT agrees to remove the NOTICE OF AUTOMATIC RESIGNATION BY ABSENCE WITHOUT LEAVE referenced in paragraph 1 AND

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<sup>6</sup> "APPELLANT" was Mr. Davey, and "RESPONDENT" was "the State of California, the California Prison Health Care Services, and Department of Corrections and Rehabilitation (CDCR)."

ALL SUPPORTING DOCUMENTS from the  
APPELLANT'S Official Personnel File.

*Discussion*

Relevant legal authority

16. In *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, the appellate court held that an employee's termination for cause rendered him ineligible for disability retirement:

[W]e conclude that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of the disabling medical condition or 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.

(*Id.*, 1307.)

The appellate court explained:

Thus, there is an obvious distinction 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. (See *Schneider v. Civil Service Com.*, *supra*, 137 Cal.App.2d at p. 285 [upholding the termination of employment as a means to deal with an unwilling employee].)<sup>7</sup> Nor are disability retirement laws intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. "The pension roll is a roll of honor—a reward of merit, not a refuge from disgrace; and it would be an absurd construction of the language creating it to hold that the intention of the Legislature was to give a life annuity to persons who, on their merits, as distinguished from mere time of service, might be dismissed from the force for misbehavior." (*MacIntyre v. Retirement Board of S.F.*, *supra*, 42 Cal.App.2d at p. 736.)<sup>8</sup>

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<sup>7</sup> *Schneider v. Civil Service Com.* (1955) 137 Cal.App.2d 277.

<sup>8</sup> *MacIntyre v. Retirement Board of S.F.* (1941) 42 Cal.App.2d 734.

This unable/unwilling dichotomy, and the role of disability retirement in addressing only the unable-to-work prong, is apparent in the PERS law. For example, while nothing in the PERS law restricts an employer's right to fire an unwilling employee, the Legislature has precluded an employer from terminating an employee because of medical disability if the employee would be otherwise eligible for disability retirement. (§ 21153.) In such a case, the employer must instead apply for the disability retirement of the employee. (*Ibid.*) In addition, while termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship (§ 19583.1), disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches the age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues. (§ 21192.) And an employee on disability retirement may apply for reinstatement on the ground of recovery. (*Ibid.*) If an employee on disability retirement is found not to be disabled any longer, the employer may<sup>9</sup> reinstate the employee, and his disability allowance terminates. (§ 21193.)

(*Haywood v. American River Fire Protection District*, *supra*, 67 Cal.App.4th at pp. 1304-1305.)

17. Later, the same appellate court explained its rationale for the exception that applies when an employee is fired because he has a disabling medical condition or his termination preempts 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 [citations] or indirectly through cause based on the disability [citation].

(*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 205.)

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<sup>9</sup> In *Department of Justice v. Board of Administration of California Public Employees' Retirement System* (2015) 242 Cal.App.4th 133, the appellate court explained that an employer's duty of unconditional reinstatement under Government Code section 21193 is mandatory "when a recipient of disability retirement is no longer incapacitated by the condition for which she was retired." (*Id.*, at p. 142.)

*Smith* involved a firefighter who filed a backdated application for disability retirement on the effective date of the termination of his employment. Focusing on the latter part of the exception articulated in *Haywood*, the appellate court explained that even a dismissal based solely for a cause unrelated to the employee's disability "cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect." (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 206.) The right to a disability pension does not mature until the pension board has concluded the applicant is substantially incapacitated for the performance of his usual duties. (*Ibid.*) Concluding that was not the case with Mr. Smith's application, the court explained:

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.

(*Ibid.*)

The appellate court recognized an equitable exception to the rule that a right to a disability pension is not mature until the pension board has determined that the applicant is substantially incapacitated for the performance of his usual duties:

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. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567, 262 Cal.Rptr. 566; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132, 139 Cal.Rptr. 814.) And for purposes of the standard for a disability retirement, the plaintiff's medical evidence is not

unequivocal. 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.

(*Smith v. City of Napa, supra*, 120 Cal.App.4th at pp. 206-207.)

18. The Board of Administration extended the rule articulated in *Haywood* and applied in *Smith* to a state employee who voluntarily resigned his employment as a heavy equipment operator with the California Department of Forestry and Fire Protection in its precedential decision *In re Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01.<sup>10</sup> Concluding that *Haywood's* holding applies whether Mr. Vandergoot was terminated for cause or voluntarily resigned his employment and waived any reinstatement rights, the Board of Administration explained:

In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*. This is because *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the District if it ultimately is determined that respondent is no longer disabled. (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at pp. 1296 - 1297.) 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 wholly inconsistent with the policy behind and rationale for disability retirement ... .

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<sup>10</sup> The specific sequence of events were that Robert Vandergoot was given notice on March 5, 2010, that his employment would be terminated, effective March 31, 2010. He appealed his dismissal to the State Personnel Board. On February 6, 2011, prior to a hearing on his appeal, he entered into an agreement with his former employer whereby the notice of dismissal was withdrawn in exchange for his resignation, effective December 9, 2010, and permanent waiver of any reinstatement rights. The agreement provided that he would be considered to be on "unpaid leave status" from March 31, 2010, through December 9, 2010. In the meantime, CalPERS received Mr. Vandergoot's application for industrial disability retirement on April 12, 2010.

(*In re Vandergoot, supra*, CalPERS Precedential Bd. Dec. No. 13-01, at p. 7; quoting, *Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. 1305.)

Mr. Davey's argument that *Vandergoot* is not binding or even persuasive authority is contrary to law. The Administrative Procedure Act (Gov. Code, tit. 2, div. 3, pt. 1, ch. 4, § 11370 et seq.) expressly provides a process through which an administrative agency, such as the Board of Administration, can adopt precedential decisions. (Gov. Code, § 11425.60.) In fact, "a decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency." (Gov. Code, § 11425.60, subd. (a).)

#### Application of relevant legal authority

19. *Haywood* and its progeny make it clear that a prerequisite to granting a disability pension is the applicant's ability to be reinstated with his former employer should it subsequently be determined that he is no longer disabled. If an applicant cannot be reinstated because he was terminated for cause (*Haywood* and *Smith*) or voluntarily resigned and waived his reinstatement rights (*Vandergoot*), he is ineligible for a disability pension.

Here, the CDCR withdrew its Notice of Automatic Resignation by Absence Without Leave (AWOL) in exchange for Mr. Davey's voluntary resignation for personal reasons, effective close of business April 17, 2009, and agreement "not to apply for and/or accept reemployment with RESPONDENT or its successors in interest" and "not to perform services for RESPONDENT or its successors, including but not limited to registries any capacity which permits [him] to touch upon or in any manner impact the CDCR, its successors in interest, or adult and/or juvenile inmates." Such resignation and agreement "expressly lock [Mr. Davey] out from being reinstated." (*In re Vandergoot, supra*, CalPERS Precedential Bd. Dec. No. 13-01, at p. 7.)

20. The exception articulated in *Haywood* does not apply because: 1) the complete severance of the employer-employee relationship between the CDCR and Mr. Davey was the result of his voluntary resignation and waiver of reinstatement rights, and 2) the severance of that relationship did not preempt an otherwise valid claim for disability retirement because the Board of Administration had not yet determined him to be substantially incapacitated for the performance of his usual job duties.

21. The equitable exception announced in *Smith* does not apply either. Mr. Davey did not apply for industrial disability retirement until more than three and one-half years *after* the effective date of his voluntary resignation. There was no impending ruling on his application that was delayed, for reasons beyond his control, until after his resignation. Therefore, Mr. Davey did not have a matured right to a pension when he resigned, and the severance of his employer-employee relationship with the CDCR did not effectuate a forfeiture of a matured right to a disability retirement.

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### Mr. Davey's Arguments

22. Mr. Davey argued at hearing that his right to due process affords him the opportunity to present medical evidence that he was discharged from the CDCR due to his disability for which he seeks disability retirement. Therefore, he requested that an additional day of hearing be scheduled so he could call Dr. Cribbs to testify. As his offer of proof, he claimed her testimony would establish that: 1) she has treated Mr. Davey's disability since June 2008, 2) her treatment has included medication and time off from work, 3) there was a direct relationship between the stress he was feeling at work and his disability, 4) his behavior that led to his April 17, 2009 arrest in San Diego was caused by a combination of alcohol and the medication she prescribed for insomnia, and 5) she has continued to treat his disability since that incident, with little to no improvement.

As previously discussed, Mr. Davey did not apply for disability retirement until after the effective date of his resignation and waiver of any right to reinstatement. He did not have a matured right to a disability retirement when he entered into the settlement agreement that resulted in the severance of his employer-employee relationship with the CDCR. Although he was out on medical leave immediately prior to his April 17, 2009 arrest, the AWOL action served upon him was not the result of his medical leave or issued to prevent a claim for disability retirement from maturing. Instead, it was based solely on facts unrelated to his medical condition. Therefore, Mr. Davey's request for an additional day of hearing to present the testimony of Dr. Cribbs is denied as such testimony would be irrelevant to this appeal.

23. Contrary to Mr. Davey's argument, the CDCR was his appointing power. (See, Gov. Code, §§ 11154 ["Except as otherwise provided by law, the head of each department may, with the approval of the Governor, appoint such officers and employees as are necessary; and prescribed their duties, and fix their salaries in accordance with classifications made by the State Personnel Board"], 18524 ["'Appointing authority' or 'appointing power' means a person or group having authority to make appointments to positions in the state civil service"].) By giving up all rights of mandatory return to the CDCR, he gave up what was the focus of *Haywood* – the right to reinstatement with the CDCR.

24. Mr. Davey's argument that CalPERS failed in its fiduciary obligation to him by not informing him that he would be waiving any right to disability retirement by signing the settlement agreement resolving his appeal before the Department of Personnel Administration is unsupported by any legal authority. Neither *Strumsky v. San Diego County Employees Retirement Association* (1974) 11 Cal.3d 28, nor *Hittle v. Santa Barbara County Employees Retirement Association* (1985) 39 Cal.3d 374, involved a former employee who applied for disability retirement after he completely severed the employer-employee relationship with his former employer such that reinstatement was precluded. (See, *Contra Costa Water District v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660 ["Opinions are not authority for issues they do not consider"].)

## *Summary*

25. Mr. Davey's voluntary resignation and waiver of any reinstatement rights effectuated "a complete severance of the employer-employee relationship" between the CDCR and himself such that he is ineligible for disability retirement. The severance of that relationship was not the result of a disabling medical condition. And since he did not apply for disability retirement until more than three and one-half years after his resignation, the severance of his relationship with the CDCR did not preempt an otherwise valid claim for disability retirement. Therefore, Mr. Davey's application for disability retirement should be cancelled.

## LEGAL CONCLUSIONS

### *Applicable Burden/Standard of Proof*

1. CalPERS has the burden of proving Mr. Davey's application for industrial disability retirement is barred by *Haywood* and its progeny. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"].) It must meet its burden by a preponderance of the evidence. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

### *Applicable Law*

2. Government Code section 20026 provides, in pertinent part:  
  
"Disability" and "incapacity for performance of duty" as the basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion.
3. Government Code section 21151, subdivision (a), provides: "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."
4. Government Code section 21156, subdivision (a), provides, in pertinent part:  
  
(1) If the medical examination and other available information show to the satisfaction of the board ... 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 . . . .

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

5. The termination of a member's employment in such a manner that there is no possibility of reinstating the employer-employee relationship in the future renders him ineligible for disability retirement so long as such termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1306-1307.) It is wholly irrelevant whether the employment was terminated because the member was fired for cause or voluntarily resigned and waived his right to reinstatement. (*In re Vandergoot, supra*, CalPERS Precedential Bd. Dec. No. 13-01, at pp. 7-8.) Under either scenario, the termination constitutes "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 CDCR] if it ultimately is determined that he is no longer disabled." (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. 1306)

*Conclusion*

6. Mr. Davey is not eligible for industrial disability retirement for the reasons explained above. Therefore, his application for industrial disability retirement should be cancelled.

ORDER

Respondent Kevin Davey's application for industrial disability retirement is CANCELED.

DATED: December 28, 2015

DocuSigned by:  
*Coren D. Wong*  
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COREN D. WONG  
Administrative Law Judge  
Office of Administrative Hearings