

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Cancellation of the
Application for Disability Retirement of
Anthony Navarro by:

JENNIFER NAVARRO,

Claimant,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
PELICAN BAY STATE PRISON,

Respondent.

Case No. 2014-1031

OAH No. 2015050796

PROPOSED DECISION

Stephen J. Smith, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California heard this matter in Sacramento, California, on November 10, 2015.

JeanLaurie Ainsworth, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Jennifer Navarro did not appear. She was represented by Jonathan Yank, Attorney at Law, of Messing, Adam and Jasmine, LLP, Attorneys.

Respondent California Department of Corrections and Rehabilitation, Pelican Bay State Prison, did not appear.

The record was left open to receive written closing argument and Points and Authorities from the parties. Opening argument and Points and Authorities submitted by the parties were received December 8, 2015, were marked and made part of the record. Replies were received December 18, 2015. The record was closed and the matter was submitted on December 18, 2015.

ISSUES

1. Was Anthony Navarro (the member) legally barred from filing an application for industrial disability retirement (IDR) with CalPERS, due to the member's employment status at the time of filing?
2. Does the member's employment status, as a result of entering into a Settlement Agreement (Agreement) with his employer CDCR to resolve the member's appeal of CDCR's termination of the member for cause, preclude him from applying for IDR, due to the legal bar referenced in No. 1 above?

CONTENTIONS

1. CalPERS contends the member was barred from filing for IDR because his employment status as a result of the Agreement terminated his employment with CDCR and precludes him from ever being reinstated. CalPERS contends the authorities of *Haywood v. American River Fire Protection District*,¹ *Smith v. City of Napa*² and CalPERS Precedential Decision *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot and Department of Forestry and Fire Protection (CalFire)*³ preclude consideration of the member's application for IDR because his employment status following execution of the Agreement is such that he cannot ever be reinstated to employment with CDCR.
2. Claimant contends *Haywood*, *Smith* and *Vandergoot* do not apply because the member was reinstated to employment with CDCR as a result of a failure of a contingency in the Agreement. Claimant contends his resignation from CDCR, required by the Agreement, was contingent upon CalPERS denying his application for IDR "on its medical merits." Claimant reasons that since the denial of his IDR application did not occur, the terms of the Agreement render his resignation ineffective, and since CDCR withdrew its Notice of Adverse Action (NOAA) terminating him as part of the Agreement, he is reinstated to CDCR employment. Claimant concludes due to the failure of the contingency, the member's employment status is that of reinstated, and as such, the member is eligible to file the application for IDR.

DISPOSITION OF CONTENTIONS

3. Claimant's appeal fails because the member is ineligible to file the application for IDR as a result of the legal bar created in *Haywood*, and elaborated and extended in *Smith*

¹ *Haywood v. American River Fire Protection District (Haywood)* (1988) 67 Cal. App. 4th 1292, 1305.

² *Smith v. City of Napa* (2004) 120 Cal.App. 4th 194, 205.

³ *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot and the Department of Forestry and Fire Protection*, CalPERS Precedential Decision 13-01, effective October 16, 2013.

and *Vandergoot*. Claimant's appeal is defeated by the member's execution of the Agreement, which had the de facto effect of permanently severing the member's employment relationship with CDCR, causing him to fall squarely within the prohibition to file for IDL announced by those authorities. Claimant's contention that the member was reinstated to CDCR employment due to the failure of CalPERS to consider his application for IDL "on its medical merits" is circular and lacks factual and legal merit. Claimant's contingency argument improperly seeks to add language to the Agreement that amounts to a unilateral modification. CalPERS's action to prohibit the filing of the member's application for IDL was correct and shall be sustained.

STANDARD AND BURDEN OF PROOF

4. "As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence."⁴ An applicant for a CalPERS disability retirement bears the burden of proof and the burden of going forward with the evidence.⁵ Claimant, as successor to the member's rights, has the burden of proving that the member was eligible to file the application for disability retirement, and for overcoming the potential bars to that filing posed by the *Haywood*⁶, *Smith*⁷, and *Vandergoot*⁸ decisions. The parties agreed that only if eligibility to file the application is determined to exist, will further inquiry be made as to whether member was substantially incapacitated from the performance of his usual and customary duties as a Correctional Sergeant (CS) with the CDCR, required to establish claimant's eligibility to receive a surviving spouse's disability retirement benefit.

FACTUAL FINDINGS

1. The member was employed by CDCR as a CS, assigned to the Pelican Bay State Prison (PBSP), Crescent City, California at all times relevant to this Decision. The member was a safety member of CalPERS as a result of his employment with CDCR.

2. Jennifer Navarro (Claimant) was, at all times relevant to this Decision, the surviving spouse of the member. Claimant's community property rights in any benefit due the member give her standing to pursue this appeal.

⁴ *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051.

⁵ *Id.*, *Harmon v. Board of Retirement* (1976) 62 Cal.App. 3d 689, 691, *In Re: Theresa V. Hasan*, Board of Administration of the California Public Employees' Retirement System Precedential Decision No. 00-01.

⁶ *Haywood v. American River Fire Protection District* (1988) 67 Cal. App.4th 1292, 1305 (Hearing Denied, February 17, 1999.)

⁷ *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 205.

⁸ *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot and the California Department of Forestry and Fire Protection*, CalPERS Precedential Decision 13-01, October 16, 2013.

APPLICATION, DENIAL AND APPEAL

3. The member applied for IDR (below). The member claimed in his application that he was disabled from the performance of his duties as a CS with CDCR due to orthopedic injuries to his back and neck, and workplace anxiety.

4. CalPERS Benefits Services Division (BSD) received information and documents from CDCR from which CalPERS BSD concluded that member had been terminated from his employment. CalPERS BSD determined that member was ineligible for a disability retirement due to the termination, that the termination was for cause, and that the member's discharge was not the ultimate result of a disabling medical condition. CalPERS BSD concluded that settled law precluded granting the application.⁹

5. CalPERS BSD notified claimant in writing dated June 21, 2014 of the CalPERS determination. CalPERS acknowledged that claimant has a community property interest in any potential disability retirement award, and thus became a party to this action as a result of member's death.

6. Claimant timely filed an appeal on August 22, 2014. Claimant requested an evidentiary hearing before an independent ALJ.

7. Diane Alsup, acting in her official capacity only as Acting Chief, of CalPERS BSD made the allegations contained in the Statement of Issues on March 25, 2015 and caused it to be filed and served on claimant. Claimant timely requested an evidentiary hearing.

EMPLOYMENT AND INJURY HISTORY

8. The member became employed by CDCR on July 27, 1996. He was hired as a Correctional Officer (CO). He was promoted to the position of CS on November 27, 2000. The member continued to be employed as a CS with CDCR until 2012. The details and characterization of the member's separation are matters of dispute.

9. The member slipped on ice while performing an inmate escort at work on July 21, 2011. He injured his back. He evidently recovered and returned to work. The member slipped on an electrical plate at work on February 7, 2012. He injured his neck and back. He also claimed he "began to develop symptoms of severe workplace anxiety about the same time." The member filed Workers' Compensation claims and "went out on disability leave on or before February 29, 2012." The member did not file an application for disability retirement until April 4, 2013 (below).

10. CDCR has a statutory obligation to file an application for IDR for any employee believed to be substantially incapacitated from his or her usual and customary

⁹*Haywood, supra, Smith, supra and Vandergoot, supra.*

duties due to the provisions of Government Code sections 21153 and 21192. CDCR did not file an application for IDR with CalPERS seeking to retire the member for disability.

TERMINATION ACTION

11. Investigators employed by CDCR's Pelican Bay State Prison Internal Affairs Department (IA) opened an investigation into the member's workplace conduct on April 27, 2011. IA investigators interviewed the member on July 25, 2011. The IA investigator interviewed the member again on February 13, 2012.

12. CDCR placed the member on Administrative Time Off (ATO) pending the results of the IA investigation on February 28, 2012. CDCR filed a Notice of Adverse Action (NOAA), terminating the member's employment for cause, on March 21, 2012. CDCR filed a First Amended NOAA, still terminating the member, on April 12, 2012. CDCR alleged causes for termination including inexcusable neglect of duty; insubordination; dishonesty; willful disobedience; and other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment. CDCR made the termination effective March 28, 2012, but CDCR extended the member's final separation to April 25, 2012, so that the member could exhaust his leave balances.

13. CDCR held a *Skelly* hearing to give the member the opportunity to contest and review the propriety of the termination on April 3, 2012. CDCR upheld the termination following the hearing.

14. The member timely appealed his termination to the State Personnel Board (SPB) and sought an evidentiary hearing.

15. The SPB scheduled an evidentiary hearing on the member's appeal of his termination and a Settlement Conference. SPB's assigned ALJ conducted a Settlement Conference that took place on November 11, 2012.

16. CDCR and the member reached a Settlement Agreement (Agreement) during the Settlement Conference. The Agreement was fully executed on November 13, 2012, by signature of all parties.

17. CalPERS was not a party to the termination action before the SPB, or to the Agreement. CalPERS did not receive notice of Agreement until long after it was fully executed.

AGREEMENT TERMS

18. The Agreement between CDCR and the member contain the following provisions:

1. Appellant by his signature on this document, agrees to withdraw and hereby does withdraw his appeal to the Notice of Adverse Action, effective at the close of business on March 28, 2012 and now pending before the SPB as Case No. 12-0585, and to waive any and all rights he may have to appeal the Notice of Adverse Action either before the State Personnel Board or any administrative body or court of law that might have jurisdiction over the matter. Appellant also waives any rights he may have set forth in section VI – Appeal Rights, of the Notice of Adverse Action and Code of Civil Procedure sections 1067 through 1110(b) inclusive.
2. Respondent agrees to withdraw and hereby does withdraw the Notice of Adverse Action for dismissal, effective at the close of business on March 28, 2012 and now pending before the SPB as Case No. 12-0585.
3. Appellant agrees to file for medical retirement from his position as a Correctional Sergeant at Pelican Bay State Prison effective at the close of business on March 28, 2012. Respondent agrees not to oppose Appellant's application for medical retirement. Appellant agrees that if he is denied a medical retirement by PERS, he will be deemed to have resigned for personal reasons from his position as a Correctional Sergeant effective at the close of business on March 28, 2012 and that Respondent will be deemed to have accepted Appellant's resignation effective on that date. This resignation is irrevocable and not contingent on any action of any other State agency now, or in the future. Appellant further agrees, as part of the consideration and inducement for the execution of this Stipulation and Release, never to apply for or accept employment, reemployment, reinstatement or placement with the CDCR or any entity providing services to inmates or wards with the CDCR. If the CDCR inadvertently offers Appellant a position, then Appellant breaches this Stipulation and Release by accepting employment with the CDCR. Appellant shall be terminated at such time as is convenient to the CDCR. Appellant agrees to waive, and hereby does waive, any right to appeal such termination before the State Personnel Board or any other administrative body or court of law that may have jurisdiction to hear such an appeal.
4. The Parties mutually agree that the medical retirement/resignation reference in Paragraph 3 is without fault and under no adverse action or circumstances.

5. Appellant by his signature on this document, and in exchange for such consideration as is set forth in this Stipulation and Release, releases, acquits, and forever discharges the State of California, the CDCR, and their agents, representatives, employees, successors and assigns, of and from any and all demands, actions, causes of action, claims of any kind or nature whatsoever, known and unknown, anticipated or unanticipated, past or present, and any claim under state or federal law, including, but not limited to, claims under the Fair Employment and Housing Act, Title VII of the 1964 Civil Rights Act, and/or the Age Discrimination in Employment Act which may exist as of the date hereof in connection with or arising out of the actions taken by the Department regarding this Notice of Adverse Action.

6. Appellant is familiar with and has read the provision of California Code § 1542 and expressly waives to the fullest extent of the law any and all rights he may have under the terms of that Code section which reads as follows

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor.

7. Appellant executes this Stipulation and Release without reliance upon any statement or representation by Respondent or its representatives except as set forth in this document. Appellant is of legal age and is legally competent to execute this Stipulation and Release. Appellant accepts fully the responsibility therefore, and executes the Stipulation and Release after having read it. After having been advised and having the opportunity to discuss it thoroughly with Appellant's attorney, Jonathan Yank, Appellant understands its provision and enters into this Stipulation and Release voluntarily.

8. This Stipulation and Release is freely and voluntarily entered into, and Appellant hereby authorizes and orders his representative of record to withdraw his appeal of the Notice of Adverse Action, currently pending before the SPB as Case No. 12-0585 as agreed to in paragraph 1 of this Stipulation and Release.

19. There was no evidence that there was any correlation or causation between the NOAA and the termination it imposed, and the member's medical condition at the time of the termination.

IDR APPLICATIONS AFTER THE AGREEMENT

20. The member initially applied for IDR on April 4, 2013. CalPERS wrote to the member requesting additional information on August 6, 2016, and informed the member that his application was incomplete. The member failed to respond. CalPERS canceled the initial application on September 30, 2013.

21. The member reapplied for IDR on November 13, 2013. The member claimed in the application that he was disabled from the performance of his duties as a CS with CDCR due to orthopedic injuries to his back and neck from an injury that occurred on February 7, 2012, and workplace anxiety.

22. The member died on February 18, 2014, but CalPERS was not timely informed.

23. CalPERS denied the application and notified the member in writing on June 21, 2014, that he was ineligible to apply for IDR because he no longer had return/reinstatement rights to his employment with CDCR. This appeal followed.

LEGAL CONCLUSIONS

THE CLAIMED CONTINGENCY

1. Claimant contends that the Agreement contains a contingency that is dispositive on the issue of whether CalPERS properly barred the filing of the member's IDR application. Claimant contends the contingency requires treating the member as only having resigned his employment if CalPERS considers and denies his application for IDR "on its medical merits." Claimant contends that the contingency never occurred, because CalPERS did not evaluate his eligibility for IDR "on its medical merits" and find against him, therefore, since the contingency did not occur, and the member did not resign from employment. Claimant describes the contingency and frames the key issue thus:

It is of critical importance to this matter that the denial of Sergeant Navarro's disability retirement application was a condition precedent to his resignation and agreement not to seek or accept reemployment with CDCR. In other words, unless and until his claim was denied *on its medical merits*, he would not resign and be prevented from being reemployed. ... [citing]

*Lucas v. State of California*¹⁰, and *McCollum v. XCare.net, Inc.*¹¹ [“Upon the State’s withdrawal of the adverse action, [he] was no longer separated from service by involuntary termination.”] However, Sergeant Navarro remained out on Worker’s Compensation leave. At no point did he resign or otherwise separate from service.... [Quoting the stated basis for CalPERS’ June 21, 2014, written denial of member’s application], The stated basis for denying the application is demonstrably false. As detailed above, Sergeant Navarro’s

¹⁰ *Lucas v. State of California* (1997) 58 Cal. App. 4th 744, 750. *Lucas* is inapposite and factually distinct. The *Lucas* court stated, “At the point in time that an employee leaves employment, he or she falls into one of three categories—a resigned employee, a terminated employee, or a retired employee.” [Citation omitted] Civil service statutes expressly distinguish separation from a civil service position by resignation and separation by service retirement.” “*Lucas* retired for service after the State involuntarily terminated his employment by dismissal for asserted cause. Once the State withdrew its disciplinary action before the SPB, *Lucas* continued seeking reinstatement to his former position. The State rejected *Lucas*’s request for reinstatement. However, since the State’s withdrawal of its disciplinary action foreclosed *Lucas* from pursuing an administrative determination reinstating his employment, *Lucas* has by this lawsuit properly sought a judicial order of employment reinstatement. Such order would also form the basis for his reinstatement from retirement under section 21198.”

The disciplinary action in *Lucas* was completely without merit. The disciplinary action withdrawal via dismissal of the NOAA was not part of a quid pro quo to resolve his appeal of the termination. Withdrawal of the disciplinary action deprived *Lucas* of the opportunity to prove the termination action had no merit. Withdrawal of the NOAA here was bargained for and did not deprive the member of going forward and vindicating himself at a SPB hearing, had the member decided to try to prove CDCR’s termination action was lacking in merit. Like *Haywood* and unlike *Lucas*, there is no evidence that going forward with the grievance process would have resulted in the member’s vindication or reinstatement.

Lucas was actually ordered to be reinstated to employment following the withdrawal of the NOAA. *Lucas* was not subject or party to any provision or term of an Agreement that prohibited him from ever working for the employer ever again, completely unlike the post-NOAA bargained-for withdrawal of the NOAA per the Agreement here. As observed in *Haywood* at p. 1305, “[G]ranting *Haywood* disability retirement would override *Haywood*’s termination for cause despite his inability to set aside the termination through the grievance process.”

¹¹ *McCollum v. XCare.net, Inc.* (2002) 212 F. Supp.2d 1142, 1147. The quotation misrepresents the authority by omission of the first dependent clause of the statement. The whole sentence reads, “Because no transition plan was ever agreed to, the condition precedent to Plaintiff’s resignation was never met.” The omission is material to the meaning claimant contends should govern this analysis.

termination was rescinded and he never separated from CDCR prior to his death. No other basis was stated for denying the application and no other issue is on appeal.”¹² (Emphasis added.)

2. The contingency argued as dispositive in the Agreement evades the fact that the member entered into the Agreement because CDCR terminated him. It impermissibly seeks to add language to the Agreement that unilaterally modifies its meaning. The claimed contingency sought to draft into the member’s termination Agreement a provision which evades the *Haywood/Smith/Vandergoot* prohibitions by forcing CalPERS, not a party to the Agreement or a participant in its drafting, to perform a duty it contends it is legally barred from performing in order to meet the contingency. The claimed contingency’s actual effect is an effort to bind CalPERS to perform an evaluation of the member’s claim for IDR “on its medical merits,” thus creating a condition precedent to CalPERS being able to claim it is legally barred from receiving and considering the application, creating a circular process that forces CalPERS to do what it contends it legally cannot. The claimed contingency seeks to bind CalPERS to the specific language contained in its denial letter, seeking to prevent evaluation of the overall effect of the Agreement. The claimed contingency seeks to avoid the overall effect and the expressed intention of the Agreement, which was to sever the employment relationship between CDCR and the member forever. The claimed contingency finally ignores the fact that CalPERS did consider and deny the member’s application, as the Agreement stipulated, not on its medical merits, but on the grounds that it is legally barred due to the authority of *Haywood/Smith/Vandergoot*.

3. The Agreement reflects the parties’ mutual understanding that the member would never return to work for CDCR in any capacity, regardless of the terms employed to reach and express that result. The Agreement’s effect was to permanently sever the member’s employment relationship with CDCR. The Agreement never contemplated that the member, would ever return to work for CDCR, regardless of his future medical condition. Claimant’s argument that, “... [I]n accordance with the settlement that reinstated his employment...,” is factually and legally incorrect. The intent and rationale of the *Haywood/Smith/Vandergoot* decisions is to preclude such a member from obtaining a IDR, because one of the conditions of obtaining that benefit is the preservation of the possibility that the member could return to work if he recovers, a condition that was indisputably not met in this matter.

4. The contingency claim misconstrues the Agreement by inaccurately and incompletely describing certain of its terms. The contingency claim adds words to the Agreement that do not exist; “on its medical merits.” The claimed contingency attempts to change the meaning of the term describing what happens if CalPERS denies the member’s application for IDR. The claimed contingency improperly attempts to narrow the permissible reasons for which CalPERS could deny the application, for any reason, as the

¹² Claimant’s Post-Hearing Brief 4:2-4, 4:10-12, 5:7-8.

term actually appears in the Agreement, to narrowing the permissible grounds for denial to “on the medical merits.”

5. The Agreement does not contain the words “on the medical merits.” The Agreement speaks merely to denial of the application for IDR. The Agreement leaves open the question of any specific reason for the denial by not addressing any identified cause for denial. The Agreement does not leave open any signer’s individual subjective interpretation, reading in meaning that does not appear in the terms. The Agreement’s actual term is as follows:

Appellant agrees that if he is denied a medical retirement by PERS, he will be deemed to have resigned for personal reasons from his position as a Correctional Sergeant effective at the close of business on March 28, 2012 and that Respondent will be deemed to have accepted Appellant’s resignation effective on that date.

6. Claimant’s contentions also seek to bind CalPERS to the four corners of the language CalPERS used in its denial letter as a basis to deny the member’s application for IDL. The contentions cannot restrict the legal analysis of the overall effect of the Agreement to the literal language of the denial letter. The contention ignores the fact that there is no indication or contention that member first, and later, the claimant, were not on notice as to what the basis was for the CalPERS denial.

7. The contentions seek to reverse the order of analysis set forth in *Haywood, Smith* and *Vandergoot*. The contentions claim the Agreement to which CalPERS was not a party can require CalPERS to determine eligibility for a medical retirement and deny that eligibility before CalPERS can contend that being required to evaluate medical eligibility for a disability retirement is absolutely legally barred. The contentions thus impermissibly seek to require CalPERS to perform a role it contends it cannot be legally required to perform as a condition precedent to effectuation of an Agreement to which it was not a party. The contentions claim that if CalPERS does not agree to assess member’s eligibility for IDR on “its medical merits,” despite the existence of the legal bar that precludes such an evaluation, the member’s employment was not terminated. There is nothing in any of the controlling authorities that suggest such Agreement contingencies can legally require CalPERS to ignore the initial *Haywood* legal bar and perform a duty *Haywood, Smith* and *Vandergoot* say it legally cannot, where that Agreement permanently severs the member’s employment and return rights relationship with his employer.

8. The contentions also isolate passages in the Agreement, diverting attention from the Agreement’s overall interpretation and effect; the fact that the Agreement was drafted and implemented to resolve the termination of member’s employment and undisputedly contemplated that the member would never return to CDCR employment, regardless of the outcome of a medical retirement. The contention in claimant’s closing argument, that if the member were granted a disability retirement, and later found to have

recovered sufficiently to be reinstated, that he could indeed be reinstated to CDCR employment, is wholly without merit.

9. The Agreement, considered as a whole, resolves the termination action imposed by the NOAA and contemplates a permanent severance of the employment relationship between the member and CDCR. Permanent severance of the employment relationship brings the matter squarely within the language of *Haywood* and *Smith*, both of which prohibit eligibility for a disability retirement where the severance of the employment relationship is permanent. The member specifically agreed in a key provision of the Agreement to never be able to do what both *Haywood* and *Smith* require—that a person eligible to receive an IDR must be able to seek reinstatement to the same employer in the event the employee recovers from the disability:

Appellant [the member] agrees to never apply for or accept employment or reemployment, reinstatement or placement within the CDCR or any entity providing service to inmates or words within the CDCR.

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. ... 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 the termination through the grievance process.¹³

EXCEPTIONS INAPPLICABLE

10. The *Haywood/Smith/Vandergoot* cases create an exception to the absolute bar that termination, or in this instance, its de facto equivalent, precludes eligibility for an IDR, including the determination of medical eligibility for same. That exception operates where an employee is fired for cause and the employee is able to prove that the discharge is either “the ultimate result of a disabling medical condition” or “preemptive” of an otherwise valid claim for disability retirement.¹⁴ In all other circumstances, termination of the employment relationship renders the employee ineligible for disability retirement.¹⁵

¹³ *Haywood, supra*, p. 1307.

¹⁴ *Haywood, supra*, p. 1305

¹⁵ *Id.*

11. *Smith* explains the *Haywood* exception of a termination that is “preemptive” of an otherwise valid claim for disability retirement. *Smith* addresses claims made by terminated employees that their termination was related to their alleged medical condition, such as claimant’s contentions here. *Smith* explains:

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 disability¹⁶ or indirectly through cause based on the disability.¹⁷

12. The *Smith* court speaks of a right to disability retirement that has “matured” before the termination:

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.¹⁸ 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.¹⁹ Conversely, ‘the right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures....’²⁰ The key issue is thus whether his right to a disability retirement matured before plaintiff’s separation from service. A vested right matures when there is an unconditional right to immediate payment. [Citations omitted]. In the course of deciding when the limitations period commenced in a mandate action against a pension board, the Supreme Court noted that a duty to grant the disability pension (i.e., the reciprocal obligation to a right to immediate payment) *did not arise at the time of the injury itself but when the pension board*

¹⁶ *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206, citing *Haywood, supra*, at p. 305 and Government Code section 21153.

¹⁷ *Id.*, citing *Patton v. Governing Board* (1978) 77 Cal.App.3d 495, 501–502.

¹⁸ *Id.*, at p. 206, Italics in original, additional citations omitted. Emphasis in original.

¹⁹ *Id.*, citing *In re Gray* (1999) State Personnel Bd. Precedential Dec. No. 99–08, p. 6 [disability retirement effective before dismissal does not forestall dismissal; however, dismissal does not affect receipt of disability retirement].)

²⁰ *Id.*, citing *Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749.

*determined that the employee was no longer capable of performing his duties.*²¹ 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.

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.²² 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.²³ Thus, an *entitlement* to a disability retirement cannot rest on the medical evidence of the plaintiff.²⁴

13. There is no evidence that it was "a foregone conclusion" at the time of the NOAA and termination that the member would be indisputably entitled to a disability retirement. The evidence strongly suggests that such a claim would be strenuously

²¹ *Id.*, citing *Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671–672. [“the right has not come into existence until the commission has concluded that the condition of disability renders retirement necessary”].) Emphasis added.

²² *Id.*, at p. 207, citing *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132, 139. Emphasis added.

²³ *Id.*, citing *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00–05, pp. 12–14.

²⁴ *Id.* at p. 207-208.

contested. The evidence reveals the member's claimed substantial incapacity was by no means a foregone conclusion, and there is no evidence that would support a conclusion that the member's right to receive a disability retirement was "matured" at the time he was terminated. *Smith* holds that such a determination cannot be made upon the applicant's evidence alone unless that evidence appears to be irrefutable, which is not the case here. The member here does not meet the exception carved out in *Haywood* and elaborated in *Smith*.

VANDERGOOT

14. Vandergoot entered into a very similar Agreement as did the member, in order to resolve the pending appeal of his termination before the SPB. Vandergoot claimed that *Haywood* and *Smith* did not control because those cases involved employees who were terminated for cause. Vandergoot claimed that because he entered into a settlement in which his employer agreed to withdraw the NOAA, in exchange for his voluntary resignation, and his agreement to never apply for or accept employment with that employer again, he was not terminated. Vandergoot thus made a nearly identical claim to that made by the claimant on behalf of the member here. Vandergoot then applied for disability retirement, and CalPERS rejected the application.

15. The ALJ hearing the Vandergoot case found that, regardless of the terms of the settlement, the practical effect was that Vandergoot had been terminated for cause, relying on *Haywood* and *Smith*. The ALJ determined that if Vandergoot was allowed to receive a disability retirement, there would be no employer who could require him to undergo a medical examination under Government Code section 21192. The ALJ also noted that, in addition, it was no longer possible for Vandergoot to be reinstated under Government Code section 21193. The ALJ concluded that these necessary prerequisites for receiving a disability retirement were absent, thus CalPERS was correct in canceling the application. The ALJ reasoned that *Haywood* makes it clear that a necessary prerequisite for disability retirement is the potential reinstatement of the employment relationship with the employer, if it is ultimately determined that the claimant is no longer disabled, and that termination, whether directly, or through a stipulation, trading off withdrawal of the termination action for a resignation and an agreement to never return to work for that employer, the net effect is that the employment relationship is permanently severed. That severance creates a circumstance where granting the disability retirement sought would be wholly inconsistent with the statutory policies supporting the existence of the benefit²⁵.

16. Claimant contends that the additional term in the Agreement, conditioning the resignation on CalPERS's denial of his application for an IDL, is a distinction from Vandergoot. The contention lacks merit. The practical effect of the Agreement is that the member, had he not died untimely, would never return to work for CDCR in any capacity. The practical effect of the Agreement with CDCR constituted a complete severance of the employer-employee relationship, a necessary prerequisite for IDR-the potential for reinstatement of his employment relationship with the employer if it ultimately is determined

²⁵ *Vandergoot, supra*, p. 19.

that he no longer is disabled. The member agreed to permanently sever his employment relationship CDCR, raising the bar set forth in *Haywood, Smith* and *Vandergoot*. The disability provisions of the Government Code containing PERS law contemplate a potential return to active service. In that the Agreement has made that an impossibility, CalPERS correctly determined that the member was in eligible to apply for disability retirement.

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.’ ”²⁶

ORDER

The claim of Jennifer Navarro is DENIED. The determination of CalPERS’ Benefit Services Division that Anthony Navarro was ineligible to file an application for disability retirement is SUSTAINED, for the reasons set forth in the Legal Conclusions above.

DATED: January 19, 2016

DocuSigned by:

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STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings

²⁶ *Haywood, supra* at 305, *Smith*, at 206, citing *MacIntyre v. Retirement Board of S. F.* (1941) 42 Cal.App.2d 734, 736.