ATTACHMENT B

PROPOSED DECISION

ATTACHMENT B

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

In the Matter of Accepting the Application for Industrial Disability Retirement of: PHILLIP D. MACFARLAND, Applicant/Respondent, and CALIFORNIA STATE PRISON, SACRAMENTO, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent.	Case No. 2014-0177 OAH No. 2014060759

PROPOSED DECISION

Ann Elizabeth Sarli, Administrative Law Judge (ALJ) of the Office of Administrative Hearings, State of California, heard this matter on June 16, 2015 and July 27, 2015, in Sacramento, California.

Complainant, California Public Employees' Retirement System (CalPERS), was represented by Preet Kaur, Staff Counsel.

Applicant, Phillip D. MacFarland, appeared and was represented by Walter L. Davis, Attorney at Law.

There was no appearance on behalf of the California State Prison, Sacramento, California Department of Corrections and Rehabilitation, and a default was taken against this respondent, pursuant to Government Code section 11520.

Evidence and argument were received. The record remained open to allow filing of closing briefs. Applicant's closing brief was filed on August 10, 2015, and was marked for identification as Exhibit K. Complainant closing brief was filed on August 31, 2015, and marked for identification as Exhibit 29. Applicant's reply brief was filed on September 8,

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RETIREMENT SYSTEM
FILED October 8, 2015
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2015, and was marked for identification as Exhibit L. The matter was submitted and the record was closed on September 8, 2015.

ISSUE

Is applicant precluded from filing an application for disability retirement due to termination for cause, pursuant to *Haywood v. American River Fire Protection District* (1998) 67 Cal. App. 4th 1292, *Smith v. City of Napa* (2004) 120 Cal. App. 4th 194 and *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot*, dated February 19, 2013 and made Precedential by the CalPERS Board of Administration on October 16, 2013?

FACTUAL FINDINGS

1. On March 15, 2001, the California Board of Psychology issued a psychologist license to applicant. On October 8, 2010, applicant was employed by the California Department of Corrections and Rehabilitation, California Correctional Health Care Services (CCHCS), as a Clinical Psychologist.

2. At some time not established by the evidence, but before January 2011, criminal charges were filed against applicant for billing his private patients for services not rendered. He was convicted of a violation of Welfare and Institutions Code section 14107 (presenting false Medi-Cal claims), a misdemeanor.

3. Effective January 7, 2011, the California Board of Psychology placed applicant's license on probation for a period of five years, effective January 7, 2011.

4. In May 2012, CCHCS issued memorandums to applicant concerning his job performance and suspended his clinical privileges for two weeks for failing to provide services to suicidal inmates in a timely manner. On June 5, 2012, CCHCS took disciplinary action against applicant by issuing him a Letter of Instruction Memorandum (LOI). The LOI was signed by applicant's supervisor, Karen G. Morgan, Ph.D. The LOI memorialized that, on June 5, 2012, Ms. Morgan had discussed with applicant: "the following areas of your job performance you need to improve in order to bring your performance to an acceptable level." The LOI identified the following areas of unacceptable performance:

> • Applicant failed to offer weekly individual therapy in a confidential setting to at least 80% of the inmate–patients (patients) on his caseload. Only 35% of individual therapy sessions were offered in a confidential setting. Additionally, applicant entered incorrect codes on his contact log, using codes indicating therapy was held in confidential settings, rather than codes for therapy sessions that were held cell side.

• Applicant failed to accurately complete Interdisciplinary Progress Notes detailing contacts with patients he was assigned to treat. Of 40 progress notes reviewed and dated in May 2012, 82.5% were found to be copied from previous progress notes with minor changes (e.g., date, name, setting). In addition, several of these notes were for patients applicant was covering for clinicians who were out. Applicant's progress notes proved to be copies of the other clinician's notes with only minor changes such as the date and signature. Additionally, nine out of 13 records reviewed were improperly, inaccurately or incompletely documented.

• Applicant's documentation of the amount of time he spent providing treatment to patients was either inaccurate or inconsistent with other data. His progress notes frequently did not reflect accurately the duration of the contact. The duration he recorded for every contact in May 2012 was inaccurately reported as 45 minutes. The duration of time he reported on his contact logs was significantly inconsistent with the in and out times recorded in the SHU logs for the cellblocks he was visiting.

• Applicant failed to complete the required documentation of his Interdisciplinary Treatment Team Meetings and Treatment Plans.

• Applicant failed to follow CCHCS policies for requesting time off by completing the form for the supervisor's approval a least one week prior to the time off requested.

5. The LOI set forth detailed expectations for improvement. Ms. Morgan wrote: "I expect you to make a concerted effort to improve in these areas by June 15, 2012 … ." Ms. Morgan also set out detailed plans to retrain applicant and review and monitor his work.

6. The LOI stated that: "This Letter of Instruction will be placed in your Official Personnel File for one year. Upon expiration, you may request its removal." The CCHCS Chief Executive Officer's signature appeared on the LOI under a line approving placement of the LOI in applicant's Official Personnel File.

7. On June 5, 2012, after his discussion with Ms. Morgan and his review of the LOI, applicant signed the LOI acknowledging that he had "received and read a copy of this Letter of Instruction."

8. Applicant was aware that CCHCS was considering disciplinary action against him. He sent a response to the LOI, rebutting his supervisor's complaints.

9. On July 9, 2012, applicant filed a Workers' Compensation Claim Form, alleging he sustained a left knee injury on July 7, 2012, while walking down a prison stairway with a bag of books in his hand. On July 8, 2012, he saw a physician and explained that he lost his balance and stepped down with his left leg and felt a sharp pain in his knee.

10. Applicant's physician took him off work for two weeks. He returned and because he was using crutches, he was placed on light duty. Eventually, on September 11, 2013, applicant had arthroscopic surgery with a partial lateral meniscectomy of the left knee, with minor chondroplasty (reshaping the joint surface) of the lateral tibial plateau.

11. CCHCS began an internal affairs investigation of applicant's conduct at a time not established, but before January 24, 2013. On January 24, 2013, an Internal Affairs investigator interviewed applicant about charges that he was continuing to inaccurately memorialize the time he spent with patients and was continuing to copy documentation from prior treatment records.

12. On February 26, 2013, applicant filed a Workers' Compensation Claim Form, alleging that he suffered from posttraumatic stress disorder (PTSD), due to death threats from patients and having to listen to gruesome and gleeful accounts of murders during group therapy.

13. On July 17, 2013, CCHCS served applicant with a Notice of Adverse Action (NOAA), advising that he would be terminated from his position as a Clinical Psychologist, effective the close of business July 26, 2013. The NOAA stated that adverse action was being taken based on causes set forth in Government Code section 19572, specifically, inexcusable neglect of duty, dishonesty and other failure of good behavior. The NOAA stated that the adverse action was also based upon California Code of Regulations, title 15, division three, subchapter five, article 2, section 3391; the Department Operations Manual; the California Business and Professions Code; and the American Psychological Association Ethical Principles of Psychologists and Code of Conduct.

14. The NOAA stated that applicant had been trained in proper protocols and procedures for charting time spent with patients and making notations regarding treatment provided as well as the standard of care expectations for licensed psychologists. The NOAA noted that applicant's license was on probation to the California State Board of Psychology for billing fraud and that on June 5, 2012 he was issued a Letter of Instruction for failure to offer individual therapy in a confidential setting to patients, failure to accurately complete interdisciplinary progress notes detailing contacts with patients and failure to accurately account for time spent providing treatment to patients. The NOAA stated: "Despite being on probation and receiving the LOI, your misconduct continued."

15. The NOAA set out 11 instances following the June 5, 2012 LOI where applicant was dishonest and inexcusably neglected his duty by failing to accurately memorialize the time he spent with inmates. The internal affairs investigation had shown that on June 12, 14, 15, 18, 19 and 25, 2012, and July 2, 2012, applicant documented that he

treated inmates at certain times. Yet, comparison of the times he documented differed from the Unit Isolation Log for the day, which showed the times that he entered and exited the units.

16. The NOAA also set out one instance where applicant documented objective findings regarding his treatment of a patient. When investigators reviewed his objective findings for the patient and compared them to the May 25, 2012, objective findings of another physician treating that patient, applicant had used the identical language, repeating the same typographical errors, which indicated that he had copied the objective findings from the prior record.

17. The NOAA advised applicant that he would be terminated at the close of business on July 26, 2013. It advised that he had a right to respond to the NOAA within five working days either verbally or in writing. Applicant did not do so and, on July 30, 2013, he was advised in writing by CCHCS that the NOAA was upheld with the effective date of termination as close of business July 26, 2013.

18. The NOAA also advised applicant that he had a right to appeal his termination to the State Personnel Board (SPB) no later than 30 days after July 26, 2013. In accordance with SPB rules, on July 30, 2013, CCHCS filed a Notice of Personnel Action with the SPB noting that it had dismissed applicant on July 26, 2013. It is unclear from the record whether applicant also filed an appeal with the SPB. However, a formal hearing was scheduled for August 26, 2013.

19. Two days after he was served with the NOAA, on July 19, 2013, applicant signed a letter to CCHCS stating that he was "officially retiring effective July 23, 2013 and filing for disability retirement and not returning to CPS sac as per my doctor's orders as my injuries sustained at CSP Sac prevent me from returning to work in the prison environment." Eureka C. Daye, Chief Executive Officer CCHCS, responded with a July 23, 2013 letter confirming receipt of applicant's "intent to retire ...effective July 23, 2013." She wrote: "I have reviewed the circumstances present at the time of your retirement and have determined that your separation was 'under unfavorable circumstances.' Should any prospective employers contact CDCR-CCHCS and request the circumstances of your separation, the above information shall be relayed to them (Labor Code § 1053). In addition, a copy of this letter will be placed in your Official Personnel File that will be forwarded to any other State Department or agency that might re-employ you." CCHCS completed a Notice of Personnel Action Report of Separation, reporting that effective July 23, 2013, applicant had been separated and the "separation type" was "retirement."

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20. On July 19, 2013, applicant filed a Disability Retirement Election Application requesting service-pending industrial disability retirement. He listed his disability as a knee injury and posttraumatic stress disorder, which prohibited him from working with dangerous inmates.[1]

21. On September 19, 2013, applicant signed a Withdrawal of Appeal, withdrawing the SPB appeal of the disciplinary action and stating that he had service-retired on July 23, 2013, prior to the effective date of the adverse action which was July 26, 2013. CCHCS sent a letter to the Office of Administrative Hearings memorializing that both parties agreed to withdraw the appeal and cancel the formal hearing, because applicant had retired on July 23, 2013.

22. On November 15, 2013, CalPERS wrote to applicant and advised him that it was unable to accept his application for industrial disability retirement, and that the application was canceled. The letter stated: "The case of *Haywood vs. American River Fire Protection District* (1998) 67 Cal App. 4th 1292,... holds that where an employee is terminated for cause and the discharge is neither the ultimate result of the disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement. Following a review of your application and file, it has been determined that the facts of your case fit within the *Haywood* case. You were dismissed from employment for reasons which were not the result of a disabling medical condition. Additionally, the dismissal does not appear to be with the purpose of preventing a claim for disability retirement. Therefore, under the *Haywood* case, you are not eligible for disability retirement...."

23. Applicant appealed and wrote to CalPERS advising that he was not terminated, because the proposed adverse action against him was not to take effect until July 26, 2013 and he retired on July 23, 2013. CalPERS filed a Statement of Issues and an Amended Statement of Issues on March 12, 2014, and this hearing ensued.

Discussion

Termination for Cause

24. Applicant argues that he was not terminated for cause from employment and therefore he is eligible to apply for industrial disability retirement. He argues, among other things, that *Haywood* and *Smith* do not preclude his application, because his resignation letter of July 19, 2013 preceded the effective date of the NOAA and, hence, he was never terminated.

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[1] CalPERS canceled the application, apparently because applicant did not respond to its request to provide a completed Workers' Compensation Carrier Request form. Applicant submitted another application on October 8, 2013, based on the same claims.

25. CalPERS argues that applicant was terminated pursuant to the NOAA and supports this argument with the NOAA, the letter from Eureka Daye advising his separation was under unfavorable circumstances and the testimony of Kisha Ogans, a Medical Employee Relations Officer from CCHCS. She testified persuasively that applicant was terminated pursuant to the NOAA under unfavorable circumstances and for cause; that he could not seek reemployment with CDCR; and that, in the event he attempted to seek reemployment, the NOAA would be enforced. Ms. Ogans testified that applicant's letter of resignation/retirement did not impact his reinstatement rights and he could not return to CDCR. Ms. Ogans testified that applicant's letter of resignation/retirement did not prevent CCHCS from enforcing the NOAA should he attempt to reinstate and that he could not return to CDCR.

26. The record is clear that applicant's employer made its decision to terminate him on or before it issued the July 17, 2013 NOAA, advising that his employment would be terminated on July 23, 2013. Applicant service-retired from his employment three days before the effective date of his termination for cause. Had applicant not service-retired on July 23, 2013, his employment would have been terminated on July 26, 2013. The evidence is persuasive that should applicant attempt to reinstate with his employer, the NOAA would be enforced and he would be barred from reinstatement. Additionally, applicant waived any appeal rights and would be barred from seeking to overturn the NOAA.

27. In *Haywood,* the appellate court found: "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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed." The court explained that: "A firing for cause constitutes a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement-the potential reinstatement of [the employee with the employer] if it is ultimately determined that he is no longer disabled .... The disability provisions of the PERS law contemplate a potential return to active service and a terminated employee cannot be returned to active service." (*Haywood, supra,* 67 Cal. App. 4th at 1306-1307.)

28. In *Vandergoot,* the Board held an employee's resignation was tantamount to a dismissal when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and agreed to waive all rights to return to his former employer. As explained in *Vandergoot*, "a necessary requisite for disability retirement is the potential reinstatement of the employment relationship" with the employer if it ultimately is determined that the employee is no longer disabled. (*Vandergoot, supra,* p. 7, ¶ 18.)

29. The law does not respect form over substance. (*Pulaski v. Calif. Occupational Safety and Health Standards Board* (1999) 75 Cal.App.4th 1315, 1328.) The courts look to the "objective realities of a transaction rather than to the particular form the parties employed. Thus, we focus on the actual rights and benefits acquired, not the labels used." (*General Mills v. Franchise Tax Bd.* (2009) 172 Cal.App.4th 1535, 1543.) Here, the

evidence is persuasive that applicant retired to avoid termination from employment. His relationship with his employer had been severed prior to his retirement, when the NOAA was served on him. His severance became irrevocable when he withdrew any appeal he filed. Applicant is barred from returning to his former employment and thus the holdings in *Vandergoot* and *Haywood* render him ineligible for disability retirement, unless he meets an exception identified in *Haywood* and *Smith*.

Matured Right to Disability Retirement

30. Applicant maintains that he had a matured right to disability retirement at the time of his separation from employment. He claims he had not been able to work for about a year before the NOAA was issued, due to knee pain and posttraumatic stress disorder. He claims that reports from two medical evaluators connected with his workers' compensation claims establish that he had a matured right to disability retirement at the time of his separation from employment. CalPERS relies upon the holdings of *Smith* and *Haywood*, which are explained as follows. The *Smith* court held that dismissal for cause extinguishes the right to disability retirement, except if a plaintiff were able to prove that the right to 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. (*Smith, supra,* 120 Cal App.4th at 206.) The court identified the key issue as whether the right to the disability retirement matures before the date of separation from service. It found that a vested right matures when there is an unconditional right to immediate payment. And, in the case of CalPERS disability retirement, there is no unconditional right to immediate payment without a finding by CalPERS that there is a right to a disability retirement pension. (*Ibid.*)

31. In *Smith*, the court pointed out that in its *Haywood* ruling:

> We took pains to exclude from our holding in *Haywood* a party otherwise entitled to a disability retirement before a dismissal for cause.... The distinction with which we were concerned is between employees dismissed for cause and employees unable to work because of a medical disability.... We repeatedly cautioned that our holding would not apply where the cause for dismissal was the result of a disabling medical condition, or where the dismissal would be 'preemptive of 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 (citing *Haywood*) or indirectly through cause based on the disability .... 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 ... 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... Conversely, the right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures... 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. (Italics in original.)

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. And for purposes of the standard for a disability retirement, the plaintiff's medical evidence is not unequivocal. (*Smith vs. City of Napa* (2004) 120 Cal App.4th 194, 205- 206.)

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. (*Id.* at 207, FN 13.)

32. At the time that CCHCS issued the NOAA and severed its employment relationship with applicant, applicant had no unconditional right to immediate payment of a disability retirement. His workers' compensation actions were unresolved, and had no bearing on a determination as to whether he was substantially and permanently incapacitated from his duties under retirement law. CalPERS had had no opportunity to evaluate any disability claims; applicant did not even initiate the disability retirement process until after giving cause for his dismissal. Applicant had no unconditional right to immediate payment of a disability pension at the time he was terminated.

33. Applicant is ineligible to apply for disability retirement or for industrial disability retirement under Government Code section 21151. His eligibility is precluded by operation of the holdings in *Haywood, Smith* and *Vandergoot.*

LEGAL CONCLUSIONS

1. By virtue of applicant's employment by the CCHCS as a Clinical Psychologist, applicant became a state safety member of CalPERS subject to Government Code sections 21154.

Government Code section 21154 provides in pertinent part:

> The application [for disability retirement] shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

2. As set forth in the Findings, applicant's application for disability retirement is precluded by the holdings in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, *Smith* vs. *City of Napa* (2004) 120 Cal App.4th 194 and the CalPERS Precedential Decision 13-01, *In the Matter of Application for Disability Retirement of Robert C. Vandergoot and California Dept of Forestry Protection* (2013). Applicant's termination from employment extinguished any right to file a Disability Retirement Election Application.

ORDER

The determination of CalPERS that Phillip D. MacFarland may not file a Disability Retirement Election Application is Affirmed. Phillip D. MacFarland's appeal is Denied.

DATED: October 7, 2015

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Ann Sarli
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ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings