

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

PAUL A. CABACUNGAN,

Respondent,

and

DEPARTMENT OF CORRECTIONS AND
REHABILITATION, SALINAS VALLEY
STATE PRISON,

Respondent.

Case No. 2014-0972

OAH No. 2015010631

PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on February 3, 2016, in Salinas, California.

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

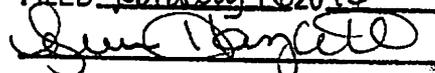
Respondent Paul A. Cabacungan represented himself and was present throughout the administrative hearing.

No appearance was made by or on behalf of respondent Department of Corrections and Rehabilitation or Salinas Valley State Prison.

The matter was submitted for decision on February 3, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED February 16, 2016



ISSUE

Is respondent precluded from filing an application for disability retirement in light of his resignation after being served with a notice of adverse action and notice of rejection dismissing him from state service?

FACTUAL FINDINGS

1. Anthony Suine, Chief of the Benefit Services Division of CalPERS, filed the statement of issues in his official capacity.

Respondent's Disability Retirement Application

2. Paul A. Cabacungan (respondent) was employed by the Department of Corrections and Rehabilitation, at Salinas Valley State Prison, as a correctional officer. By virtue of his employment, respondent became a state safety member of CalPERS.

3. On August 13, 2012, respondent signed an application for industrial disability retirement, received by CalPERS on August 20, 2012. Respondent claimed that he was disabled as a result of orthopedic injuries (back, neck, right elbow and right leg), and psychological conditions (post-traumatic stress disorder, depression and anxiety). Respondent asserted in the application that the orthopedic injuries occurred on August 10, 2005, when he was assaulted by an inmate, and that the psychological injuries occurred as a result with an onset in July 2007.

Employment History at the Salinas Valley State Prison

4. Respondent attended correctional officer academy at the Richard A. McGee Correctional Training Center. After graduating in February 2006, he was hired as a part-time correctional officer at Salinas Valley State Prison.

5. On August 10, 2006, Salinas Valley State Prison Warden, M. S. Evans issued a Notice of Adverse Action to respondent. The Notice of Adverse Action alleged that on August 10, 2005, respondent used unnecessary and excessive force upon an inmate while escorting the inmate to his cell. The Notice of Adverse Action also alleged that on December 12, 2005, respondent had been dishonest in his investigative interview concerning his actions during the incident. Warden Evans found respondent's conduct to violate Government Code section 19572, subdivisions (b) (incompetence); (c) (inefficiency); (d) (inexcusable neglect of duty); (e) (insubordination); (f) (dishonesty); (o) willful disobedience); and, (t) (failure of good behavior), and California Code of Regulations, title 15, sections 3268 (excessive force) and 3391 (employee conduct).

The Notice of Adverse Action advised respondent that he was being terminated from his position as a correctional officer as a result of the findings. The Notice further advised

respondent that he had the right to inspect documents relevant to the charges, respond to the appointing authority or appeal to the State Personnel Board.

6. On August 18, 2006, respondent was served with a Notice of Rejection during Probationary Period. The Notice of Rejection stated that effective August 25, 2006, respondent was being rejected from his position as a correctional officer during his probationary period. The Notice of Rejection stated that the cause for rejection was his failure to demonstrate merit, efficiency, fitness and moral responsibility.

The Notice of Rejection identified an incident occurring on January 6, 2005, while respondent was assigned at the Richard A. McGee Correctional Training Center. The Notice of Rejection stated that respondent had received a Letter of Instruction for violating regulations concerning willful disobedience and disregard of rules and regulations. The Notice of Rejection cited another incident occurring at the Training Center; on December 15, 2004, respondent's locker was found unsecured. Finally, the Notice of Rejection cited the incidents described in Factual Finding 5. The Notice of Rejection advised respondent of his right to inspect documents, respond to the Appointing Authority, or to appeal to the State Personnel Board.¹

7. On August 25, 2006, respondent submitted a letter resigning his position as a correctional officer, citing personal reasons.

8. On August 28, 2006, Warden Evans responded in a letter stating:

Salinas Valley State Prison is in receipt of your letter of resignation. You are requesting that your resignation be effective August 25, 2006. This letter will acknowledge the Department's acceptance of that resignation. However, it is noted that you resigned while pending the service of Adverse Action with the recommended penalty of Dismissal from State service and Rejection of Probation. Should your prospective employers contact the Department for information regarding your resignation, the circumstances surrounding your resignation will be disclosed.

A copy of this letter will be placed in your official personnel file. In light of the circumstances surrounding your resignation, you are obligated to disclose that you have resigned under unfavorable circumstances on any future State employment

¹ It was not established at hearing whether the Department of Corrections and Rehabilitation was seeking to terminate respondent as a permanent employee, or to reject him as a probationary employee. The resolution of that issue does not affect the determination of this matter.

application. If you gain employment with the Department in the future, the Department will continue the action against you. You are entitled to respond to this letter, in writing, within 30 days. Your response will be included in your personnel file.

9. Respondent's personnel file contains no information concerning any injuries sustained by respondent, or his inability to work due to a disability.

Respondent's Evidence

10. Respondent testified at hearing concerning his strong disagreement with the findings made in the Notice of Adverse Action. Respondent asserts that the Notice of Adverse Action was filed against him for two reasons: 1) because he challenged the warden when the warden offered to waive the probationary period of recent graduates of the academy so that they could be required to work overtime; and, 2) because he was unwilling to cooperate with other correctional officers who looked the other way when the inmates removed fruit from the kitchen to make illicit alcohol.

11. Respondent elected not to appeal the adverse action for several reasons. Respondent was studying to obtain his real estate appraisal license in 2006, and had not intended to continue working as a correctional officer. He had already applied to take the real estate appraiser examination in October 2006. After receiving the Notice of Adverse Action, respondent decided to pursue his career in real estate appraisal rather than fight the disciplinary action.

Respondent obtained his real estate appraiser's license and worked in that field for a period of time, but had difficulty with the physical aspects of the job due to his orthopedic injuries.

12. In addition to his desire to pursue a career in real estate appraisal, respondent decided not to appeal the Notice of Adverse Action because he was disillusioned by the manner in which the prison was run; he felt it was a corrupt and manipulative environment.

13. Respondent sustained orthopedic injuries during the confrontation he had with an inmate on August 10, 2005; his psychological injuries followed later. Respondent reports that the reason he waited six years to file his application for disability retirement was because he was unaware of the severity of the injuries he sustained until much later, and because he was unaware he might be entitled to disability retirement benefits.

LEGAL CONCLUSIONS

Burden and Standard of Proof

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

Eligibility for Disability Retirement

2. By virtue of his employment, respondent is a state safety member of CalPERS. Eligible CalPERS members, who are incapacitated physically or mentally for the performance of duty, may apply to retire for disability. (Gov. Code, §§ 21150 to 21154.) Government Code section 21154, which sets forth the conditions for filing a disability retirement application, states in pertinent part:

The application 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 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.

THE HAYWOOD RULING

3. The issue here is whether respondent is eligible to apply for disability retirement after having resigned while a Notice of Adverse Action and Notice of Rejection were pending. In *Haywood v. American River Fire Protection District* (1998) 67 Cal. App.4th 1292, the court held that when an employee is terminated, the employee is ineligible for disability retirement unless certain exceptions are established. The court explained that an employee's dismissal constitutes a complete severance of the employer – employee relationship, thus eliminating a necessary requisite for disability retirement: the potential reinstatement of the employment relationship if it ultimately is determined that the employee is no longer disabled. (Gov. Code, §§ 21192, 21193 [disability retirement recipient's retirement allowance may be cancelled and employee reinstated if it is found recipient is capable of working].) The *Haywood* court also drew a distinction between an employee who is medically unable to work versus an employee who is unwilling to work; disability retirement laws are not intended to require an employer to pay a pension to unwilling employees. (*Id.* at pp. 1304–1305; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194.)

Although respondent resigned, rather than having been terminated, his resignation was tantamount to termination. Respondent was served with a Notice of Adverse Action and

Notice of Rejection, dismissing him from state service, and he resigned under unfavorable circumstances. Respondent was notified that if he applied to return to work for the Department of Corrections and Rehabilitation in the future, dismissal proceedings would begin anew. (Factual Findings 5 through 8.) He was therefore advised that he was not eligible for reinstatement. Under these circumstances, the employment relationship was severed and his resignation was tantamount to termination. (See, *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (October 16, 2013) Precedential Decision 13-01, Case No. 2012-0287, OAH No. 2012050989.)

Respondent's disagreement with the basis for his termination is not properly raised or considered in this proceeding. Respondent had the opportunity to contest the Notice of Adverse Action and Notice of Rejection, but chose not to do so.

EXCEPTIONS TO THE *HAYWOOD* RULE

4. The *Haywood* court identified two instances in which a terminated employee may nevertheless apply for disability retirement: 1) where the employee establishes that the separation from service was the ultimate result of a disabling condition; or, 2) where the employee establishes that the separation from service preempted an otherwise valid claim for disability retirement.

5. Respondent did not establish that his separation from service was the ultimate result of his disabling condition. Respondent's personnel file contained no information regarding injuries or disability. The basis for respondent's disciplinary action involved his use of excessive force on an inmate and his dishonesty during the internal affairs interview. (Factual Findings 5, 6 7 and 9.) Moreover, respondent's testimony regarding the basis for the disciplinary action taken against him does not support the conclusion that he was terminated as a result of his disabling condition. (Factual Finding 10.)

6. Respondent did not establish that the Department of Corrections and Rehabilitation terminated him for the purpose of preempting an otherwise valid claim for disability retirement.

In *Smith v. City of Napa, supra*, 120 Cal.App.4th 194, 206, the court explained that a disability claim must have "matured" in order to find that a disciplinary action preempts the right to receive a disability retirement pension, and this maturation does not occur at the time of the injury, but rather when the pension board determines that the employee was no longer capable of performing his duties. (*Id.* at p. 206.) Respondent filed his application for disability retirement six years after he resigned under unfavorable circumstances; his right to disability retirement had not matured when disciplinary action was taken. (Factual Findings 3, 7, 8 and 13.)

Conclusion

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

ORDER

The appeal of respondent Paul A. Cabacungan is denied.

DATED: February 10, 2016

DocuSigned by:
Jill Schlichtmann
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JILL SCHLICHTMANN
Administrative Law Judge
Office of Administrative Hearings