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 Industrial Disability Retirement of: FREDERICK JOHNSON, Respondent. and DEPARTMENT OF CORRECTIONS, VALLEY STATE PRISON, Respondent.	Case No. 2014-0148 OAH No. 2015050536

PROPOSED DECISION

On March 3, 2016, this matter was heard before Danette C. Brown, Administrative Law Judge, in Sacramento, California.

California Public Employees' Retirement System (CalPERS), was represented by Kevin Kreutz, Senior Staff Counsel.

Frederick Johnson (respondent) represented himself.

No appearance was made by or on behalf of respondent Department of Corrections, Valley State Prison (VSP). Proper service of the Statement of Issues and Notice of Hearing was made. The matter proceeded as a default against respondent VSP, pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on March 3, 2016.

CalPERS requested Official Notice, pursuant to Government Code section 11515 and Evidence Code section 452, of:

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED April 4, 2016
Summer Naylett

1. The termination documents regarding respondent by VSP and/or the State Personnel Board:

    a. July 28, 2010 Case Closure Notice

    b. August 16, 2010 Notice of Adverse Action Withdrawn

    c. August 16, 2010 Letter of Instruction

    d. July 8, 2011 Notice of Adverse Action

    e. August 11, 2011 Skelly Determination

    f. September 7, 2012 State Personnel Board determination upholding Notice of Adverse Action

    g. July 31, 2013 Report of Adverse Action

2. *Haywood v. American River Fire Protection District* (1999) 67 Cal.App. 4th 1292 (*Haywood*).

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

4. Precedential Decision, *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot, Respondent*, dated February 19, 2013, made Precedential by the CalPERS Board of Administration, effective October 16, 2013 (*Vandergoot*).

Respondent did not object to CalPERS' request for Official Notice. Official Notice is hereby taken of the items cited above.

ISSUE

This appeal is limited to the issue of whether respondent is precluded from applying for industrial disability retirement because he was terminated for cause before he filed his industrial disability retirement application.

FACTUAL FINDINGS

1. Respondent was employed by VSP as a Correctional Supervising Cook in 1993. He was later promoted to Supervising Correctional Cook in 2000, and he remained in this position until his dismissal on August 14, 2011.

2. Effective August 14, 2011, respondent was terminated for cause after: referring to inmates by derogatory names; engaging in unprofessional, overfamiliar and flirtatious behavior with female inmates on numerous occasions; exhibiting discourteous treatment toward a Correctional Officer; violating California Department of Corrections and Rehabilitation (CDCR) policies by furnishing inmates with extra food items and bleach on a consistent basis; and making dishonest statements during his administrative inquiry.

3. Respondent appealed his termination to the State Personnel Board (SPB). On September 7, 2012, SPB upheld respondent's termination, finding that respondent: (1) engaged in inexcusable neglect of duty by using inappropriate and overfamiliar nicknames for inmates, grabbing and rubbing an inmate's hand, then leaning within inches of her and whispering into her ear; flirting with an inmate; and distributing surplus food to inmates; (2) was dishonest during an administrative inquiry when he denied having no physical contact with a correctional officer; (3) engaged in discourteous treatment when he was flippant, rude and demeaning to the correctional officer after she observed respondent's interaction with a female inmate; and (4) engaged in other failure of good behavior due to his misconduct.

4. On June 18, 2013, almost two years after he was terminated for cause, respondent submitted his application for industrial disability retirement to CalPERS. Respondent based his application on cumulative stress of a "mental/psychological" nature due to the "false allegations of misconduct made by other staff members." Respondent also based his application on "lower back/right leg nerve damage," and "numbness in right leg/foot" due to being confined in a sitting position after being temporarily reassigned to the mail room at VSP during the investigation and prior to his termination.

5. On October 3, 2013, CalPERS notified respondent that his application had been cancelled based upon the following: (1) he was terminated for cause; (2) his termination was neither the ultimate result of a disabling medical condition nor preemptive of any otherwise valid claim for disability retirement; (3) the CalPERS Board had not determined that respondent was no longer capable of performing his duties before the effective date of his termination; and (4) he did not have an unconditional right to immediate payment of disability retirement benefits at the time of his termination. Respondent timely appealed from CalPERS' cancellation of his disability retirement application.

6. Respondent testified at hearing that the cause for his termination was the result of his disability. He stated that the "allegations prior to the investigation stressed me out." Respondent believed that his termination was the ultimate result of his medical condition caused by stress due to VSP's investigation. He also asserted that "I am a victim of calumny."

7. There was no indication in any of the evidence that VSP terminated respondent's employment in order to pre-empt him from filing a disability retirement application. Instead, as set forth in the notice of adverse action served on him and the decision of the SPB, respondent's termination was based on factual and legal causes unrelated to respondent's current claim for disability retirement.

LEGAL CONCLUSIONS

1. In *Haywood,* the appellate court found that "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." (*Haywood, supra,* 67 Cal.App.4th at p. 1307.) 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." (*Id.* at pp. 1306-1307.)

2. More recently, the court in *Smith* analyzed the holding in *Haywood.* The *Smith* court held that a termination for cause extinguishes the right to disability retirement, except if an employee were able to prove that the right to disability retirement matured before the date of the event giving cause to dismiss. (*Smith, supra,* 120 Cal.App. 4th at p. 206.) The court explained that a right to disability retirement matures as follows:

> A vested right matures when there is an unconditional right to immediate payment. [Citations.] 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 determined that the employee was no longer capable of performing his duties.** (*Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672 [197 P.2d 710] ["the right has not come into existence until the commission has concluded that the condition of disability renders retirement necessary.") [Footnote omitted.] 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.

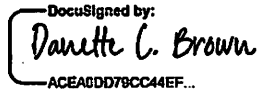
(*Ibid.* Bold added.)

3. At the time respondent was terminated, he did not have a mature right to disability retirement. The CalPERS Board had not determined that he was no longer capable of performing his duties as a Supervising Correctional Cook. He did not have an unconditional right to immediate payment of disability retirement benefits. There was no indication that VSP terminated respondent's employment in order to pre-empt him from filing a disability retirement application. Instead, as set forth in the notice of adverse action and the decision of the SPB, respondent's termination was based on factual and legal causes unrelated to respondent's current claim for disability retirement. Because respondent did not have a mature right to disability retirement before he was terminated, his termination precluded him from thereafter applying for disability retirement. Consequently, in accordance with *Haywood* and *Smith*, respondent's appeal to be allowed to submit an application for disability retirement must be denied.

ORDER

Respondent Frederick Johnson's appeal seeking to submit an application for industrial disability retirement is DENIED.

DATED: April 1, 2016



DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings