

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:

GEORGE GERBER,

Respondent,

and

SWEETWATER UNION HIGH SCHOOL
DISTRICT,

Respondent.

Case No. 2015-0378

OAH No. 2015060266

PROPOSED DECISION

Administrative Law Judge Debra D. Nye-Perkins, Office of Administrative Hearings, State of California, heard this matter on March 2, 2016, in San Diego, California.

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

Leah M. Peer, Attorney at Law, represented respondent George Gerber.

No one appeared for or on behalf of respondent Sweetwater Union High School District.

Evidence was received, and the record was left open for the parties to submit closing and reply briefs. CalPERS's closing brief is marked as Exhibit 11¹ and respondent's closing

¹ CalPERS's closing brief included a request that Exhibit 8A (a document purporting to be an unpublished decision from the Court of Appeal, Fourth Appellate District, Division One, State of California) be admitted into evidence. CalPERS's attorney asserted that the document was excluded from evidence based on relevancy. CalPERS's attorney was not completely correct; the document was also excluded from evidence at hearing for lack of foundation and authentication. While it appeared on its face to be a court document, it was

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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Mailee-Morgan

brief is marked as Exhibit H.² The record was closed, and the matter was submitted for decision on March 16, 2016.

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 re Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13?

FACTUAL FINDINGS

Employment History

1. Mr. Gerber began working as an AC/HVAC and refrigeration technician in 1991 at the Sweetwater Union High School District. As a result of such employment, Mr. Gerber was a local miscellaneous member of CalPERS, and subject to Government Code section 21154. Mr. Gerber held this position for 17 years.

2. Mr. Gerber's duties as an AC/HVAC and refrigeration technician included repair and maintenance of all air conditioning, refrigeration and ventilation equipment and appliances in the Sweetwater Union High School District. His duties required him to travel to 30 different schools in the district. Mr. Gerber testified that for the first 15 years of his employment at the Sweetwater Union High School District, he received good performance evaluations. On April 14, 2009, Mr. Gerber was placed on administrative leave without pay. He was dismissed from his employment on January 26, 2010, pursuant to a Notice of Disciplinary Action.

Application for Disability Retirement

3. Mr. Gerber signed an Application for Industrial Disability Retirement on April 5, 2013. He identified his specific disability as:

not a certified copy and is not self-authenticating under any provision of the Evidence Code and counsel for CalPERS failed to present a witness to authenticate this document. The request is denied.

² Respondent's closing brief included a request that a February 18, 2015, letter from Mr. Gerber's counsel to the Board of Administration be admitted into evidence as the correct letter of appeal to the denial of his application for disability retirement. Having received no objection to this request, the request is granted. The letter is marked as Exhibit I and admitted into evidence. Both parties' closing and reply briefs were considered in their entirety, but not admitted into evidence.

Bad back, (2) Bad Hips, Bad Knee, Degenerative Joint Disorder.

He indicated that his disability occurred on May 10, 2007, and is progressive. In response to the question "How did the disability occur?" he responded "Work Aggravated [sic]." Mr. Gerber's application makes reference to attached doctor reports, but no such reports were offered into evidence.

Mr. Gerber wrote that his disability "has rendered [him] unable to perform [his] job duties."

4. On August 24, 2014, CalPERS sent Mr. Gerber correspondence stating his application for disability retirement was being canceled because:

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

5. Mr. Gerber timely appealed CalPERS's decision to cancel his application. On May 26, 2015, Anthony Suine, Chief of the Benefit Services Division of CalPERS, signed the Statement of Issues, solely in his official capacity.

Evidence Regarding the Onset of Mr. Gerber's Disability

6. According to Mr. Gerber's application, his disability occurred on May 10, 2007. Mr. Gerber testified that his first physical symptoms related to his work occurred in February or March of 2007 and he made his first workers' compensation claim for that injury in May 2007. He testified that his symptoms at that time were related to pain in his hips and back. Mr. Gerber's workers' compensation application form was admitted in evidence and indicates that he filed for workers' compensation on May 16, 2007, and described his injury in that document as "feet, legs, hips, back and arm." No evidence was presented other than this workers' compensation application and his own testimony to support his claims of medical injury.

7. Mr. Gerber testified that he began having physical symptoms after being transferred in January 2007 to a warehouse in Vista, California. He stated that he worked in bad conditions and was on his feet all day long, working with equipment that was not in proper working order. He claimed that as a result of these conditions he became ill. Mr. Gerber sought treatment from a physician in early 2007. He stated that the physician "diagnosed me with issues with my skin, respiration, and pain in my bones."

Mr. Gerber stated that in 2008 he received accommodation from the school district because of his injuries, which included limitations on the amount of weight he could lift. Mr. Gerber testified that he sought physical therapy for his injuries, and when he took "sick time" for doctor's appointments, he was reprimanded for doing so.

On December 19, 2008, Mr. Gerber received a Notice of Proposed Dismissal from the school district. Mr. Gerber testified that on the date he received this Notice of Proposed Dismissal, he had been in the process of seeking approval for surgery on his left hip to treat his injuries. On April 14, 2009, Mr. Gerber was placed on administrative leave without pay. Mr. Gerber testified that at the time he received this Notice of Proposed Dismissal, he was already scheduled to have hip surgery sometime in early 2010.

Mr. Gerber received an adverse decision on his hearing for the Notice of Proposed Dismissal and was terminated from his job on January 26, 2010. Mr. Gerber had not yet had the hip surgery at the time of his dismissal. He testified that his doctors told him that if the surgery did not go well, he may not be able to return to work.

After his dismissal from his job, Mr. Gerber stated that he had several surgeries for his injuries. According to Mr. Gerber, his physician eventually told him sometime in 2012 that he was totally disabled and unable to return to his usual and customary occupation.

Severance of the Employer-Employee Relationship

8. The evidence established that Mr. Gerber was terminated from his job at the school district on January 26, 2010, as a result of a Notice of Proposed Dismissal following an administrative hearing. It is undisputed that the final decision from that hearing found that Mr. Gerber was terminated for being insubordinate and failing to perform his duties in a satisfactory manner. Mr. Gerber disagreed with those findings, but testified that he did not file a writ of mandate to contest the final administrative decision regarding his termination. Instead, he filed a civil lawsuit against the school district. The lawsuit continued until 2014 when it was dismissed.

Relevant Legal Authority

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

[W]e conclude that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of the disabling medical condition or preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for

disability retirement regardless of whether a timely application is filed.

(*Id.* at p. 1307.)

The appellate court explained:

Thus, there is an obvious distinction between an employee who has become medically unable to perform his usual duties and one who has become unwilling to do so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. (See *Schneider v. Civil Service Com.*, *supra*, 137 Cal.App.2d at p. 285 [upholding the termination of employment as a means to deal with an unwilling employee].)³ Nor are disability retirement laws intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. “The pension roll is a roll of honor—a reward of merit, not a refuge from disgrace; and it would be an absurd construction of the language creating it to hold that the intention of the Legislature was to give a life annuity to persons who, on their merits, as distinguished from mere time of service, might be dismissed from the force for misbehavior.” (*MacIntyre v. Retirement Board of S.F.*, *supra*, 42 Cal.App.2d at p. 736.)⁴ This unable/unwilling dichotomy, and the role of disability retirement in addressing only the unable-to-work prong, is apparent in the PERS law. For example, while nothing in the PERS law restricts an employer’s right to fire an unwilling employee, the Legislature has precluded an employer from terminating an employee because of medical disability if the employee would be otherwise eligible for disability retirement. (§ 21153.) In such a case, the employer must instead apply for the disability retirement of the employee. (*Ibid.*) In addition, while termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship (§ 19583.1), disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches the age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues. (§ 21192.) And an

³ *Schneider v. Civil Service Com.* (1955) 137 Cal.App.2d 277.

⁴ *MacIntyre v. Retirement Bd. of S.F.* (1941) 42 Cal.App.2d 734.

employee on disability retirement may apply for reinstatement on the ground of recovery. (*Ibid.*) If an employee on disability retirement is found not to be disabled any longer, the employer may⁵ reinstate the employee, and his disability allowance terminates. (§ 21193.)

(*Haywood, supra*, 67 Cal.App.4th at pp. 1304-1305.)

10. Later, the same appellate court explained its rationale for the exception that applies when an employee is fired because he has a disabling medical condition or his termination preempts an otherwise valid claim for disability retirement:

This caveat flows from a public agency's obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability [citations] or indirectly through cause based on the disability [citation].

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

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

In the present case, a CalPERS determination of eligibility did not antedate the unsuccessful certification on the ladder truck. His right to a disability retirement was thus immature, and his dismissal for cause defeated it.

(*Ibid.*)

⁵ In *Department of Justice v. Bd. of Administration of California Public Employees' Retirement System* (2015) 242 Cal.App.4th 133, the appellate court explained that an employer's duty of unconditional reinstatement under Government Code section 21193 is mandatory "when a recipient of disability retirement is no longer incapacitated by the condition for which she was retired." (*Id.* at p. 142.)

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

Conceivably, there may be facts under which a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause. This case does not present facts on which to explore the outer limits of maturity, however.

It is not as if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal. Rather, he did not even initiate the process until after giving cause for his dismissal.

Nor, for that matter, is there undisputed evidence that the plaintiff was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb). At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers' compensation claims. But a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567, 262 Cal.Rptr. 566; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132, 139 Cal.Rptr. 814.) And for purposes of the standard for a disability retirement, the plaintiff's medical evidence is not unequivocal. The defendants would have a basis for litigating whether this evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862, 143 Cal.Rptr. 760; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877, 86 Cal.Rptr. 450; *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.) Thus, an entitlement to a disability retirement cannot rest on the medical evidence of the plaintiff.

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

11. The Board of Administration extended the rule articulated in *Haywood* and applied in *Smith* to a state employee who voluntarily resigned his employment as a heavy equipment operator with the California Department of Forestry and Fire Protection in its

precedential decision *In re Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01.⁶ Concluding that *Haywood's* holding applies whether Mr. Vandergoot was terminated for cause or voluntarily resigned his employment and waived any reinstatement rights, the Board of Administration explained:

In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*. This is because *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the District if it ultimately is determined that respondent is no longer disabled. (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at pp. 1296 - 1297.) Such is not possible here. The employment relationship has not only been severed, but the terms of the Stipulation and Settlement Agreement expressly lock respondent out from being reinstated. Such a circumstance must be viewed as wholly inconsistent with the policy behind and rationale for disability retirement

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

Application of Relevant Legal Authority

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

Here, Mr. Gerber was terminated for cause on January 26, 2010, and as of that date he could not be reinstated to his job. While Mr. Gerber disagrees with the findings in the final administrative decision that he was terminated for cause, and he asserts in this hearing that his medical conditions were the reason for his termination, he failed to file a petition for a

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

writ of mandate to challenge the findings in the final administrative decision. His own physician did not make a determination that he was disabled and unable to return to his customary occupation until sometime in 2012. He did not file his application for disability retirement until April 5, 2013.

13. The exception articulated in *Haywood* does not apply because: 1) the complete severance of the employer-employee relationship between the school district and Mr. Gerber was the result of his dismissal and he therefore had no reinstatement rights as of January 26, 2010, and 2) the severance of that relationship did not preempt an otherwise valid claim for disability retirement because the Board of Administration had not yet determined him to be substantially incapacitated for the performance of his usual job duties.

14. The equitable exception announced in *Smith* does not apply either. Mr. Gerber did not apply for disability retirement until more than three years *after* the effective date of his dismissal. Accordingly, there was no impending ruling on his application that was delayed, for reasons beyond his control, until after his dismissal. Therefore, Mr. Gerber did not have a matured right to a pension when he was dismissed, and the severance of his employer-employee relationship with the school district did not effectuate a forfeiture of a matured right to a disability retirement.

Summary

15. Mr. Gerber's dismissal for cause on January 26, 2010, allowed for no reinstatement rights and effectuated "a complete severance of the employer-employee relationship" between the Mr. Gerber and the school district such that he is ineligible for a disability retirement. The severance of that relationship was not the result of a disabling medical condition. Given that Mr. Berger did not apply for a disability retirement until more than three years after his resignation, the severance of his relationship with the school district did not preempt an otherwise valid claim for disability retirement. Therefore, Mr. Gerber's application for disability retirement should be cancelled.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

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

Applicable Law

2. Government Code section 21150 provides, in pertinent part:
A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age ...
3. Government Code section 21151, subdivision (a), provides: "Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service." Government Code section 21151, subdivision (b), provides: "This section also applies to local miscellaneous members if the contracting agency employing those members elects to be subject to this section by amendment to its contract."
4. Government Code section 21156, subdivision (a), provides, in pertinent part:
 - (1) If the medical examination and other available information show to the satisfaction of the board ... that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability ...
 - (2) In determining whether a member is eligible to retire for disability, the board ... shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.
5. Government Code section 21154 provides:

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 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.

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

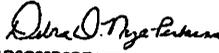
Conclusion

7. Mr. Gerber is not eligible for disability retirement for the reasons explained above. Therefore, his application for disability retirement is canceled.

ORDER

Respondent George Gerber's application for disability retirement is canceled.

DATED: April 8, 2016

DocuSigned by:

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DEBRA D. NYE-PERKINS
Administrative Law Judge
Office of Administrative Hearings