ATTACHMENT E

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: CYNTHIA A. JAMISON, Respondent, and DEPARTMENT OF HEALTH CARE SERVICES (ALCOHOL AND DRUG PROGRAMS), Respondent.	Case No. 2015-0079 OAH No. 2015051085

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on March 14, 2016, in Sacramento, California.

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

Cynthia A. Jamison (respondent) represented herself.

There was no appearance by or on behalf of the Department of Health Care Services (Alcohol and Drug Programs) (DHCS).

Evidence was received, the record was closed, and the matter was submitted for decision on March 14, 2016.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED April 1, 2016
Senior Staff Counsel

ISSUE

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

FACTUAL FINDINGS

1. Respondent was employed by the Department of Alcohol and Drug Programs (ADP) as an Associate Governmental Program Analyst (AGPA).[1] By virtue of her employment, respondent became a state miscellaneous member of CalPERS subject to Government Code section 21154.[2]

Respondent's Resignation from ADP

2. On or about February 10, 2010, respondent was served with a Notice of Adverse Action (NOAA), which notified her that, effective February 23, 2010, she would be dismissed from her position as an AGPA under the following causes for discipline set forth in Government Code section 19572:

(c) Inefficiency
(d) Inexcusable neglect of duty
(f) Dishonesty
(p) Misuse of State property
(t) 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 of the person's employment.

The NOAA alleged that respondent engaged in the following acts and omissions: On June 9, 2009, while respondent was in Los Angeles on state business, she was arrested at approximately 4:33 a.m. for driving under the influence of alcohol (DUI). At the time of her arrest, respondent was driving a vehicle rented at state expense. As a result of the arrest, the

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[1] At a time not identified at hearing, ADP was merged into DHCS.

[2] Government Code section 21154, in relevant part, provides that an 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."

rental vehicle was towed and impounded. Respondent told the rental company that the rental vehicle was lost and she believed it to be stolen. On her time reports, respondent claimed nine hours of work on both June 9 and June 10, 2009, when she was incarcerated in the Los Angeles County jail. On her travel expense claims for June 9 and 10, 2009, respondent claimed expenses for lodging, meals, incidentals, gasoline, and carfare, tolls or parking, even though she was incarcerated on these days. Respondent traveled to Los Angeles on June 16 and 22, and November 10, 2009, for reasons related to her DUI arrest. She submitted time reports showing that she worked on these days. She submitted travel expense claims seeking reimbursement for her travel costs and meals on these days.

3. Respondent appealed from the NOAA. On August 5, 2010, her appeal came on for hearing before an administrative law judge (ALJ) of the State Personnel Board (SPB). At the hearing, respondent and ADP entered into a stipulated settlement, which was memorialized in a proposed decision issued by the SPB ALJ (Stipulated Proposed Decision). As set forth in the Stipulated Proposed Decision, among other stipulations: (1) respondent agreed to withdraw her appeal with prejudice and ADP agreed to withdraw the NOAA; (2) respondent agreed to resign from her position as an AGPA "for personal reasons" effective February 23, 2010; and (3) respondent agreed as follows:

> [Respondent] agreed not to seek employment with [ADP] at any time after the execution of this settlement. If [respondent] should be inadvertently hired by [ADP] at any time after the execution of this settlement, she agrees to and hereby does resign from her employment with [ADP]. [Respondent] agrees not to exercise any mandatory or permissive reinstatement rights [respondent] currently has or may acquire to reinstate to employment with [ADP].

On August 11, 2010, the SPB adopted the Stipulated Proposed Decision as its decision.

Respondent's Service Retirement and Applications for Disability Retirement

4. On April 22, 2010, respondent filed an application with CalPERS for service retirement. Respondent retired for service effective February 24, 2010, and has been receiving her service retirement allowance since that date.

5. Also on April 22, 2010, respondent filed a Disability Retirement Election Application (2010 Disability Retirement Application) with CalPERS. In her 2010 Disability Retirement Application, respondent stated that her injury or illness affected her ability to perform her job as follows:

> Severe Panic Attacks, confusion, must take medication that affects my behavior and my awareness and ability to stay awake [and] alert.

There was no further information included in respondent's 2010 Disability Retirement Application about her alleged disability.

6. There was no evidence or testimony presented at the hearing as to what happened to respondent's 2010 Disability Retirement Application. There were no letters or communications between respondent and CalPERS offered into evidence to explain what actions, if any, were taken in response to respondent's 2010 Disability Retirement Application.[3]

7. On May 5, 2014, respondent filed another Disability Retirement Election Application (2014 Disability Retirement Application) with CalPERS. Respondent's 2014 Disability Retirement Application contained significantly more information about her claimed disability than was included in her 2010 Disability Retirement Application. In her 2014 Disability Retirement Application, respondent described her disability as follows:

> PTSD, Post Traumatic Stress Disorder, Acute Anxiety Disorder, Bi-Polar, Severe Depression

In response to the question asking when her disability occurred, respondent answered, "unknown – over a period of time from Jan 2006 – Feb 2010." In response to the question asking how her disability occurred, respondent answered, "unknown – a compilation of incidents – attacked, robbed, beaten, house burned down, death of close family members in quick succession."

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[3] An Amended Statement of Issues was received by OAH on November 18, 2015. The Amended Statement of Issues was not offered into evidence at the hearing. Instead, only the Statement of Issues dated March 25, 2015, was offered at the hearing. The Amended Statement of Issues included the following statement not included in the March 25, 2015 Statement of Issues offered at the hearing:

> On September 9, 2010, CalPERS staff explained to respondent that her disability retirement was cancelled because it was incomplete. On September 15, 2015, CalPERS staff explained that she did not qualify to apply for disability retirement under the Haywood case because her employment was terminated. She stated that she would address this with SPB and employer.

There was no evidence offered at the hearing regarding this statement in the Amended Statement of Issues.

Respondent described her limitations/preclusions as:

> I am unable to deal with stressful situations on every level except the simplest – not involving other people. My reasoning [and] common sense skills have diminished to the point of self destruction.

Respondent described how her injury or illness affected her ability to perform her job as follows:

> I cannot concentrate or remember anything. It is nearly impossible for me to come out of my safe home – especially by myself due to my fear [and] anxiety. I cannot sleep longer than 1-2 hours at a time. I have bad panic attacks daily. Tightening chest [and] breathing problems.

In her 2014 Disability Retirement Application, respondent also stated that she had been "hospitalized on several occasions due to PTSD [and] residual effects."

8. On November 17, 2014, CalPERS sent a letter to respondent, which cited *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*). The November 17, 2014 letter stated that CalPERS had determined that the facts of respondent's 2014 Disability Retirement Application and file "fit within the *Haywood* case" as follows:

> 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 for the purpose of preventing a claim for disability retirement. Therefore, under the *Haywood* case, you are not eligible for disability retirement. For that reason, CalPERS cannot accept this application for disability retirement.

The November 17, 2014 letter notified respondent that her 2014 Disability Retirement Application had been cancelled, and that she had the right to file an appeal from the cancellation within 30 days. Respondent timely appealed from the cancellation of her 2014 Disability Retirement Application.

Respondent's Evidence and Arguments

9. At the hearing, respondent argued that she should be allowed to apply for disability retirement because her dismissal was the ultimate result of her disabling medical condition, and her dismissal preempted an otherwise valid claim for disability retirement.

10. Respondent testified that, in December 2008, she and her daughter were attacked in a parking lot. As a result of that incident, she began experiencing PTSD. She did not immediately know that she had PTSD, but she knew she had trouble thinking clearly. She asserted that her PTSD led to her June 9, 2009 DUI arrest. According to respondent, she had a panic attack while she was in Los Angeles, and she drank wine to calm herself. She continued to work at ADP after her DUI arrest. She admitted that she did not tell her supervisors at ADP about her arrest, and attempted to cover it up.

11. To support respondent's assertion that she suffered from a disabling mental health condition before she was dismissed from state service, respondent submitted the following documents, which were admitted as administrative hearsay under Government Code section 11513, subdivision (d):[4]

(a) A January 18, 2008 memorandum from Kate MacKenzie, a licensed clinical social worker, noted respondent's "extreme anxiety and depression" and stated that respondent had "recently been hospitalized for depression and is taking several new medications."

(b) A July 11, 2014 letter from Saleha Abbasi, M.D., respondent's treating psychiatrist, stated that respondent's "life changed very significantly after the attack and robbery incident on December 10th 2008." Accordion to Dr. Abbasi, respondent "experienced flashbacks, nightmares, increased anxiety and fear and depressed mood." Dr. Abbasi stated further that respondent had "experienced low mood since teenage years and had been able to function well until this incident in December 2008. Her symptoms of Post-Traumatic Stress Disorder are related to this incident in December 2008."

(c) A June 25, 2011 "comprehensive psychiatric evaluation" performed by Richard Hicks, M.D., at MDSI Physician Services in Ogden, Utah, stated that respondent applied for Supplemental Security Income (SSI) from the Social Security Administration (SSA) for "posttraumatic stress disorder, bipolar, anxiety, and hypothyroidism." Dr. Hicks noted that respondent "was beaten up and knocked unconscious about December 2008." Dr. Hicks diagnosed respondent with "posttraumatic stress disorder of a severe degree." He also found that there "may be a bipolar condition associated with it."

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[4] Government Code section 11513, subdivision (d), in relevant part, provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(d) A Notice of Award stated that respondent was awarded SSA disability benefits beginning August 2010. The SSA found that respondent became disabled on February 12, 2010.

12. Respondent asserted that, given her severe PTSD prior to her February 2010 dismissal, her right to disability retirement matured before she was dismissed from state service. She asserted further that, if she had been aware of the severity of her PTSD earlier, she would have applied for disability retirement before she was dismissed, but due to her PTSD, she was not thinking clearly and did not have sufficient information.

Discussion

13. At the hearing, CalPERS argued that respondent was precluded from applying for disability retirement under *Haywood* and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*), and the precedential decision issued by the CalPERS Board of Administration (Board) in *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 (*Vandergoot*).

14. As set forth in the Legal Conclusions below, *Haywood* and *Smith* held that civil service employees are precluded from applying for disability retirement if they have been dismissed from their civil service employment. *Haywood* and *Smith* recognized two exceptions to this preclusion: (1) when the employee established that the dismissal was the ultimate result of a disabling condition; and (2) when the employee established that the dismissal preempted the employee's otherwise valid claim for disability retirement. In *Vandergoot*, the Board determined that a stipulated settlement agreement in which an employee settled a dismissal action by agreeing both to resign and to give up all return rights was tantamount to a dismissal for purposes of applying the *Haywood* and *Smith* criteria.

15. Respondent resigned to settle a dismissal action against her. As part of the settlement, she gave up all return rights to ADP. Given these facts, in accordance with *Vandergoot*, respondent's resignation must be treated as tantamount to the dismissals at issue in *Haywood* and *Smith*.

16. As set forth below, respondent did not establish that she should be allowed to apply for disability retirement under either of the two exceptions recognized in *Haywood* and *Smith*: (1) her separation from state service was not the ultimate result of her disabling condition; and (2) her separation from state service did not preempt an otherwise valid claim for disability retirement.

17. Respondent asserted that her dismissal was the ultimate result of her disabling condition because, when she was in Los Angeles, she drank wine in response to a panic attack, which resulted in her DUI. But from a review of the NOAA, the primary reason for respondent's dismissal was not because she was involved in a DUI. Instead, as set forth in the NOAA, the primary reason for respondent's dismissal was that she was dishonest when

she charged ADP for her time and expenses while she was in jail as a result of her DUI, and when she returned to Los Angeles for reasons related to her DUI.

18. Respondent also asserted that her PTSD caused her not to think clearly after her DUI. But she offered no competent medical evidence to establish that her dishonesty can be attributed to her PTSD or other mental health conditions. None of the medical or psychiatric reports she submitted found or opined that respondent's PTSD or other mental health conditions caused her to engage in dishonest conduct.

19. Respondent's dishonest conduct, not her mental health condition, was the ultimate cause of her dismissal. Consequently, respondent failed to establish that her separation from state service was the ultimate result of her disabling condition.

20. Respondent also did not establish that her separation from state service preempted an otherwise valid claim for disability retirement. There was no indication in the NOAA or any other competent evidence presented at the hearing that ADP was aware that respondent had a disabling mental health condition before it served the NOAA, or that it instituted dismissal proceedings against her to preempt her from filing an application for disability retirement based upon a disabling mental health condition.

21. Respondent did not file for disability retirement until after she had been dismissed from state service by ADP. There was no evidence that she had a matured right to disability retirement before her dismissal. As the court explained in *Smith, supra*, 120 Cal.App.4th at p. 206, a "vested right matures when there is an unconditional right to immediate payment." Thus, a right to a disability retirement does not mature at the time of the injury that causes the disability; instead, it matures when a pension board determines that the employee is no longer capable of performing her duties. (*Ibid.*)

22. There was no evidence that respondent had a matured right to a disability allowance prior to the time she was dismissed by ADP. (*Smith, supra*, 120 Cal.App.4th at p. 206.) In addition, there was no evidence that principles of equity should be applied to grant respondent the right to seek disability retirement because she had an obvious disability, such as a loss of a limb.

23. In sum, when all the evidence and arguments are considered, respondent did not establish that she should be allowed to file an application for disability retirement. Consequently, respondent's appeal must be denied.

LEGAL CONCLUSIONS

1. In *Haywood, supra*, 67 Cal.App.4th at p. 1297, the court found that, when "an employee is fired 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, termination of the employment relationship renders the employee ineligible for disability

retirement." The court explained that the employee's dismissal in that case "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 is no longer disabled." (*Ibid.*)

2. In *Smith*, *supra*, 120 Cal.App.4th at pp. 203-204, the court reiterated the principles of the *Haywood* decision. The court further explained that a disability claim must have "matured" in order to find that a disciplinary action preempted the right to receive a disability retirement pension, and this maturation did not occur at the time of the injury, but rather when the pension board determined that the employee was no longer capable of performing her duties. (*Id.* at p. 206.) The *Smith* court further allowed consideration of equitable principles to "deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause." (*Id.* at p. 207.) The *Smith* court explained that equitable principles would be applicable when a "favorable decision on [a disability] claim would have been a foregone conclusion (as perhaps with a loss of limb)."

3. In *Vandergoot*, the Board held that an employee's resignation was tantamount to a dismissal for the purposes of applying the *Haywood* and *Smith* criteria when the employee: (1) resigned pursuant to a settlement agreement entered into to resolve a dismissal action; and (2) 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*, Precedential Decision 13-01 at p. 7, ¶ 18.)

4. As set forth in the Findings, before filing for disability retirement, respondent was dismissed from state service by ADP. She agreed to settle the dismissal action by resigning, effective on the original dismissal date, and waiving her right to return to employment with ADP. Pursuant to the holding in *Vandergoot*, respondent's resignation under these circumstances was tantamount to a dismissal for the purposes of applying the *Haywood* and *Smith* criteria. Respondent did not establish either: (1) that her separation from state service was the ultimate result of her disabling condition; or (2) that her separation from state service preempted an otherwise valid claim for disability retirement. In addition, respondent did not establish there were any equitable principles that should be applied to grant her the right to seek disability retirement.

5. Pursuant to the holdings in *Haywood*, *Smith*, and *Vandergoot*, respondent is precluded from filing for disability retirement.

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ORDER

The appeal of respondent Cynthia A. Jamison to be granted the right to file an application for disability retirement is DENIED.

DATED: March 29, 2016

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Karen Brandt
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KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings