

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM

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

Agency Case No. 2014-0947

CHRISTOPHER B. GUILIN,

OAH No. 2014120983

Respondent,

and

IRONWOOD STATE PRISON,
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Respondent.

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter on December 1, 2015, and March 18, 2016.

On December 1, 2016, the hearing occurred in San Bernardino, and Jeanlaurie Ainsworth, Senior Staff Attorney, represented Anthony Suine, Chief, Benefit Services Division.

On March 18, 2016, the hearing occurred in Orange, and Preet Kaur, Senior Staff Attorney represented Anthony Suine, Chief, Benefit Services Division.

There was no appearance by or on behalf of Ironwood State Prison, California Department of Corrections and Rehabilitation.

Christopher B. Guilin represented himself.

The matter was submitted on April 15, 2016.¹

¹ The hearing concluded on March 18, 2016, and the record remained open for receipt of briefs. On March 29, 2016, Complainant filed Declaration of Mari Cobbler Regarding the

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED May 19 20 16

Vallera Johnson

FACTUAL FINDINGS

Jurisdiction

1. Anthony Suine, Chief of the Benefit Services Division, California Public Employees' Retirement System, filed Statement of Issues, Agency Case No. 2014-0947, in his official capacity and not otherwise.

2. On December 19, 2005, Ironwood State Prison, California Department of Corrections and Rehabilitation employed Christopher Guilin as a heavy truck driver. By virtue of this employment, respondent Guilin became a state safety member of CalPERS subject to Government Code section 21154.

Termination of Employment

3. In order to maintain his position as heavy truck driver at respondent CDCR, respondent Guilin is required to have a California driver's license "valid for the operation of any combination of vehicles."

4. On November 11 2011, respondent Guilin was arrested for violation of Vehicle Code section 23152, subdivision (a) [driving while under the influence of alcohol], and subdivision (b) [driving with a blood alcohol content of 0.08 percent or greater]. The blood sample taken from respondent Guilin contained 0.23 percent alcohol.

5. As a result of the arrest, the Department of Motor Vehicles suspended respondent's CDL, and respondent Guilin was issued a temporary CDL, which allowed respondent Guilin to drive heavy trucks at work. The temporary CDL was in effect for 30 days from November 11, 2011.

Respondent Guilin requested a hearing, held on February 9, 2012. His temporary CDL was extended to the date of his DMV hearing. Following the hearing, effective February 20, 2012 through February 19, 2013, DMV "disqualified" respondent Guilin "from operating any vehicle or combination of vehicles that requires a Class A or B license or a Class C license."

6. Thereafter, on February 24, 2012, respondent CDCR served respondent Guilin with a "Notice of Non Punitive Separation – Failure to Meet Conditions of Employment" and appeal rights and stated, in part:

You are hereby separated from your position as Heavy Truck Driver.

Earlier Effective Retirement Date, and it was marked Exhibit 25. Respondent did not file a response.

The separation shall take effect March 2, 2012, close of business.

[¶] ... [¶]

You have failed to meet the conditions of employment in the area of maintaining a California driver's license [*sic*] which allows you to drive heavy trucks, in accordance with the following:

California Government Code section 19585 (d), which states in part: For the purposes of this section requirements for continuing employment shall be limited to the acquisition or retention of specified licenses, certificates, registrations, or other professional qualifications, education, or eligibility for continuing employment or advancement to the fully qualified level within a particular class series.

State Personnel Board Specification for Heavy Truck Driver, Correctional Facility, which states in part, and "MINIMUM QUALIFICATIONS Possession of a California driver's license valid for the operation of any combination of vehicles."

7. On February 29, 2012, respondent CDCR served respondent Guilin a "Notice of Personnel Action – Report of Separation," with effective date of March 2, 2012.

Respondent Guilin appealed this decision to the State Personnel Board but withdrew his appeal.

In a memorandum, dated March 22, 2012, respondent CDRC warden stated:

Christopher Guilin was non-punitively separated from his employment at Ironwood State Prison effective March 2, 2012. At the time of his separation, Ironwood State Prison was in the process of investigating this individual for possible adverse action. The investigation is now complete with a decision to pursue formal adverse action. Should your department decide to reinstate this individual, you are requested to contact ... to confirm your reinstatement of this individual, in order that we may proceed with the above-mentioned action.

As of the date of hearing, respondent Guilin had not been reinstated.

Application for Disability Retirement

8. On December 2, 2013, respondent Guilin signed an application for industrial disability retirement, received by CalPERS on December 13, 2013.

In the application, respondent Guilin stated that the disability occurred on March 13, 2012 when he had a "slip and fall while on duty". Further in the application, in the workers' compensation detail section, respondent Guilin stated that he filed a workers' compensation claim on the basis of an orthopedic (neck and back) condition that occurred at work on February 10, 2012.

9. On the date that he filed his IDR application, respondent Guilin was no longer in state service. He had been terminated because he no longer met the requirement of the position due to his driver's license being suspended as a result of his arrest for violation of California Vehicle Code section 23152.

10. Respondent Guilin testified that he was fired because he was injured on the job and was hoping that he would get benefits and back pay.

11. On February 10, 2012, while employed by respondent CDCR, respondent Guilin sustained a work related injury. On February 14, 2012, respondent filed a claim for workers compensation benefits. He did not file an IDR application until December 2013, more than a year after he sustained the work related injury and more than a year after termination of his employment.

CalPERS Determination

12. After review of respondent Guilin's employment status with respondent CDCR, CalPERS determined that respondent Guilin is not eligible to apply for industrial disability retirement and cancelled his application.

13. By letter, dated July 18, 2014, respondent Guilin was notified of CalPERS' determination to cancel his IDR application based on termination by respondent CDCR.

Respondent Guilin's Appeal

14. By letter dated July 28, 2014, respondent Guilin filed a timely appeal challenging the cancellation of his IDR application and requested a hearing.

15. The appeal is limited to the issue of whether respondent Guilin is eligible to apply for industrial disability retirement based on an orthopedic (neck and back) condition or whether the IDR is precluded by operation of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App. 4th 1292, *Smith v. Napa* (2004) 120 Cal.App.4th 194, and *In the Matter of Robert Vandergoot* (2003) California Public Employees' Retirement System Board of Administration, Precedential Decision No 13-01.

Should respondent Guilin be found eligible to submit an IDR application, issues regarding his medical condition and industrial causation will be handled under a separate appeal.

Application of Haywood

16. In *Haywood*, the employee “was terminated for cause following a series of increasingly serious disciplinary actions against him. After his discharge, the employee applied for disability retirement, claiming that stress from the disciplinary actions cause him to suffer a major depression which rendered him incapable of performing his usual duties with the [employer].” *Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4 th at p. 1295. The Court of Appeals concluded that the employee was not entitled to disability retirement and stated the following:

As we shall explain, there is an obvious distinction in public employment retirement laws 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. Nor are they intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. In addition, while termination of an unwilling employee for cause completely severs the employer-employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and is no longer disabled.

In this case, Haywood challenged his employer’s authority and lost when, after a series of disciplinary actions, he was terminated for cause. The behavior which resulted in Haywood’s firing - his unwillingness to faithfully perform his duties-was not caused by a physical or mental condition, and Haywood had no valid claim for disability retirement which could have been presented before he was fired.

Haywood’s firing for cause 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. Moreover, to award Haywood a disability pension would interfere with the District’s authority to discipline recalcitrant employees. Such an award in effect would compel the District

to pension-off an employee who has demonstrated an unwillingness to faithfully perform his duties, and would reward Haywood for his recalcitrance. In other words, granting Haywood disability retirement would override Haywood's termination for cause despite his inability to set aside the termination through the grievance process.

It follows that where, as here, 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.

(*Id.* at pp. 1296-1297, footnote omitted.)

17. Respondent Guilin was no longer in state service at the time he filed his IDR application. He was terminated because he no longer met the requirement of the position due to the suspension of his CDL as a result of his arrest for DUI. Respondent Guilin's termination was not the result of a disabling medical condition.

18. When he filed his IDR application, respondent Guilin's relationship with respondent CDCR had been severed, and he had no right to return to his employment. As such, no employer who could require him to undergo a medical examination under Government Code section 21192 to assess medical condition, and it is not possible for him to be reinstated under Government Code section 21193. These necessary prerequisites for receiving a disability retirement allowance are not present in this case.

Preemptive of Valid Claim

19. Even if an agency dismisses an employee for cause unrelated to a disabling medical condition, this will not result in the forfeiture of a matured right to a pension allowance. (*Smith v. City of Napa* (2004) 120 Cal.App.4 th 194, 206.) "Thus, if a plaintiff were able to provide the right to a disability retirement matured before the date of the event giving rise to dismissal, the dismissal cannot preempt the right to receive a disability pension for the duration of the disability. [Citations omitted.] Conversely, 'the right may be lost upon occurrence of a condition subsequent such as a lawful termination of employment before it matures ... (*Dickey v. Retirement Board* (1976) 16 Cal.3d745, 749, ...)" (*Ibid.*)

20. Respondent Guilin had a vested right to apply for industrial disability retirement upon acceptance of employment with respondent CDRC. While the "right" to the benefits vest upon acceptance of employment, an employee would not be entitled to receive the benefit until all conditions prescribed have been met. (*Dickey v. Retirement Board of the City and County of San Francisco* (1976) 16 Cal.3d 745.). There is a marked difference between the vesting of a pension right and the accrual of a cause of action to enforce a vested

right. “The right to a pension is a vested right; the amount of the pension may not always be ascertained until the last contingency has occurred.” (*Id.* at p. 750; *Brooks v. Pension Board* (1938) 30 Cal.App.2d 118, 123.) The vested right to the pension benefit may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures, or because of the nonoccurrence of one or more conditions precedent. (*Id.* at 749.) Thus, the issue is whether respondent Guilin’s vested interest in disability retirement “matured” prior to his separation from employment.

21. A vested right matures when there is an unconditional right to immediate payment. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 206.) Typically, this arises at the time a pension board determines that the employee was no longer capable of performing his/her duties. (*Ibid.*; *Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672.) Here, a CalPERS determination of eligibility does not antedate respondent Guilin’s separation from employment. His right to industrial disability retirement had not matured prior to termination of employment.

22. *Smith* recognized that even where there has not yet been a determination of eligibility, there might be facts, which a court, applying principles of equity, will deem an employee’s right to a disability retirement. (*Id.* at pp. 206-207.) Then *Smith* went through a number of situations where equitable principles might apply. Also, these equitable principles are considered in this case. Unlike in *Smith*, this is not a case where respondent Guilin had an pending ruling on a claim for a CalPERS disability pension that was delayed through no fault of his own. (*Id.* at p. 207.) Here, he did not initiate the process for receiving an industrial disability retirement until December 2013, after respondent CDRC terminated his employment, effective March 2, 2012. Nor was there “undisputed evidence” that respondent Guilin 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).” (*Ibid.*) As was the case in *Smith*, for purposes of the standard for disability retirement, the medical evidence in this case is not unequivocal. CalPERS would have a basis for litigating whether the evidence demonstrated a substantial inability to perform his duties or instead show only discomfort making it difficult to perform his duties, which is insufficient. (*Ibid.*)

23. When the above matters are considered as a whole, respondent Guilin has not presented unequivocal medical evidence of such nature that approval of his application for disability retirement was a “foregone conclusion.” Any right to an industrial disability retirement cannot be deemed to have matured in this case.

Respondent’s Request to an Earlier Date for his IDR Application

24. Respondent Guilin filed his IDR Application on December 12, 2013. He requested an effective retirement date of February 29, 2012, based on expiration of his employment benefits. His last day on pay status is February 29, 2012, and his separation date is March 2, 2012.

Government Code section 21252 is used to determine the effective retirement date, in the event the member's application for IDR is approved. Regarding the effective retirement date, Government Code section 21252, subdivision (a) states:

A member's written application for retirement, if submitted to the board within nine months after the date the member discontinued his or her state service, and, in the case of retirement for disability, if the member was physically or mentally incapacitated to perform his or her duties from the date the member discontinued state service to the time the written application was retirement was submitted to the board, shall be deemed to have been submitted on the last day for which salary was payable. The effective date of a written application for retirement submitted to the board more than nine months after the member's discontinuance of state service shall be the first day of the month in which the member's application is received at an office of the board or by an employee of this system designated by the board.

25. Respondent Guilin's IDR application was submitted more than nine months after the date respondent Guilin discontinued his state service; he was terminated on February 29, 2012; his separation date was March 2, 2012; he filed his IDR application on December 12, 2013. The effective date for an IDR application submitted more than nine months after discontinuance of service shall be the first of the month in which the application is received. This would apply only if respondent Guilin's application is approved.

LEGAL CONCLUSIONS

1. Government Code section 21152 states, in part:

Application to the board for retirement of a member for disability may be made by ...

[¶] ... [¶]

(d) The member or any person in his or her behalf.

2. 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.

3. 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. (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1297.) The Third District Court of Appeal explained that the dismissal “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.*)

4. Respondent Guilin’s last day on pay status is February 29, 2012, and his separation date is March 2, 2012. His separation was not the ultimate result of a disabling medical condition.

5. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the same 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 preempts 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 his 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.)

6. Even when the principles of equity are applied in this case, there was not undisputed evidence that respondent Guilin was eligible for a CalPERS industrial disability retirement allowance, such that a favorable decision on his claim would have been a “foregone conclusion.” Respondent Guilin’s vested interest in an industrial disability retirement allowance did not “mature” prior to his separation from employment.

7. Regarding the request to date his IDR Application February 29, 2012, the California Public Employees’ Retirement Law does not provide members the ability to

backdate applications prior to a termination to avoid *Haywood* cancellation. If allowed, members could possibly receive a benefit that they would not otherwise be entitled to, rendering *Haywood* case law no longer necessary and negating employer's disciplinary actions.

8. Government Code section 21156, subdivision (a) (2) states: " In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process."

9. Based on the facts and the law, cause exists to uphold the decision of CalPERS that respondent Guilin is not entitled to file an application for an industrial disability retirement allowance.

ORDER

The appeal of Christopher B. Guilin to be granted the right to file an application for industrial disability retirement is denied.

DATED: May 16, 2016

DocuSigned by:

Vallera J. Johnson

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VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings