

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:

LINDA MARTINEZ,

Respondent,

and

DEPARTMENT OF SOCIAL SERVICES,

Respondent.

Agency Case No. 2015-0918

OAH No. 2016031210

PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, State of California, Office of Administrative Hearings, heard this matter on July 27, 2016, in Oakland, California.

Kerianne R. Steele, Attorney at Law, represented Linda Martinez (Respondent).

No appearance was made by or on the behalf of the Department of Social Services (Department).

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

The record was left open at the parties' request to submit simultaneous closing briefs. The briefs were timely received and marked for identification as follows: Respondent's Post-Hearing Brief as Exhibit F, and CalPERS's Closing Brief in Support of Determination as Exhibit 14.

The record closed on August 26, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED

9/14 2016

Debra Wooten

ISSUE

Whether the decision made by CalPERS to cancel Respondent's November 17, 2014, application for disability retirement was correct.

FACTUAL FINDINGS

1. Beginning December 31, 1985, Respondent was employed by the State of California as a Psychiatric Technician Trainee with the Department of Mental Health. On October 1, 2001, she transferred to the Department and began work as a Disability Evaluation Analyst (DEA). In June 2007, Respondent was promoted to DEA III. Effective August 22, 2012, she was demoted back to DEA following the settlement of an adverse action. By virtue of this employment, Respondent was a state miscellaneous member of CalPERS.

2. On November 17, 2014, Respondent signed and filed an application for disability retirement with CalPERS. She asserted disability based on the condition of her "bilateral arms and neck, endometriosis, severe GERD vocal cord damage, DM2, anxiety cumulative trauma conditions."

3. On June 17, 2015, the Department informed CalPERS that Respondent had voluntarily resigned her employment pursuant to a settlement agreement that resolved an adverse action brought by the Department. The adverse action charged the following causes for dismissal: incompetence; inefficiency; inexcusable neglect of duty; insubordination; dishonesty; discourteous treatment of the public and other employees; willful disobedience; misuse of state property; violation of prohibitions in accordance with section 19990; other failure of good behavior; and unlawful retaliation. The adverse action terminated Respondent's employment with the Department as of January 17, 2014.

4. Respondent appealed the termination, and on September 22, 2014, a settlement agreement was executed by the parties. Respondent did not cite disability as a ground for appeal. The terms included Respondent's resignation in lieu of termination, the Department's retraction of the Notice of Adverse Action and all related documents, and Respondent's agreement that she would "never again apply for or accept any employment position" with the Department. The settlement also resolved two unfair practice complaints that were pending with the Public Employment Relations Board. (In the PERB matters, Respondent had alleged that the Department retaliated and discriminated against her for engaging in activities protected under the Dills Act.) Most pertinent here were the following clauses: that Respondent "will be deemed to be on unpaid leave of absence from . . . January 17, 2014 through . . . August 31, 2014" and "on unpaid medical leave of absence from . . . September 1, 2014 through . . . September 30, 2014" and that the Department "agrees to cooperate with any application for disability retirement filed by [Respondent] within the next six months."

5. CalPERS reviewed the information concerning Respondent's separation from employment with the Department, and determined she was not eligible to apply for disability retirement. By letter dated June 22, 2015, CalPERS notified Respondent that it was not able to accept her disability retirement application because she was "dismissed from employment for reasons which were not the result of a disabling medical condition." The letter also states that "the dismissal does not appear to be for the purpose of preventing a claim for disability retirement." Respondent appealed and this hearing followed.

Respondent's position

6. Respondent argued that she was not dismissed, but rather that she voluntarily resigned pursuant to the settlement agreement. Respondent had planned to retire for disability for some years. She testified that she "told everyone at my 25-year party" that she was not going to work past the age of 50 and was going to retire for disability. Respondent asserted that the settlement agreement was crafted with CalPERS's input to protect her ability to apply, because at that time she had been separated from employment for over one year. Her belief is understandable, given the provisions in the agreement for the cooperation by the Department with a disability retirement application and the designation of periods of unpaid leaves of absence. As set forth below, to be timely, applications must be made within four months of separation or while on an approved leave of absence.

7. At some time after she filed her application for disability retirement, Respondent applied for and was hired by the Department of Rehabilitation as a Program Technician II. She worked in the position beginning October 1, 2015 for two months. Respondent testified that she had to resign the position because she could not physically handle the commute.

LEGAL CONCLUSIONS

1. Government Code section 21154 specifies when a CalPERS member may apply for disability retirement. That section provides, in relevant part, that

The application shall be made only (a) while the member is in state service, or (b) while the member . . . 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.

2. If CalPERS determines that a member who has been receiving a disability pension is no longer unable to perform the duties of the position, Government Code section.

21193 requires that she be reinstated to the same position, or in another position in the same class, at the option of the member.

3. Among the issues addressed in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, was the effect of a termination for cause on an application for disability retirement. After Haywood was dismissed, he filed for disability retirement, contending in part that the dismissal action caused a mental disability. The Court determined that he was not eligible because the “firing for cause constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement—the potential reinstatement” should his conditions resolve and he subsequently become able to perform his job. In other words, the right to retire for disability is contingent upon the ability to return to work if the disability is overcome.

4. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the Court reiterated its position in *Haywood*, holding that if a dismissal for cause makes an applicant ineligible for reinstatement in his position, he is also disqualified from receiving disability retirement. To hold otherwise, the Court explained, would override “the power of public agencies to discipline employees, and would reward poor employees with early retirement.” (*Id.*, at 203.) This result would not apply, however, if a disabling medical condition was the cause for dismissal.

5. The CalPERS precedential decision *In the Matter of the Application for Disability Retirement of Robert C. Vandergoot* (adopted effective October 6, 2013) applied the *Haywood* and *Smith* rulings in the context of a stipulated settlement of a dismissal action. As in this case, Mr. Vandergoot settled the employment action by converting the termination into a resignation. He also agreed not to apply again for employment with the Department of Forestry. The CalPERS Board found that, under *Haywood* and *Smith*, the fact of the settlement was a distinction without a difference; the end result was the same: termination with no right to return to the employing agency. Because Mr. Vandergoot could not have returned following a finding that he was no longer disabled, the elements and requirements for receipt of a disability pension could not be satisfied. The *Vandergoot* decision quoted *Haywood* as follows:

[D]isability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability reaches an age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues. (§ 21193.) And an 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 may reinstate the employee, and his disability allowance terminates. (§ 20093.)

(*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. 1305.)

Analysis

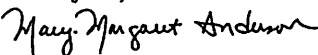
6. Fundamental to the receipt of a disability retirement pension is the inability to perform the duties of the position retired from. It therefore follows logically that if an employee stops working because she is terminated, and the termination is not based upon an inability physically or mentally to perform the duties, the receipt of a disability retirement pension is foreclosed. The situation is somewhat complicated by the settlement of a dismissal action against an employee. Such settlements often contain many terms, including waivers, the incorporation of other claims and grievances, and the removal of charging documents from personnel files. But the basis of the separation is still the original action terminating the employee; but for the termination there would have been no settlement. And there was no evidence that a medical condition caused or led to Respondent's termination, or that the Department terminated her to prevent her from retiring for disability.

7. Respondent argues that *Smith* and *Haywood* are two incorrectly decided Court of Appeal opinions, and that *Vandergoot* is flawed as well. But she requests that if they are seen as controlling authority, principles of equity be applied to resolve the ambiguity in her favor. But this situation is not ambiguous. The facts here fit squarely within the factual basis for the two opinions and precedential decision. And her argument that equity supports her application because the Department received valuable consideration in exchange for an agreement that it would cooperate with her disability application is also without merit. The terms of the settlement agreement are irrelevant here, and the Department was without authority to bind CalPERS in any respect. Accordingly, Respondent's appeal will be denied.

ORDER

The decision made by CalPERS to cancel Respondent's November 17, 2014, application for disability retirement was correct. The appeal of Respondent Linda Martinez is denied.

DATED: September 13, 2016

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MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings