

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Acceptance of the
Application for Disability Retirement of:

MARTY E. GAINES,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
CALIPATRIA STATE PRISON,

Respondent.

Case No. 2016-0128

OAH No. 2016031205

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 30, 2016, in San Diego, California.

Terri L. Popkes, Senior Staff Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Marty E. Gaines, respondent, represented himself, with the assistance of Kelly S. Jennings¹.

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

¹ Mr. Jennings is admitted to practice law in Arkansas, Georgia, and the District of Columbia, but is not licensed in California. Mr. Jennings, who is a friend of respondent, requested to represent respondent in these proceedings. It was determined that as a non-licensed attorney in California, Mr. Jennings could not act as respondent's attorney, but he was permitted to speak on behalf of respondent in these proceedings. Complainant did not object to Mr. Jennings's role in these proceedings.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED SEP 23 2016
Kathy Stanley

The matter was submitted for decision on August 30, 2016.

ISSUE

Is respondent precluded from filing an application for industrial disability retirement due to his prior dismissal for cause?

FACTUAL FINDINGS

1. Marty Gaines (respondent) was employed by California Department of Corrections and Rehabilitation, Calipatria State Prison (department) as a correctional officer, effective April 9, 2000. By virtue of his employment, respondent became a state safety member of CalPERS subject to Government Code section 21154.

2. On November 16, 2012, the department served respondent with a Notice of Adverse Action (NOAA) against him pursuant to Government Code section 19574. The notice informed respondent that he was dismissed from his position as a correctional officer effective December 7, 2012. The NOAA advised respondent of his right to appeal the NOAA to the State Personnel Board (SPB) by written appeal.

3. Respondent filed an appeal with the SPB, and a hearing was held before a SPB administrative law judge (ALJ) on May 1, 2013. By order dated May 30, 2013, the ALJ sustained respondent's dismissal from the department. The decision was adopted by the SPB by resolution dated July 9, 2013.

4. On or about November 18, 2013, respondent signed an application for industrial disability retirement, which was received by CalPERS on November 19, 2013. In filing the application, respondent claimed disability on the basis of an orthopedic injury (herniated disc) that occurred on February 14, 2012.

5. By letter dated October 6, 2015, CalPERS cancelled respondent's application stating that he was barred from any entitlement to disability retirement because he was terminated for cause, and the discharge was neither the ultimate result of a disabling medical condition nor preemptive of any otherwise valid claim for disability retirement. Respondent appealed this decision and requested a hearing.

6. On March 9, 2016, complainant filed the Statement of Issues in his official capacity. As noted in the Statement of Issues, the appeal is limited to the issue of whether respondent may file an application for industrial disability retirement based on an orthopedic condition, or whether his application and eligibility for disability retirement are precluded by operation of law.

Employment Background and Termination

7. Respondent is 53 years old. He was employed by the department beginning in April 2000. He was injured in February 2012,² when he was hit by a cell door while bent over picking up an inmate's property. His application for industrial disability retirement was based on this incident and a subsequent diagnosis of a herniated disc. He testified that he had three surgeries as a result of the injury. According to respondent, he immediately received workers' compensation benefits following the injury. It does not appear that respondent ever returned to duty following his injury.

8. The incident leading to the NOAA occurred on November 23, 2011. Respondent was involved in a verbal confrontation with an inmate, after which respondent pepper-sprayed the inmate. After respondent's SPB hearing, the ALJ found respondent used unnecessary and unreasonable force against the inmate. The ALJ further found respondent was dishonest in reporting the incident to his superiors and department investigators. The ALJ's decision found that respondent's conduct constituted the following grounds for dismissal under Government Code section 19572: inexcusable neglect of duty, discourteous treatment, dishonesty, and other failure of good behavior.

9. Respondent testified that he continued to work as a correctional officer after the November 23, 2011, incident involving the inmate until the time that he was injured. The department did not impose discipline until he was served with the NOAA. Respondent contended that he was actually terminated because of his disability. However, the evidence established that respondent's termination from employment with the department was the result of misconduct and not a disabling medical condition.

LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. Government Code section 21151 provides in part:

- (a) 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.

² The exact date of respondent's injury was unclear. In his application filed with CalPERS, respondent wrote it was February 14, 2012. In his appeal request he stated the date of the injury was February 24. In an attachment indicating he received workers' compensation benefits, the date of injury was listed as February 29.

3. Government Code section 21152 provides in part that an application for retirement for disability may be made by the member or any person in his or her behalf.

Relevant Legal Authority

4. In *Haywood v. American River Fire Protection Dist.* (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 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.

(*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

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.

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 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.)

5. 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*,

⁵ In *Dept. 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.)

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.*)

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.)

6. 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.)

⁶ The specific sequence of events was that Mr. 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.

Application of Relevant Legal Authority

7. *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 determine 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.

8. Here, respondent was terminated for cause on December 7, 2012, and as of that date he could not be reinstated to his job. While respondent disagreed with the findings in the final administrative decision that he was terminated for cause, and asserted in this hearing that his medical conditions were the reason for his termination, he failed to file a petition for a writ of mandate to challenge the findings in the SPB's final administrative decision.

9. The exception articulated in *Haywood* does not apply because: 1) the complete severance of the employer-employee relationship between the department and respondent was the result of his dismissal and he therefore had no reinstatement rights as of December 12, 2012, 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.

10. The equitable exception announced in *Smith* does not apply either. Respondent did not apply for disability retirement until almost a year 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, respondent did not have a matured right to a pension when he was dismissed, and the severance of his employer-employee relationship with the department did not effectuate a forfeiture of a matured right to a disability retirement.

Conclusion

11. Respondent is not eligible for disability retirement as a matter of law. Therefore, his application for disability retirement is canceled.


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ORDER

Respondent's appeal is denied. Respondent Marty Gaines's application for disability retirement is canceled.

DATED: September 27, 2016

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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings