

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

SHELDON K. SCARBER,

Respondent,

and

CALIFORNIA HIGHWAY PATROL,

Respondent.

Case No. 2015-0243

OAH No. 2016050434

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on September 15, 2016, in Fresno, California.

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

Respondent Sheldon K. Scarber represented himself.

No one appeared for or on behalf of respondent California Highway Patrol (CHP), its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to the CHP.

Evidence was received, and the record was left open for the parties to submit simultaneous closing briefs. The parties' closing briefs are marked as Exhibits 17 (CalPERS's) and N (Mr. Scarber's).<sup>1</sup> The record was closed, and the matter was submitted for decision on October 17, 2016.

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<sup>1</sup> Mr. Scarborough also filed a request for a protective order, which CalPERS opposed. A separate order ruling on that request was issued.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED 24 Oct 20 10  
Ally M. [Signature]

## SUMMARY

The sole issue on appeal is whether Mr. Scarber is eligible to apply for industrial disability retirement. CalPERS's received his Application for Industrial Disability Retirement on February 27, 2013. On April 14, 2014, CalPERS notified him he was not eligible to apply for industrial disability retirement pursuant to the appellate court's decision in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), and its progeny, and his application was cancelled. During the intervening 13 months: 1) the CHP notified Mr. Scarber his employment was being terminated; 2) he appealed his termination to the State Personnel Board; 3) he settled that appeal by agreeing to resign his employment effective August 27, 2013, and waive any right to reinstatement; and 4) the settlement was approved by the State Personnel Board. Under the specific circumstances of this matter and applying principles of equity, the permanent termination of Mr. Scarber's employer-employee relationship with the CHP did not affect his eligibility for industrial disability retirement. Therefore, his appeal from CalPERS's decision to cancel his application should be granted, and he should be granted the right to apply for industrial disability retirement.

## FACTUAL FINDINGS

### *Procedural History*

1. Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues on April 19, 2016, solely in his official capacity. The sole issue raised by the Statement of Issues is whether Mr. Scarber is eligible to apply for industrial disability retirement based on the holding in *Haywood* and its progeny.

### *Application for Industrial Disability Retirement*

2. On February 27, 2013, Mr. Scarber signed, and CalPERS received, his Application for Industrial Disability Retirement. He identified his disabilities as cardio, epilepsy, anxiety, and hypertension, and identified those disabilities as having first arisen in 1997. CalPERS acknowledged receipt of the application by correspondence dated March 11, 2013. The correspondence explained:

This application will be processed as quickly as possible. You can help expedite this process by promptly providing all information requested. If you are approved for this benefit CalPERS will send you a letter providing the date of your first retirement check, the amount you can expect to receive, an important income tax information.

The correspondence did not request any information from Mr. Scarber.

3. Mr. Scarber contacted CalPERS to check on the status of his Application for Industrial Disability Retirement sometime after March 11, 2013, but before July 9, 2013, because he had not heard anything further regarding his application. He explained at hearing that a CalPERS staff member wondered whether the application had been lost, and suggested that Mr. Scarber apply for service retirement.

4. On July 9, 2013, Mr. Scarber signed a Service Retirement Election Application, which CalPERS received on August 26, 2013. He was approved for service retirement, effective October 31, 2013, and has been receiving his service retirement allowance since then.

5. CalPERS subsequently sent Mr. Scarber correspondence dated April 4, 2014, notifying him CalPERS is "unable to accept" his Application for Industrial Disability Retirement, and "the application has been cancelled" based on *Haywood* and its progeny. The correspondence informed Mr. Scarber: "You will not be eligible to apply for disability retirement in the future unless you return to work for a CalPERS-covered employer and subsequently become unable to perform your job duties because of a physical or mental condition.

The correspondence also advised Mr. Scarber of his right to appeal CalPERS's decision to cancel his Application for Industrial Disability Retirement, and he timely appealed that decision.

#### *Relevant Employment History*

6. Mr. Scarber began his employment with the CHP on December 16, 1989, as a Traffic Officer. He rose through the ranks over the years, eventually becoming an Assistant Chief. He is a state safety member of CalPERS by virtue of his employment.

7. On July 22, 2013, the CHP issued a Notice of Adverse Action (Notice) to Mr. Scarber. The Notice informed him he would be dismissed from his position as an Assistant Chief with the CHP, effective 5:00 p.m. on August 29, 2013. The legal bases for dismissal cited in the Notice were an excusable neglect of duty, insubordination, dishonesty, discourteous treatment of the public or other employees, willful disobedience, misuse of state property, violation of the prohibition set forth in Government Code section 19990, and other failure of good behavior either during or outside working hours which is of such a nature that it causes discredit to the appointing authority or Mr. Scarber's employment. The Notice advised Mr. Scarber of his right to file an appeal with the State Personnel Board.

8. Mr. Scarber filed an appeal with the State Personnel Board. During the pendency of his appeal, he and the CHP entered into a Settlement Agreement and Release of All Claims on December 12, 2013. Pursuant to the terms of the settlement, Mr. Scarber agreed to withdraw his appeal of the Notice, with prejudice, voluntarily resign his employment with the CHP "for personal reasons," waive any right to reinstate his employment with the CHP, and wave any right to appeal the Notice, and the CHP agreed to

withdraw the Notice from his official personnel file. The parties further agreed Mr. Scarber's resignation was effective at 5:00 p.m. on August 29, 2013. The terms of the parties' settlement were subsequently approved by the State Personnel Board in a Decision Approving Stipulation for Settlement dated January 9, 2014.

*Worker's Compensation Claims History*

9. Mr. Scarber testified generally to a history of suffering on-the-job injuries over the course of his employment with the CHP. His physician removed him from duty due to his injuries, effective December 20, 2012, and he subsequently filed a worker's compensation claim for cumulative injuries due to hypertension and cardiovascular health matters. He filed a worker's compensation claim for cumulative injuries to his back and a skull lesion on July 24, 2013. His physician never released him to return to duty.

10. Mr. Scarber submitted a Physician's Report on Disability completed by his primary care physician, Robert Graham, M.D., with his Application for Industrial Disability Retirement. Attached to that report is a Physical Requirements of Position/Occupational Title, which indicates Mr. Scarber can perform a majority of the physical requirements of his former position of Assistant Chief "Occasionally," some of them "Frequently" or "Constantly," and only a few of them "Never."<sup>2</sup>

11. At hearing, Mr. Scarber introduced a Patient Discharge Summary from Van Polglase, M.D., dated November 19, 2015, which identifies his permanent work restrictions as:

Avoid lifting more then [sic] 35lbs [sic] from waist level more than 4-5 times per hour

Avoid sitting for more then [sic] 45 mins continuously [sic] & should have 1-2 min breaks every 45 mins as needed.

He also introduced a November 18, 2015 Agreed Medical Evaluation Report prepared by Samuel Sobol, M.D., and Dr. Sobol's March 16, 2016 supplemental report. Dr. Sobol did not opine in either report that Mr. Scarber suffers from a disability which precludes him from performing the usual duties of his former position as an Assistant Chief with the CHP.

*Discussion*

12. As explained further in the Legal Conclusions below, the crux of the holdings in *Haywood* and its progeny is that the permanent termination of the employer-employee relationship renders the former employee ineligible to apply for a disability pension, so long as termination is neither the ultimate result of a disability nor preemptive of a valid claim for

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<sup>2</sup> "Constantly" is more than six hours, "Frequently" is three to six hours, and "Occasionally" is less than three hours in an eight-hour shift.

disability retirement. It matters not whether termination of the relationship was caused by the former employee's dismissal from employment for cause (*Haywood*) or his voluntary resignation and permanent waiver of any right to reinstate to his former position (*Vandergoot*)<sup>3</sup>, or that he applied for disability retirement prior to termination of the relationship (*Smith*).<sup>4</sup>

13. Mr. Scarber permanently terminated his employer-employee relationship with the CHP when he entered into the settlement agreement resolving his appeal before the State Personnel Board on December 12, 2013. Termination of that relationship was precipitated solely by his voluntary resignation and waiver of any right to reinstate to his former position, and was wholly unrelated to any disability from which he may have been suffering at the time. The fact that he filed his Application for Industrial Disability Retirement prior to termination of the relationship is irrelevant. (*Haywood v. American River Fire Protection District, supra*. 67 Cal.App.4th at p. 1307 [Government Code section 21154 "provides a procedural time limit within which an application for disability retirement must be filed, but does not provide for substantive eligibility whenever a timely application is filed".])

14. The Board of Administration had yet to decide Mr. Scarber's Application for Industrial Disability Retirement when he terminated his employer-employee relationship with the CHP. It was ultimately denied the opportunity to do so when CalPERS cancelled the application on April 4, 2014. Mr. Scarber did nothing to delay or prevent the Board of Administration from deciding his application during the almost five months that elapsed before the CHP served him with the Notice, or the almost three months that elapsed after the termination of his relationship with the CHP became final. Nor did he do anything to delay or prevent the Board of Administration from deciding his application after he received the Notice and while his appeal was pending before the State Personnel Board, other than exercise his right to appeal his termination.

## LEGAL CONCLUSIONS

### *Applicable Burden/Standard of Proof*

1. CalPERS has the burden of proving Mr. Scarber'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".]) Mr. Scarber, however, has the burden of proving the applicability of the equitable exception articulated in *Smith*. Each party 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

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<sup>3</sup> *In re Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01 (*Vandergoot*).

<sup>4</sup> *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*).

amount to “substantial evidence.” (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And 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. The appellate court held that an employee’s termination for cause rendered him ineligible for disability retirement in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292. The court explained, “while termination of an unwilling employee for cause results in a complete termination of the employer-employee relationship (citation), disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. (Citation.)” (*Id.*, at p. 1305.)

Therefore:

[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.*, 1307.)

3. The Board of Administration extended the rule articulated in *Haywood* to the termination of an employer-employee relationship caused by an employee’s voluntary resignation and irrevocable waiver of any rights to reinstate to his former position in *In re Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01. Mr. Vandergoot was a heavy equipment operator with the California Department of Forestry and Fire Protection. He was dismissed from his employment for cause, and appealed his dismissal to the State Personnel Board. He ultimately settled his appeal by agreeing to voluntarily resign his employment and waive any rights to reinstate to his former position in exchange for his employer withdrawing his dismissal for cause.

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

5. *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, involved a firefighter whose employment was terminated for cause. He filed an application for disability retirement on the effective date of his termination. The city council affirmed his termination, and the Board of Administration subsequently denied his application for disability retirement pursuant to *Haywood*. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 198.)

6. Analyzing the *Haywood* court's qualification that an employer's dismissal may not preempt "an otherwise valid claim for disability retirement," the *Smith* court identified "the key issue [as] thus whether his right to a disability retirement matured before plaintiff's separation from service." (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 206.) The court then explained that "a vested right matures when there is an unconditional right to immediate payment." and "a duty to grant a disability pension ... [does] not arise at the time of injury itself but when the pension board determine[s] that the employee [is] no longer capable of performing his duties." (*Ibid.*) But the appellate court also recognized an equitable exception when there is an impending ruling on an application for disability retirement that is delayed, through no fault of the applicant, until after his employer-employee relationship has been terminated. (*Id.*, at pp. 206-207.)

### *Conclusion*

7. Mr. Scarber permanently terminated his employer-employee relationship with the CHP for reasons wholly unrelated to any disability he may have been suffering at the time. Therefore, termination of that relationship was not "the ultimate result of [a] disabling medical condition." Nor did the termination of that relationship preempt an otherwise valid claim for an industrial disability pension. The Board of Administration had not yet ruled on Mr. Scarber's Application for Industrial Disability Retirement when he signed the settlement agreement or the State Personnel Board approved the agreement, the final act necessary to effectuate the termination of Mr. Scarber's relationship with the CHP.

8. But Mr. Scarber's Application for Industrial Disability Retirement had been pending for nearly five months before the CHP issued the Notice of Adverse Action. It had been pending for almost 10 months before he signed the settlement agreement, and for nearly



11 months before the State Personnel Board approved the settlement. And once the termination of Mr. Scarber's relationship with the CHP became final, CalPERS waited almost three months before cancelling the Application. In total, Mr. Scarber had been waiting more than 13 months for the Board of Administration to rule on his Application before it was cancelled on April 14, 2014. No explanation for CalPERS's delay was articulated at hearing.

9. Applying principles of equity, Mr. Scarber's eligibility for an industrial disability retirement is deemed to have survived the termination of his employer-employee relationship with the CHP. Therefore, his appeal of CalPERS's decision to cancel his Application for Industrial Disability Retirement should be granted, and he should be allowed to apply for an industrial disability pension.

#### ORDER

Respondent Sheldon K. Scarber's appeal from CalPERS's decision to cancel his Application for Industrial Disability Retirement is GRANTED, and he is granted the right to apply for industrial disability retirement.

DATED: October 21, 2016

DocuSigned by:  
*Coren D. Wong*  
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**COREN D. WONG**  
Administrative Law Judge  
Office of Administrative Hearings