

ATTACHMENT A
THE PROPOSED DECISION

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

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

JOSE HUERTA JR.,

Respondent,

and

CALIFORNIA SUBSTANCE ABUSE
TREATMENT FACILITY AND STATE
PRISON - CORCORAN, CALIFORNIA,
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2014-0764

OAH No. 2016031077

PROPOSED DECISION

Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on September 22, 2016, at Bakersfield, California.

Kevin Kreutz, Staff Attorney, appeared and represented the complainant California Public Employees' Retirement System (CalPERS).

Andrew Scott, Attorney At Law, appeared and represented respondent Jose Huerta Jr., who was present throughout the hearing.

No appearance was made by or on behalf of respondent California Substance Abuse Treatment Facility and State Prison - Corcoran, California, Department of Corrections and Rehabilitation (Employer) despite its having been properly served with notice of the date, time, and location of the hearing.

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CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Nov. 7, 2016
Summer Daylett

The record was held open for the parties to file concurrent closing briefs on or before October 21, 2016. Respondent Huerta filed an untimely brief, marked for identification as Exhibit M. CalPERS filed an untimely brief, marked for identification as Exhibit 8. The administrative law judge considered both untimely briefs and took the matter under submission effective October 21, 2016.

FACTUAL FINDINGS

1. On April 10, 2015, Anthony Suine, Chief of the Benefit Services division of CalPERS, made and filed the Statement of Issues in his official capacity.
2. Respondent Huerta worked for the Employer as a correctional officer for approximately six years. Pursuant to Government Code section 21151, respondent Huerta was a state safety member of CalPERS.
3. Respondent Huerta last worked for the Employer on December 22, 2011, when he fell through a control booth gunport window, sustaining injuries to his leg, hip, and shoulder, while on duty. Respondent was taken by ambulance to a local medical center for care and treatment. He eventually underwent three surgeries and physical therapy. He was previously granted a medical leave of absence when he sustained injuries when he tripped and fell on April 27, 2009. He returned to work on September 11, 2011, and was performing his usual and customary duties when he sustained the injury on December 22, 2011.
4. On December 28, 2012, the Employer served respondent Huerta with written notice that he would be dismissed from his position as a correctional officer effective January 10, 2013 (Notice of Adverse Action). The actual date of separation was extended to January 18, 2013 to enable respondent Huerta to deplete his accrued furlough, personal leave program, and informal holiday time. On January 10, 2013, the Employer amended the Notice of Adverse Action to extend the effective date of the action to January 18, 2013. On January 29, 2013, the Employer amended the Notice of Adverse Action to extend the effective date of the action to January 28, 2013.
5. The Notice of Adverse Action stated causes for dismissal under Government Code section 19572, including: inexcusable neglect of duty, dishonesty, discourteous treatment of public or other employees, willful disobedience, and other failure of good behavior either during or outside of duty hours, which was of such a nature that it caused discredit to the Employer.
6. Respondent Huerta disputed the allegations in the Notice of Adverse Action and filed a timely appeal of the Notice of Adverse Action.
7. Respondent Huerta and the Employer executed a Stipulation and Release, settling the matter in dispute "to avoid the expense, inconvenience, uncertainty, and delay attendant upon litigation of an appeal before the State Personnel Board." (Ex. 7.) Respondent Huerta executed the stipulation on December 24, 2013, and the Employer executed the

stipulation on February 6, 2014. None of the terms or conditions terminating respondent Huerta's employment related to a disabling medical condition or any physical incapacity to perform his job. On February 20, 2014, the State Personnel Board adopted the stipulation as its decision in the case, based on stipulated facts, terms and conditions, including, but not limited to, the following:

2. On January 28, 2013, at the close of business, [respondent Huerta] agrees that he will be deemed to have resigned. This resignation is irrevocable and is not contingent upon the action of any other State agency, now or in the future. [Respondent Huerta] further agrees, as part of the consideration and inducement for the execution of the Stipulation and Release, to never apply for or accept employment with the California Department of Corrections and Rehabilitation (CDCR), or any entity providing services to inmates or wards within CDCR. . . .
3. [The Employer] agrees to accept [respondent Huerta's] resignation effective at the close of business on January 28, 2013, and in exchange, [the Employer] agrees to withdraw the Notice of Adverse Action effective at the close of business January 13, 2013.
4. [Respondent Huerta], by his signature on this document, agrees to withdraw his appeal to the Notice of Adverse Action effective at the close of business January 28, 2013, and to waive his right to appeal the Notice of Averse Action either before the State Personnel Board or any court of law, which might have jurisdiction over the matter.
5. [Respondent Huerta] is familiar with and has read the provisions of California Civil Code § 1542, and expressly waives to the fullest extent of the law any and all rights he may otherwise have under the terms of that Code section. [quoted text omitted]. This release does not apply to any workers' compensation claims.
6. [Respondent Huerta], by his signature on this document, and in exchange for such consideration as is set forth in this Stipulation and Release, releases, acquits, and forever discharges the State of California, the California Department of Corrections and Rehabilitation (the Department), and its agents, representatives, employees, successors and assigns, of and from any and all demands, actions, causes of action, claims of any kind or nature whatsoever, known and unknown, anticipated or unanticipated, past or present, and any other claim under state or federal law . . . in connection with or arising out of the actions taken by the Department regarding this Notice of Adverse Action.

¶ . . . ¶

11. Nothing in this Stipulation and Release shall constitute an admission of wrongdoing by either party.

(Ex. 7.)

8. On January 23, 2014, respondent Huerta filed a Disability Retirement Election Application, claiming Industrial Disability Retirement (IDR) benefits on the basis of a disability to his left shoulder, neck, and right hip. He described the occurrence of his injury as follows: “1. In the course of feeding the inmates, I slipped on a wet surface and fell backwards striking a concrete surface. 2. While walking in a Control Booth I stepped in an open gunport with my right foot and fell through the gunport up to my groin.” (Ex. 5.)

9. On April 2, 2014, CalPERS determined that respondent Huerta’s application for IDR benefits was unacceptable because respondent was dismissed from employment for reasons which were not the result of a disabling medical condition and not for the purpose of preventing a claim for disability retirement. CalPERS served respondent with notice that his application was cancelled. On May 28, 2014, respondent Huerta filed a timely appeal of the adverse determination.

10. On February 18, 2015, the Workers’ Compensation Appeals Board awarded respondent permanent disability in the amount of \$49,450, less credits for payments previously made and attorney fees, beginning December 21, 2013. Respondent presented the medical records and reports of James L. Strait, M.D., F.A.C.S., and Dennis K. Miller, D.O., pertaining to examinations and assessments made in relation to respondent’s workers’ compensation claim and award.

LEGAL CONCLUSIONS

1. As the applicant for government benefits, respondent Huerta bears the burden of proof. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156; see also Gov. Code, § 20160, subd. (d).) The standard of proof is preponderance of the evidence. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044.)

2. A state safety member who is incapacitated for the performance of duty as the result of an industrial disability is eligible for IDR benefits. (Gov. Code, § 21151, subd. (a).)

3. An application for IDR benefits is timely if made while the employee is in state service, within four months after the discontinuance of the state service or while on an approved leave of absence, or while the employee is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the date of the application. (Gov. Code, § 21154.)

4. “Disability” and “incapacity for performance of duty” as a basis of retirement, mean a disability of permanent or extended and uncertain duration, as determined by CalPERS on the basis of competent medical opinion. (Gov. Code, § 20026.)

5. In this case, respondent Huerta filed his application for IDR benefits on January 23, 2014, before the decision made by the State Personnel Board resolving his appeal. However, the decision was based on terms agreed to by respondent Huerta, effectively backdating his resignation to January 28, 2013. Respondent Huerta expressly waived specific rights and privileges in connection with his separation from state civil service. (Gov. Code § 19996.1) Notably, he agreed not to accept reemployment and to release all claims and demands against the Employer, and “any other claim under state or federal law” in connection with or arising out of his employment rights. He expressly reserved his right to pursue his claim to workers’ compensation insurance benefits, but made no similar reservation of rights to pursue a claim to IDR benefits.

6. Accordingly, respondent Huerta’s employment terminated effective January 23, 2013, at which time he was deemed permanently separated from state civil service through resignation. (Gov. Code, § 19996.) The severance of the employer-employee relationship was under terms and conditions that eliminated any potential respondent Huerta may have otherwise had for reinstatement of employment if his capacity were restored, a necessary requisite for disability retirement. (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1297.)

7. Respondent Huerta’s separation was based on a resignation without any admission of wrongdoing, whereas the facts of the *Haywood* case involved a dismissal for cause. Nonetheless, these facts present a “difference without a distinction” as explained by Administrative Law Judge Jonathan Lew in Precedential Decision 13-01, *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot and California Dept. of Forestry and Fire Protection* (2013), as follows:

Were respondent to receive a disability retirement allowance, he would have no employer who could require him to undergo a medical examination under Government Code section 21192. And it is no longer possible for him to be reinstated under Government Code section 21193. These necessary prerequisites for receiving a disability retirement allowance are simply not present [when the employee resigns in settlement of an appeal to a Notice of Adverse Action.]

8. A similar conclusion was reached in Precedential Decision 16-01, *In the Matter of the Application for Industrial Disability Retirement of Philip D. McFarland and California State Prison, Sacramento, California, Department of Corrections and Rehabilitation* (2016). In the *McFarland* matter, the applicant responded to a Notice of Adverse Action by giving notice of his intent to retire and apply for IDR benefits. The effective date of his retirement was three days before the effective date of the Notice of Adverse Action issued to terminate his

employment for cause. The applicant unsuccessfully argued that his employment terminated by reason of his retirement, not by reason of a dismissal for cause. In concluding that the *Haywood* case precluded the application for IDR benefits, the administrative law judge applied substance over form, looking to the objective realities of the transaction, and finding that the applicant retired to avoid termination from employment with no matured right to IDR benefits

9. Therefore, the underlying rationale of the *Haywood* case applies in this case, even though respondent Huerta was not dismissed for cause.¹ However, the *Haywood* court expressly provided that its holding would not apply when a separation from employment is neither the “ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement.” (*Haywood v. American River Fire Protection District* (1998) 67 Cal. App.4th at 1307.) Respondent is unable to satisfy the conditions of either exception.

10. First, the Stipulation and Release was based on facts unrelated to any disabling medical condition or to respondent Huerta’s physical incapacity to perform his job. Respondent Huerta’s resignation was tendered in exchange for the Employer’s withdrawal of the Notice of Adverse Action and to avoid the costs and hazards of litigation. Accordingly, the separation from state service was not the ultimate result of a disabling medical condition.

11. Second, although respondent Huerta sustained injuries before the Employer served the Notice of Adverse Action, his right to IDR benefits matures only when CalPERS determines that he is no longer capable of performing his duties, not the date of injury. (*Smith v. City of Napa* (2004) 120 Cal. App.4th 194.) Because respondent Huerta did not apply for IDR benefits until after the separation from service, CalPERS made no determination of respondent’s ability to perform his duties as a correctional officer and had no opportunity to evaluate his claim before the Notice of Adverse Action. CalPERS’s approval was not a “foregone conclusion” because the medical records pertaining to respondent’s Workers’ Compensation Insurance claim were not “unequivocal evidence” of a permanent disability, such as the loss of a limb. (*Smith v. City of Napa, supra.*, 120 Cal. App.4th at 207.) The Workers’ Compensation Appeals Board award in favor of respondent Huerta has no res judicata effect on CalPERS. (*Petrillo v. Bay Area Rapid Transit Dist.* (1988) 197 Cal.App.3d 798.) Accordingly, the Notice of Adverse Action did not preempt an otherwise valid claim for IDR benefits.

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¹ In his closing brief, respondent inaccurately concludes that his “termination was withdrawn” and that “no termination exists.” (Ex. M.) In fact, the Employer withdrew the dismissal action subject to respondent’s resignation, resulting in the termination of employment, effective January 28, 2013.

12. Respondent Huerta has failed to prove by a preponderance of the evidence that he is entitled to IDR benefits. Respondent Huerta's application for IDR benefits fails to comply with Government Code section 21154 and is precluded under the principles of the *Haywood* case. Cause was not shown to reverse the determination of CalPERS to cancel the application.

ORDER

Respondent Huerta's appeal is denied. CalPERS's denial of respondent Huerta's application for IDR benefits is affirmed.

DATED: November 2, 2016

DocuSigned by:
Matthew Goldsby
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MATTHEW GOLDSBY
Administrative Law Judge
Office of Administrative Hearings