

ATTACHMENT D

DECEMBER 21, 2016 BOARD AGENDA ITEM



Board of Administration Agenda Item 8e

December 21, 2016

Item Name: Proposed Decision – In the Matter of the Cancellation of the Application for Industrial Disability Retirement of SHELDON K. SCARBER, Respondent, and CALIFORNIA HIGHWAY PATROL, Respondent.

Program: Benefit Services Division

Item Type: Action

Parties' Positions

Staff argues that the Board of Administration should decline to adopt the Proposed Decision.

Respondent Sheldon K. Scarber (Respondent Scarber) argues that the Board of Administration should adopt the Proposed Decision.

Strategic Plan

This item is not a specific product of either the Strategic or Annual Plans. The determination of administrative appeals is a power reserved to the Board of Administration.

Procedural Summary

Respondent Scarber submitted an application for Industrial Disability Retirement based on cardio, epilepsy, anxiety and hypertension conditions. CalPERS rejected the application for Industrial Disability Retirement because Respondent had been dismissed from his employment for reasons which were not the result of a disabling medical condition pursuant to *Haywood v. American River Fire Protection District*. Respondent Scarber appealed this determination and the matter was heard by the Office of Administrative Hearings on September 15, 2016. A Proposed Decision was issued on October 21, 2016, granting the appeal.

Alternatives

A. For use if the Board decides to adopt the Proposed Decision as its own Decision:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own Decision the Proposed Decision dated October 21, 2016, concerning the appeal of Sheldon K. Scarber; RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the Decision.

B. For use if the Board decides not to adopt the Proposed Decision, and to decide the case upon the record:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated October 21, 2016, concerning the appeal of Sheldon K. Scarber, hereby rejects the Proposed Decision and determines to decide the matter itself, based upon the record produced before the Administrative Law Judge and such additional evidence and arguments that are presented by the parties and accepted by the Board; RESOLVED FURTHER that the Board's Decision shall be made after notice is given to all parties.

- C. For use if the Board decides to remand the matter back to the Office of Administrative Hearings for the taking of further evidence:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated October 21, 2016, concerning the appeal of Sheldon K. Scarber, hereby rejects the Proposed Decision and refers the matter back to the Administrative Law Judge for the taking of additional evidence as specified by the Board at its meeting.

- D. Precedential Nature of Decision (two alternatives; either may be used):

1. For use if the Board wants further argument on the issue of whether to designate its Decision as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System requests the parties in the matter concerning the appeal of Sheldon K. Scarber, as well as interested parties, to submit written argument regarding whether the Board's Decision in this matter should be designated as precedential, and that the Board will consider the issue whether to designate its Decision as precedential at a time to be determined.

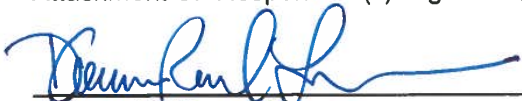
2. For use if the Board decides to designate its Decision as precedential, without further argument from the parties.

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, hereby designates as precedential its Decision concerning the appeal of Sheldon K. Scarber.

Budget and Fiscal Impacts: Not applicable

Attachments

- Attachment A: Proposed Decision
Attachment B: Staff's Argument
Attachment C: Respondent(s) Argument(s)


DONNA RAMEL LUM
Deputy Executive Officer
Customer Services and Support



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:

Case No. 2015-0243

OAH No. 2016050434

SHELDON K. SCARBER,

Respondent,

and

CALIFORNIA HIGHWAY PATROL,

Respondent.

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).¹ The record was closed, and the matter was submitted for decision on October 17, 2016.

¹ 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 16
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SUMMARY

The sole issue on appeal is whether Mr. Scarber is eligible to apply for industrial disability retirement. CalPERS 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."²

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

² "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*)³, or that he applied for disability retirement prior to termination of the relationship (*Smith*).⁴

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

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

⁴ *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

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Coren D. Wong
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COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DECLINE TO CONDUCT A FULL BOARD HEARING

CalPERS staff requests the Board decline to adopt the Proposed Decision, in favor of its own Decision, after conducting a Full Board Hearing in accordance with its policies. Staff's argument is based on the following:

1. The Proposed Decision improperly applies principles of equity. Equity does not apply to CalPERS' compliance with the California Public Employees' Retirement Law (PERL).
2. The Proposed Decision erroneously declined to apply prior case law (*Haywood* and *Smith*), as well as the Precedential Decision *Vandergoot*, to the facts.

Legal and Factual Background

On February 27, 2013, Respondent Sheldon Scarber (Respondent) applied for Industrial Disability Retirement (IDR). On July 9, 2013, Respondent submitted a Service Retirement Application, which was approved. Respondent has been receiving his service retirement allowance since then.

On July 22, 2013, the California Highway Patrol (CHP) issued a Notice of Adverse Action (NOAA) to Respondent. He was to be dismissed from his position as an Assistant Chief with the CHP effective August 29, 2013. The legal bases for dismissal were inexcusable neglect of duty, insubordination, dishonesty, discourteous treatment of the public or other employees, willful disobedience, misuse of state property and other failure of good behavior either during or outside working hours of such a nature that it causes discredit to the CHP.

Respondent appealed his termination. On December 12, 2013, Respondent and the CHP entered into a Stipulated Settlement. Pursuant to the terms of the Stipulated Settlement, Respondent agreed to withdraw his appeal of the termination, voluntarily resign from the CHP for personal reasons, waive any right to reinstate his employment, and waive any right to appeal the NOAA. On January 9, 2014, the State Personnel Board (SPB) approved the Stipulated Settlement.

On April 14, 2014, CalPERS notified Respondent that his IDR application had been cancelled due to operation of *Haywood*, *Smith* and *Vandergoot*. Respondent appealed, and a hearing was held on September 15, 2016.

The Proposed Decision

The Administrative Law Judge (ALJ) found that Respondent permanently terminated his employment relationship with the CHP when he entered into the Stipulated Settlement, and Respondent's termination of the employment relationship was wholly unrelated to any disability. The ALJ also found that the termination was not the ultimate result of a disabling medical condition, nor did the termination pre-empt an otherwise valid claim for industrial disability pension.

However, the ALJ also found that Respondent's IDR application had been pending for five months before the NOAA was issued, ten months before the Stipulated Settlement was executed, and eleven months before the SPB approved the settlement. After SPB approval, CalPERS waited three more months before cancelling Respondent's IDR application. In sum, the ALJ found that Respondent had waited approximately thirteen months for the Board to rule on his IDR application before it was canceled due to *Haywood et al.*

Applying principles of equity, the ALJ found that Respondent's eligibility for IDR is deemed to have survived the termination of his employment relationship with the CHP. The ALJ therefore granted his appeal.

Why the Proposed Decision Should Be Rejected

- I. The Proposed Decision improperly applies principles of equity. Equity does not apply to CalPERS' compliance with the PERL.

The law is clear that the power of equity "cannot be intruded in matters that are plain and fully covered by positive statute." *Barrett v. Stanislaus Co. Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1608. CalPERS may only pay benefits that are authorized by law. To the extent that the ALJ relies on inaction by CalPERS staff (thirteen months delay), that equitable doctrine is called laches.

The law is clear that equity is barred where the government agency does not possess the authority to do what it appears to be doing. *Medina v. CalPERS* (2003) 112 Cal.App.4th 864, 870. Principles of equity cannot be invoked to contravene statutes and provisions that define an agency's powers. *Fleice v. Chualar Union Elem. School Dist.* (1988) 206 Cal.App.3d 886, 893.

CalPERS may only grant retirement benefits that are authorized by the PERL and case law. CalPERS has no authority to grant additional retirement benefits, no matter the equities involved. Even if Respondent Scarber relied to his detriment on inaction by CalPERS staff, CalPERS staff does not possess the authority to do what it appeared to be doing. *Medina, supra and Pomona Police Officers Assoc. v. CalPERS* 58 Cal.App.4th, 585. Therefore principles of equity, including laches, do not apply to the facts here.

Even if laches were available to Respondent, the facts in this case do not rise to the level of a laches claim. Laches is an equitable remedy based on unreasonable delay. "The first element of laches is delay." (*Magic Kitchen LLC v. Good Things Intern. Ltd.*, 153 Cal.App.4th at p. 1157.) Courts have concluded that some delay is permissible, including "when it is necessitated by the exhaustion of remedies," or "when it is used to evaluate and prepare a claim." (*Id.* at p. 1160.)

Laches applies to an unreasonable delay in making an assertion, such as asserting a right, which may result in refusal. Here, Respondent's IDR application was pending for

only 5 months prior to the NOAA being issued. When CalPERS receives any IDR application, it investigates all the underlying facts, including claimed medical condition and employment status. During CalPERS' investigation, it found out for the first time, that Respondent was served with an NOAA. Once CalPERS had notice of Respondent's termination, it could not ignore it. The NOAA had to be finalized either through a hearing at SPB, or as here, through a Stipulated Settlement. CalPERS had to wait for the NOAA to be final, in order to determine whether *Haywood* applied.

Further, laches is not available to provide Respondent a benefit not otherwise available to him. For an equitable theory to survive, an important element must be met - which the ALJ fails to address at all - that the interests of the private party must outweigh the effect on the public interest and policies. *Precedential Decision: In Re Henderson*, p. 10-11 (citing *Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489). Here, Respondent's interest in IDR cannot possibly outweigh strong public interest in maintaining the Public Employees' Retirement Fund, particularly when Respondent's appeal conflicts directly with case law and prior Precedential Decisions.

The Proposed Decision is inconsistent with *Haywood*, *Smith* and *Vandergoot*. Thus, the Board should conduct a hearing on the record to correct the erroneous analysis and conclusion in the Proposed Decision.

II. The Proposed Decision erroneously failed to apply prior case law (*Haywood* and *Smith*), and the Precedential Decision *Vandergoot*, to the facts.

Relying on a partial quote from *Smith*, the ALJ used principles of equity to grant Respondent's appeal. The ALJ reasoned that because Respondent waited approximately thirteen months for the Board to rule on his IDR application before it was canceled, somehow Respondent's eligibility for IDR is deemed to have survived his termination.

The ALJ's reasoning is seriously flawed because it ignores the full language and reasoning in *Smith*, which states in its entirety:

It is not as if the plaintiff had an impending ruling on a claim for 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.
Id.

Identical to the plaintiff in *Smith*, Respondent Scarber did not initiate the IDR process until two years after giving numerous causes for his dismissal. According to the NOAA, beginning in May 2011, pornographic images were accessed and saved on Respondent's work computer's hard drive. In July 2011, Respondent inappropriately used for private gain or advantage his prestige and influence as a member of the CHP when he requested and was allowed extra visitation privileges and physical contact to visit his son arrested and incarcerated in Fresno county jail, facing rape and burglary charges. In November 2012, Respondent directed a subordinate employee to

unlawfully access California Law Enforcement Telecommunications System in order to run an unauthorized driver's history check. Beginning in September 2012, Respondent sent and received unauthorized emails of police reports regarding his son's arrest. On December 2012, Respondent willfully disobeyed a direct order given to him by a CHP Supervisor, after his police powers were suspended when he discussed the nature of an ongoing investigation involving Respondent personally. On December 2012, Respondent aided in and conspired to assist his son to evade prosecution, filed a false missing persons report, and made dishonest statements to law enforcement, when he helped his son escape Fresno county jurisdiction by transporting him to Mexico.

All the above events happened *before* respondent filed his IDR application on February 27, 2013. The ALJ ignores all these facts when arriving at his erroneous decision. Respondent did not even initiate the IDR process until after giving numerous significant causes for his dismissal for cause.

Second, *Smith* recognizes that the key issue is whether Respondent's "right to a disability retirement matured before [his] separation from service." *Id.* According to *Smith*, "a vested right matures when there is an unconditional right to immediate payment." *Id.* The Supreme Court noted that "a duty to grant a disability pension does not arise at the time of injury itself, but when the pension board determines that the employee was no longer capable of performing his duties." *Id.* Here, a CalPERS determination of eligibility did not antedate the facts giving rise to Respondent's termination. Any "right" Respondent may have had to a disability retirement was immature, and his dismissal for cause defeated it. *Id.*

Third, the ALJ ignores the clear language in *Smith* which states, "As we stated in *Haywood*, the timeliness of the application is a procedural issue without any significance to the substantive entitlement to a disability retirement." *Smith*, citing *Haywood*, 67 Cal.App.4th at p. 1307. Here Respondent has no substantive entitlement to a disability retirement. He was terminated for reasons wholly unrelated to any disability he may have been suffering at the time, and the reasons for his termination occurred long before he submitted his IDR application.

Proposed Board Action

Based on the serious flaws of the Proposed Decision, CalPERS staff urges the Board to reject the Proposed Decision and hold a Full Board Hearing. Once the Board considers all the evidence and arguments in full context, the Board can then decide for itself whether the ALJ has analyzed the applicable law correctly. In short, the Board should grant a Full Board Hearing so that the Board's final Decision, whatever it may be, is supported by a correct and reasonable application of law.

December 21, 2016.


ELIZABETH YELLAND
Senior Staff Attorney

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

ATTACHMENT _____
RESPONDENT'S ARGUMENT



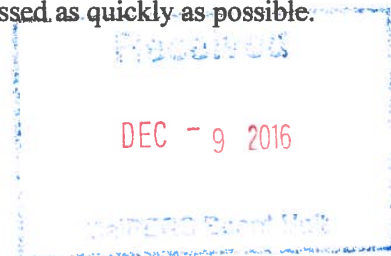
RESPONDENT'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent **Sheldon 'Kyle' Scarber** (Respondent Scarber) rose to the rank of Assistant Chief with Respondent California Highway Patrol (CHP) – culminating at the Central Division Office, Fresno, California. Respondent Scarber's promotional advances occurred in Central Division (Sergeant); CHP headquarters, Sacramento (Lieutenant); Federal Bureau of Investigation, Washington, D.C.; Central Division (Captain) and CHP headquarters assigned to the Office of Assistant Commissioner Field; and Central Division (Assistant Chief). By virtue of his employment with the CHP, Respondent Scarber is a state safety member of CalPERS.

It is undisputable Respondent Scarber was and is entitled to fairness and equity regarding his Application for Industrial Disability Retirement (IDR), since he first submitted his Application in February of 2013; however, he was intentionally and otherwise denied a timely review and unjustly provided a denial of his Application for IDR. Upon the Boards review of the Proposed Decision and Order by the Honorable Judge Coren D. Wong (whom reviewed and considered factual and legal issues; evidentiary matters, statements, and legal conclusions citing case law used by CalPERS to deny Respondent Scarber's Application for IDR¹); the Argument to Adopt the Proposed Decision; and ultimately applying the principles of equity and fairness, Respondent Scarber prays upon the Board to render the only reasonable conclusion in that the Board adopt the Proposed Decision/Order in its entirety.

Respondent Scarber was placed on **no-duty status** by his designated primary care physician (Doctor Robert Graham, M.D. and Julie Guyette, Family Nurse Practitioner (FNP)), on **December 20, 2012**, on the basis of hypertension, cardio, epilepsy, anxiety and hypertension. Respondent Scarber was instructed by his primary care physicians that he was never to return to a law enforcement position, nor within the CHP based on his medical conditions and his inability to perform the required critical tasks of a CHP officer.

On **February 27, 2013**, CalPERS received Respondent Scarber's Application for Industrial Disability Retirement, and all necessary required documents to process his application. This included documentation required to be filled out and signed by his immediate departmental superior prior to submission. Respondent Scarber's cumulative disabilities included hypertension, cardio, epilepsy, anxiety and hypertension beginning in 1997. (Application submitted by personal delivery to the Fresno CalPERS regional office.) Respondent Scarber was provided a response from CalPERS his Application will be processed as quickly as possible.



¹ Legal Conclusions rendered by the Honorable Judge Coren D. Wong as a result of *the Hearing In the Matter of the Cancellation of the Application for Industrial Disability Retirement of Sheldon K. Scarber* conducted on September 15, 2016, in Fresno, California. Case number 2015-0243; OAH number 2016050434, pp 5-7.

On **August 26, 2013**, upon the advice of CalPERS representative(s), Respondent Scarber submitted his Application for Service Retirement by personal delivery to the Fresno CalPERS regional office.

(Note: Between March 11, 2013, and July 9, 2013, Respondent Scarber personally spoke with CalPERS representatives, up to and including the Senior Staff Attorney, Jeanlaurie Ainsworth, regarding the status of his pending Application. Respondent Scarber was provided several varying responses as to the review status of his Application.)

CalPERS representatives informed Responded Scarber his better alternative was to seek service retirement with an Application for IDR, since Respondent's pending Application was somewhere within CalPERS but nobody was sure where. Once again, Respondent followed the advice of CalPERS.

Respondent Scarber began receiving his service retirement benefits upon his 50th birthday; October 31, 2013.

On **April 14, 2014**, CalPERS notified Respondent Scarber that his Application for IDR was denied and he filed a timely appeal.

When the established and procedural process is disrupted or delayed by no fault of the applicant, as in Respondent Scarber's case, on the surface the acts and harm appear malicious and intentionally, not out of caution or slow decision making, but cause distress while Respondent Scarber's Application was delayed more than 13 months before the Board of Administration ruled on his Application.

From the time Respondent Scarber was placed on "no-duty" status on December 20, 2012, until his matter was resolved, Respondent Scarber was required to utilize the use of his sick leave/vacation time to seek continued medical care.

Respondent Scarber has patiently complied with any and all instructions, time frames, and directions of state entities (CalPERS and State Compensation Insurance Fund (SCIF)), in an effort to assist him with his Application and industrial related injuries and illnesses. Respondent Scarber willingly participated in Agreed Medical Examinations (AME) and Qualified Medical Examinations (QME) between the time he filed his initial Application and until such time the Board of Administration ruled on his Application. (Dr. Sobol's examination was conducted after the Board of Administration Ruling.) Each independent medical evaluator ruled in favor of Respondent Scarber as mentioned below. Unfortunately, the principles of equity, procedures and processes were to ensure accountability by Respondent Scarber and not by CalPERS representatives assigned to review Respondent Scarber's Application while collaborating with SCIF and the CHP.

AME – Dr. Samuel Sobol. Cardiovascular. 37% industrial disability rating;

AME – Dr. Jacks. Psychological. 65% industrial disability rating, 26% permanent disability;

QME – Dr. Kurt Miller. Neurology. 25% industrial disability rating; and

QME – Dr. Mark Bernhard. Spine (lower back). 40% industrial disability rating.

Additionally, Respondent Scarber had a Heart Monitor Implant inserted close to his heart by his Cardiologist, Dr. Dalpinder Sandhu and is required to take medications for the rest of his life. As of the preparation and submission of this Argument in Support of Proposed Decision, the Heart Monitor is still in place. Ms. Elizabeth Yelland, Senior Staff Attorney representing CalPERS, stated during the Hearing before Judge Wong that medical information was not evaluated/considered. This demonstrated act contradicts the document (booklet) for access by all state employees seeking guidance or answers pertaining to disability or industrial disability retirement.²

In accordance with Respondent Scarber's primary care provider, he is still not employable due to his chronic, job related, injuries and illnesses. Additionally, the state approved, primary treating physician (Dr. Polglase), has imposed strict limitations limiting Respondent Scarber's day-to day activities.

The overriding factor regarding Respondent Scarber's case was did he survive the termination in which the CHP was seeking? The answer is an unequivocal "yes!" Was Respondent Scarber's and his Application treated with fairness, ethical practices, and equitable treatment? The answer is an unequivocal "no!"

Respondent Scarber stipulates the CHP conducted an Internal Investigation against him as discussed within this matter and that he entered into a Settlement Agreement with CHP; and that the Board of Administration had not yet ruled on his claim for IDR when he signed the Agreement or the State Personnel Board's final approval of the Agreement. As argued in the Hearing and this document is the fact Respondent Scarber waited more than 13 months for the Board of Administration to apply a ruling on his Application. However, Respondent Scarber contests and contested, verbally and in writing, material used and/or not used by Ms. Elizabeth Yelland, Senior Staff Attorney representing CalPERS. The manner in which she prepared, presented, articulated, and "defended" this case, and in making the determination leading to the cancellation of Respondent Scarber's Application appeared biased and riddled with unfairness and unethical practices.³ At no time did any CalPERS representative request any information or additional documentation of Respondent Scarber from the initial filing of his Application, through the cancellation of his Application. However, CalPERS did request several documents from the CHP and were only provided limited documents. An example of one such document was the "Skelly Hearing" in which Respondent Scarber participated. The timing of such request did not hinder the Board of Administration's decision process.

At no time did Ms. Elizabeth Yelland, provide any explanation nor plausible rationale, orally or in writing, to Respondent Scarber nor to Judge Wong, as to the exorbitant delay relating to Respondent Scarber's Application. A relevant and underlying question asked over and over

² CalPERS. *A Guide to Completing Your CalPERS Disability Retirement Election Application; Other Considerations Regarding Disability Retirement; Workers' Compensation*, p. 26. "Medical evidence will be required to show that you meet the CalPERS definition of disability." (*Emphasis added.*) <https://www.calpers.ca.gov/.../disability-retirement-pub.pdf>. Accessed December 8, 2016.

³ Addressed in detail in Respondent's Closing Argument.

again by Respondent Scarber. Instead she focused solely on irrelevant case laws,⁴ without any consideration of the relevant and underlying question nor the totality of the case before her. Additionally, her methodology in “defending” the denial of Respondent Scarber’s Application for IDR is plagued with procedural, administrative, judicial prejudice and error.⁵

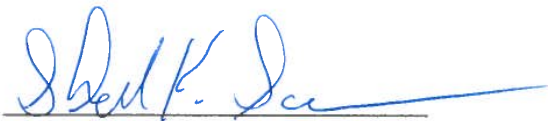
Respondent Scarber’s decision to appeal the denial of IDR was based on principle, courage – doing the right thing despite the adversity, and because the case was treated unjustly and unfairly, and without equity, therefore rendering the cancellation of the Application unjustifiable and without merit.

The Proposed Decision/Order is supported by the law and facts. Respondent Scarber argues that the Board adopt the Proposed Decision.

Because the Proposed Decision/Order properly applies the law to the salient facts of this case, the risks of adopting the Proposed Decision/Order of the Honorable Judge Coren D. Wong are minimal, justifiable, and proven beyond a preponderance by Respondent Scarber. The principles of equity here does not replace or violate the law, but it backs it up and supplements it as in this case before the Board. Equity follows appropriate rules of law which are thoroughly documented by the Honorable Judge Coren D. Wong. As such, Respondent Scarber respectfully requests the Board to render a just and proper decision that parallels that of Judge Wong in that Respondent Scarber be granted his Application for Industrial Disability Retirement. Thank you for your time!

Respectfully Submitted

December 8, 2016



SHELDON “KYLE” SCARBER
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⁴ *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*) and its progeny *Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01 (*Vandergoot*), and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*).

⁵ Addressed in detail in Respondent’s Closing Argument.