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7 BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

8 In the Matter of the Cancellation of IDR) CASE NO. 2015-0243
9 Application of:)
10 SHELDON K. SCARBER,) OAH NO. 2016-050434
Respondent,) **CalPERS' REQUEST FOR**
11) **OFFICIAL NOTICE**
and) Hearing Date: September 15, 2016
12) Hearing Location: Fresno
13 CALIFORNIA HIGHWAY PATROL,)
Respondent.)

14 TO THE COURT, ALL COUNSEL AND PARTIES OF RECORD:

15 Petitioner California Public Employees' Retirement System (CalPERS) hereby
16 requests Official Notice pursuant to Gov. Code section 11515 and Evidence Code
17 section 452 be taken of the following documents. The significance, existence and
18 genuineness of these documents constitute facts not reasonably subject to dispute.

19 **SUPERIOR COURT DOCUMENTS**

20 14. Superior Court of California, County of Fresno, Court Reporter's
21 Transcript from Preliminary Hearing, Sheldon Kyle Scarber Held to Answer, dated
22 March 11, 2016.

23 15. Superior Court of California, County of Los Angeles, Judgment on
24 Petition for Writ of Mandate, *Sergio Garcia v. CalPERS*, filed October 23, 2015.

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1 Judgments and orders of the Superior Court may be judicially noticed by the
2 courts of this State. CA Evid. Code section 452.

3 **PRECEDENTIAL DECISION**

4 16. Precedential Decision, *In the Matter of the Application for Industrial*
5 *Disability Retirement of Robert Vandergoot, Respondent*, dated February 19, 2013;
6 made Precedential by the CalPERS Board of Administration, effective October 16, 2013.

7 The Legislature has specifically granted quasi-judicial entities, such as the
8 CalPERS Board of Administration, the power to designate "precedential" appeal
9 decisions if the Board determines that it contains a significant legal or policy
10 determination of general application that is likely to recur; and the decision contains a
11 clear and complete analysis of the issues in sufficient detail so that interested parties
12 can understand why the findings of fact were made and how the law was applied.
13 Gov. Code section 11425.60.

14 Once an appeal decision has been designated as precedential, it will bind all
15 future appeals to the extent that the disputed law and issues are the same. Gov. Code
16 section 11425.60.

17 This case is on all fours with the facts, law and issues in *Haywood, Smith* and
18 *Vandergoot*. In all three cases, the members' applications were rejected on the
19 grounds that each of them had been terminated for cause.

20 In *Haywood*, the appellate court found:

21 Where an employee is terminated for cause and the discharge is neither the
22 ultimate result of a disabling medical condition nor pre-emptive of an otherwise
23 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. . . .

24 A firing for cause constitutes a complete severance of the employer-employee
25 relationship, thus eliminating a necessary requisite for disability retirement – the
potential reinstatement of [the employee with the employer] if it is ultimately

1 determined that he is no longer disabled. . . . the disability provisions of the
2 PERL contemplate a potential return to active service and a terminated
3 employee cannot be returned to active service. (*Haywood, supra*, 67
4 Cal.App.4th at 1306-1307.)
5 In *Vandergoot*, the CalPERS Board held an employee's resignation was
6 tantamount to a dismissal when the employee resigned pursuant to a Settlement
7 Agreement entered into to resolve a dismissal action and agreed to waive all rights to
8 return to his former employer. As explained in *Vandergoot*, "a necessary requisite for
9 disability retirement is the potential reinstatement of the employment relationship" with
10 the employer if it ultimately is determined that the employee is no longer disabled.
11 (*Vandergoot, supra*, p. 7, para. 18.)

12 The facts in *Vandergoot* and *Garcia* mirror those here. In both, Respondents
13 were served with NOAAs, and both elected to sign Stipulated Settlements which
14 provided that Respondents would sign and submit "voluntarily" resignations to avoid
15 termination. In both, Respondents' relationship with their employers was severed, and
16 that severance became irrevocable when each withdrew his appeal. In both,
17 Respondents were barred from returning to former employment due to the express
18 terms of Stipulated Settlements. On those facts, both *Vandergoot* and *Garcia* found that
19 Respondents were ineligible to file for IDR.

20 Both *Vandergoot* and *Garcia* argued that *Haywood* and *Smith* are not controlling,
21 because those cases involved employees who were terminated for cause. They argued
22 that they were not terminated, but had voluntarily resigned pursuant to a Stipulated
23 Settlement. Both ALJs (and the Superior Court judge in *Garcia*) disagreed with that
24 argument, and upheld CalPERS' determination.

25 Citing *Haywood* and *Smith*, the judges interpreted Gov. Code §21154 to mean
that a CalPERS member terminated for cause is ineligible to apply for disability
retirement after termination. Case law holds that a continuing employment relationship

1 is required, in order to make possible reinstatement to employment, if the disability
2 resolves. The ALJ was not persuaded by Vandergoot and Garcia's contentions that
3 they were not precluded by *Haywood* and *Smith* from applying for disability retirement
4 because they had "voluntarily" resigned rather than being terminated.

5 The rationale in *Vandergoot* is binding here. The ALJ reasoned that if
6 Vandergoot was allowed to receive a disability retirement allowance, he would have no
7 employer who could require him to undergo a medical examination under Gov. Code
8 section 21192. And it is no longer possible for him to be reinstated under Gov. Code
9 section 21193, due to the express provisions of the stipulated settlement. These
10 necessary prerequisites for receiving a disability retirement allowance are simply
11 absent, so the ALJ found that CalPERS can fairly consider the terms of the Stipulated
12 Settlement as being tantamount to a dismissal, for purposes of applying the *Haywood*
13 and *Smith* criteria (*Vandergoot*, p. 8, para. 19).

14 The ALJ explained it as follows: Vandergoot's employer commenced disciplinary
15 action against him, and terminated him from employment for cause pursuant to a NOAA.
16 The character of the disciplinary action terminating Vandergoot's employment did not
17 change because Respondent elected to settle the case prior to exhausting his appeal
18 rights. But for the pendency of the disciplinary action, Vandergoot would not have
19 entered into a settlement agreement with his employer resigning from his position.
20 Furthermore, the ALJ found that Vandergoot's resignation is a distinction without a
21 difference. His resignation resulted in his permanent separation of service. Gov. Code
22 section 19996; *Collins v. Co. of Los Angeles* (1976) 55 Cal.App.3d 594,597. Therefore,
23 Vandergoot's employment relationship was ultimately terminated on the effective date of
24 his NOAA, and his termination for cause bars his eligibility to apply for disability
25 retirement.

1 The ALJ was not impressed with Vandergoot's argument that he might be eligible
2 for disability retirement because he could be reinstated to state service, just not with his
3 current employer. The ALJ reasoned that even if Vandergoot obtained another civil
4 service position with the State of California in the future, such employment will not
5 resurrect his eligibility to apply for disability retirement with his terminating employer.
6 That claim is foreclosed due to Vandergoot's termination for cause. As Vandergoot's
7 employment relationship was completely severed, there was no potential for
8 reinstatement if he is found no longer disabled.

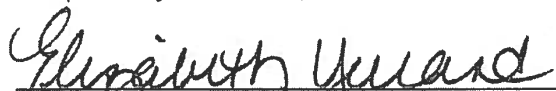
9 The ALJ reasoned that *Haywood* makes it clear that a necessary prerequisite for
10 disability retirement is the potential reinstatement of the employment relationship with
11 the employer if it ultimately is determined that Respondent is no longer disabled.
12 *Haywood, supra*, at p. 1296-1997. In *Vandergoot*, the employment relationship was
13 severed, and the terms of the Stipulated Settlement expressly lock Respondent out from
14 being reinstated. The ALJ found that such is wholly inconsistent with the policy behind
15 disability retirement (*Vandergoot*, para. 17-18, pp. 7-8).

16 The *Vandergoot* decision found that the operation of *Haywood* and *Smith* applied
17 to prevent Respondent from filing an application for IDR, even when he agreed to
18 voluntarily resign in the face of pending disciplinary action.

19 The facts here are the same. The result should also be the same. Respondent
20 Scarber is precluded from filing an application for disability retirement based on the
21 holdings in *Haywood, Smith* and *Vandergoot, supra*.

22 Respectfully submitted,

23 Dated: September 15, 2016.


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