

ATTACHMENT A
THE PROPOSED DECISION

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

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

JOSEPH RAMEY,

Respondent

and

SYLVAN CEMETERY DISTRICT,

Respondent.

Case No. 2015-0997

OAH No. 2016040755

PROPOSED DECISION

Administrative Law Judge Tiffany L. King, Office of Administrative Hearings, State of California, heard this matter on November 1, 2016, in Sacramento, California.

Preet Kaur, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Joseph Ramey (respondent) was present and represented himself.

Ronnie Clark, General Manager, appeared on behalf of respondent Sylvan Cemetery District (Sylvan).

Evidence was received, the hearing was closed, and the record was held open until close of business on November 15, 2016, to allow CalPERS to submit additional exhibits and respondents to respond thereto. On November 1, 2016, CalPERS submitted the meeting minutes from the Sylvan board meeting on December 9, 2014. The minutes were marked as Exhibit 15. No objection was received and Exhibit 15 was admitted. The record was closed and the matter was submitted on November 15, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED

10/14 20/16

Debra Woolen

FACTUAL FINDINGS

1. Respondent was hired by Sylvan in December 1994. He worked there continuously for twenty years until his separation in December 2014. At the time of his separation, respondent held the job title of Assistant Manager. By virtue of his employment, respondent became a local miscellaneous member of CalPERS subject to Government Code section 21154.

2. As early as 2008 and thereafter, respondent was counseled on numerous occasions for preparing a gravesite other than the one designated by the decedent's family. In more than one instance, respondent's error led to the decedent being buried in the wrong burial plot.

3. In the fall of 2012, respondent broke his leg for which he took medication and wore an air cast. The wearing of the air cast caused respondent to experience back pain. He took muscle relaxers to remain limber enough to walk. As a result of respondent's injury, Sylvan agreed to place him on light duty. Respondent remained on light duty until his separation.

4. On April 26, 2014, respondent was placed on indefinite probation due to his repeated mistakes in laying out gravesites. On May 2, 2014, after preparing another gravesite incorrectly, respondent was issued a written reprimand by his supervisor, Ronnie Clark. The reprimand cautioned respondent that another gravesite error would result in respondent's immediate termination.

5. On December 8, 2014, respondent again prepared the wrong gravesite. Mr. Clark met with respondent and verbally advised that he was terminated. Respondent replied that he could not be terminated because he was resigning, effective immediately. At the time of the meeting, Mr. Clark had not yet prepared a written notice of termination and provided nothing else in writing to respondent concerning the effective date of his termination, the bases therefor, or his rights to appeal the dismissal. At its regular board meeting on December 9, 2014, Mr. Clark informed the Sylvan Board of Trustees that respondent was terminated. The next day or day after, respondent submitted to Mr. Clark his written letter of resignation with an effective date of December 8, 2014. On December 11, 2014, Sylvan accepted respondent's resignation with an effective date of December 8, 2014. At no time was respondent served with a written notice of termination nor did he enter into a settlement agreement with Sylvan wherein he agreed his resignation was in lieu of termination for cause and waived his rights to return to Sylvan.

6. On January 28, 2015, respondent signed and submitted to CalPERS an application for service pending disability retirement (Application). In his Application, respondent claimed disability on the basis of orthopedic (back) conditions. On June 22, 2015, CalPERS notified respondent that his Application was approved.

7. By letter dated July 3, 2015, CalPERS advised respondent that his Application was cancelled.¹ By letter dated July 23, 2015, CalPERS explained that respondent was not eligible for disability retirement because he was “dismissed from employment for reasons which were not the result of a disabling medical condition” and his dismissal did “not appear to be for the purpose of preventing a claim for disability retirement.” Consequently, CalPERS cancelled respondent’s Application.

8. By letter dated August 4, 2015, respondent appealed the cancellation of his Application, asserting that: (1) he was not terminated from his job but rather voluntarily resigned, and (2) his separation from employment was the ultimate result of his disabling medical condition, i.e., his back.

9. Anthony Suine, Chief, Benefits Services Division, CalPERS, made and filed the Statement of Issues in his official capacity. As noted therein, the appeal is limited to the issue of whether respondent may file an application for disability retirement based on an orthopedic (back) condition, or whether his application and eligibility for disability retirement is precluded by operation of law. (See *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*).)

Discussion

10. Respondent argues that he was not terminated for cause from his employment and therefore he is eligible to apply for disability retirement. He contends that *Haywood* and its progeny do not preclude his application because he resigned before any termination took effect and Sylvan accepted his resignation.

11. CalPERS contends that respondent resigned in lieu of termination for cause, and therefore, the employer-employee relationship between Sylvan and respondent was permanently severed. In furtherance of this position, CalPERS relies on Mr. Clark’s testimony that Sylvan would not hire respondent again if respondent were to seek reemployment or reinstatement.

12. The termination of a member’s employment for cause, where the dismissal is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, renders the member ineligible for disability retirement. (*Haywood, supra*, 67 Cal. App. 4th at 1306-1307 [“[A] firing for cause constitute[s] a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement — the potential reinstatement of [the employment relationship] if it is ultimately determined that he no longer is disabled”].) A termination constitutes “a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement – the potential reinstatement of his employment

¹ The reason for CalPERS’ cancellation of respondent’s Application, after the Application had been accepted, was not offered into the record.

relationship with [the employer] if it ultimately is determined that he is no longer disabled.” (*Haywood, supra*, 67 Cal.App.4th at p. 1306.)

13. In *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot*, CalPERS Precedential Bd. Dec. No. 13-01 (*Vandergoot*), the Board held an employee’s resignation was tantamount to a dismissal for cause when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and agreed to waive all rights to return to his former employer. As explained in *Vandergoot*, “a necessary requisite for disability retirement is the potential reinstatement of the employment relationship” with the employer if it ultimately is determined that the employee is no longer disabled. (*Vandergoot, supra*, p. 7, ¶ 18.)

14. The facts in this case are distinguishable from those in *Haywood* and *Vandergoot* in that respondent resigned without having ever been served with a notice of termination and without entering into a settlement agreement with Sylvan wherein he agreed never to return.

15. CalPERS also argues that respondent is precluded from seeking disability retirement by the reasoning in its precedential decision, *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland (MacFarland)*, CalPERS Precedential Bd. Dec. No. 16-01. In *MacFarland*, a prison psychologist was served with written notice that his employment would be terminated for cause. The written notice included an effective date for the termination, the bases therefor, and the employee’s right to respond to his employer before the dismissal took effect or to appeal the termination to an independent adjudicative agency. Two days before the dismissal took effect, the psychologist notified his employer of his service retirement, effective immediately, and his intent to file for disability retirement. He subsequently applied for disability retirement. CalPERS denied the application on grounds that the psychologist was terminated for cause.

Concluding the psychologist was ineligible for disability retirement benefits pursuant to the holdings in *Haywood* and its progeny, the Board of Administration explained:

The record is clear that applicant’s employer made its decision to terminate him on or before it issued the July 7, 2013 [Notice of Adverse Action], advising that his employment would be terminated on July 23, 2013. Applicant service-retired from his employment three days before the effective date of his termination for cause. Had applicant not service-retired on July 23, 2013, his employment would have been terminated on July 26, 2013. The evidence is persuasive that should applicant attempt to reinstate with his employer, the [Notice of Adverse Action] would be enforced and he would be barred from reinstatement. Additionally, applicant waived any appeal rights and would be barred from seeking to overturn the [Notice of Adverse Action].

Furthermore,

The law does not respect form over substance. [Citation.] The courts look to the “objective realities of a transaction rather than to the particular form the parties employed. Thus, we focus on the actual rights and benefits acquired, not the labels used.” [Citation.] Here, the evidence is persuasive that applicant retired to avoid termination from employment. His relationship with his employer had been severed prior to his retirement, when the NOAA was served on him. His severance became irrevocable when he withdrew any appeal he filed. Applicant is barred from returning to his former employment and thus the holdings in *Vandergoot* and *Haywood* render him ineligible for disability retirement, unless he meets an exception identified in *Haywood* and *Smith*.

(*MacFarland*, *supra*, at pp. 7-8.)

16. The facts in *MacFarland* are also distinguishable from the facts in the instant case. Here, respondent was never served with a notice of termination which included an effective date, the bases therefor, or explained his rights to challenge the dismissal action. Rather, although verbally informed by Mr. Clark that he would be terminated, respondent resigned before Sylvan took any formal steps to effectuate its decision to terminate his employment. In cancelling respondent’s Application, CalPERS essentially argues that *MacFarland* should be taken one step further – i.e., that an employee’s resignation under negative circumstances, but before the employer has taken any formal steps to effectuate a dismissal, is tantamount to a termination for cause, and therefore, precludes eligibility for disability retirement. Such a scenario is not contemplated by *Haywood* or any of its progeny. To extend the holding in *MacFarland* in this manner would effectively eliminate an employee’s right to apply for disability retirement from the moment his or her employer orally notifies him that he is going to be terminated. The arguments that CalPERS made at hearing were not persuasive that the holding in *MacFarland* should be so significantly extended.

17. In sum, CalPERS failed to establish that the preclusion set forth in *Haywood* and its progeny applies in this case. Respondent’s appeal from the cancellation of his Application should therefore be granted, and his Application should be reviewed on the merits to determine whether he should be granted disability retirement.

///

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. CalPERS has the burden of proving that respondent was terminated for cause prior to seeking disability retirement, or that he resigned under circumstances which are tantamount to a dismissal for cause. (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”]; *Haywood, supra*, 67 Cal.App.4th 1292.) The standard of proof is 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 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.) If CalPERS meets its burden, the burden then shifts to respondent to show whether either of the *Haywood* exceptions applies.

Applicable Law

2. Government Code section 21152 states in pertinent part:

Application to the board for retirement of a member for disability may be made by...

(d) The member or any person in his or her behalf.

3. By virtue of his employment with Sylvan, respondent became a local miscellaneous member of CalPERS subject to Government Code section 21154, which provides in relevant part:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of any application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or on its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the


board shall request the governing body of the contracting agency employing the member to make the determination.

4. CalPERS did not establish that respondent's resignation from his position at Sylvan was tantamount to a dismissal for cause under the criteria set forth in *Haywood* and its progeny, which would preclude his applying for disability retirement. (See Findings 10 through 17.) Accordingly, respondent's appeal from CalPERS' cancellation of his Application should be granted.

ORDER

The appeal of respondent Joseph Ramey is GRANTED. CalPERS shall review respondent's disability retirement application on the merits to determine whether he should be granted disability retirement.

DATED: December 12, 2016

DocuSigned by:

E485005DE8FE46C

TIFFANY L. KING
Administrative Law Judge
Office of Administrative Hearings