

ATTACHMENT A
THE PROPOSED DECISION

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

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

TIMOTHY J. BECK,

Applicant/Respondent,

and

LAKE ARROWHEAD COMMUNITY
SERVICES DISTRICT

Respondent.

Case No. 2016-0553

OAH No. 2016060675

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on December 15, 2016, in San Bernardino, California.

John Shipley, Staff Attorney, represented Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS), State of California.

Respondent, Timothy Beck, represented himself.

No appearance was made by or on behalf of respondent, Lake Arrowhead Community Services District.

The matter was submitted on December 15, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 11/01 20 17
Debra S. Wooten

FACTUAL FINDINGS

Background

1. Respondent commenced employment as a maintenance worker with the Lake Arrowhead Community Services District (LACSD), beginning in November 2006. By virtue of his employment, respondent is a member of CalPERS subject to Government Code sections 21151 and 21154.

2. On March 25, 2015, LACSD served on respondent a Notice of Disciplinary Action for the following misconduct:

- 1) Causing, creating, or participating in a disruption of any kind during work hours or on District property;
- 2) Insubordination, including but not limited to failure or refusal to obey the orders or instructions of a supervisor or member of management or the use of abusive or threatening or violent language toward a supervisor or member of management;
- 3) Violation of any safety, health, security, or District policies, rules or procedures, and
- 4) Committing a fraudulent act or breach of trust under any circumstances.

3. Respondent did not appeal the alleged misconduct contained in the March 25, 2015, Notice of Disciplinary Action.

4. On April 30, 2015, LACSD served on respondent a Notice of Intent to Terminate for the following misconduct:

- 1) Falsification of other District records;
- 2) Insubordination, including but not limited to failure or refusal to obey the orders or instructions of a supervisor or member of management or the use of abusive or threatening or violent language toward a supervisor or member of management;
- 3) Committing a fraudulent act or a breach of trust

5. On May 6, 2015, respondent filed a grievance contesting the allegations in the April 30, 2015, Notice of Intent to Terminate. According to respondent, a union representative prepared the grievance, but he reviewed and signed the document. Rather

than specifically address each instance of alleged misconduct, respondent's grievance contained allegations that his supervisor was "out to get him" and in general, harassed him.

6. On May 18, 2015, LACSD notified respondent that, although it considered his grievance and information provided the union representative speaking on his behalf, LACSD was adhering to its' decision to terminate him.

7. On June 11, 2015, LACSD served respondent with a Notice of Termination effective on that date based on the misconduct alleged in the April 30, 2015, Notice of Intent to Terminate. Respondent did not appeal the termination.

8. On January 19, 2016, more than seven months following respondent's termination for cause, respondent filed an application for an industrial disability retirement, claiming the right to receive a disability retirement due to a back condition, stating only that he could "not perform [his] job."

9. CalPERS reviewed respondent's application and applicable law, and determined that respondent had been terminated for cause. CalPERS further concluded that respondent's discharge was neither the result of the claimed disabling medical condition nor preemptive of any otherwise valid claim for disability retirement. Pursuant to applicable law, CalPERS cancelled respondent's application and notified him of his right to appeal.

10. On April 15, 2016, respondent appealed the cancellation of his application.

11. On June 6, 2016, Anthony Suine, Chief, CalPERS Benefits Services Division, signed the Statement of Issues in his official capacity seeking to uphold the cancellation of respondent's application for an industrial disability retirement. This hearing ensued.

12. The issue in this appeal is whether respondent's application and eligibility for disability retirement are precluded by virtue of his termination for cause.

Conduct Underlying Respondent's Termination for Cause¹

13. The incidents leading to respondent's termination occurred between April 21, 2015, and April 29, 2015. Respondent was on light duty stemming from an injury he received on March 19, 2015, and for which he received worker's compensation benefits. However, no medical records or other documents were provided at the administrative hearing concerning respondent's medical status in April 2015, when the incidents underlying his

¹ No findings are made in this case regarding the factual basis for the underlying disciplinary charges or whether respondent's termination was justified. The conduct underlying respondent's termination was considered solely for the purpose of determining whether respondent's termination, as the facts were presented, was the direct result of the disabling condition he later claimed on his application for disability retirement, or preemptive of any otherwise valid claim for disability retirement.

termination occurred. In December 2015, respondent had back surgery for this injury. CalPERS does not dispute that respondent was injured during his employment on March 19, 2015.

14. According to the Notice of Intent to Terminate, respondent was ordered on April 21, 2015, to clean a break room; the order was consistent with his light duty restrictions. By April 27, 2015, respondent had not done so. Respondent was instructed again to clean the break room. By April 29, 2015, respondent still had not done so. A supervisor took respondent in the break room and specifically showed him what he needed to do. Respondent apologized and said he would perform as ordered. Respondent later reported that he had cleaned the break room as instructed. However, upon inspection, it was discovered respondent had not cleaned the break room as instructed. Thus, respondent ignored several directives by his supervisor.

15. The Notice of Intent to Terminate also noted that respondent's March 2015 discipline in, which he did not appeal, contained similar sustained allegations of insubordination (i.e. disobeying orders). In that incident, respondent was assigned a task consistent with his light duty restrictions; to identify manholes in the LACSD area that needed to be raised or that were exposed. He returned after two hours and submitted documents allegedly mapping the manholes. The documents contained 27 errors. Respondent also failed to utilize a back-up person while backing up a truck as required; failed to dump solid waste from a truck which could have left LACSD in an unprepared state had they needed the truck for an emergency; and damaged district equipment by using poor judgment while cleaning a smoke blower.

16. No evidence demonstrated that the incidents underlying respondent's termination for cause were related to any alleged medical condition. There was no evidence that respondent told any of his supervisors that the reason he failed to perform the duties as instructed was because of his alleged back condition. Rather, the evidence showed respondent's termination was due to his failure to perform certain job duties as instructed, disobeying orders, and not completing documents properly.

Respondent's Testimony

17. Respondent testified that on March 19, 2015, he hurt his left arm and tore his rotator cuff while at work. Respondent planned on getting his injuries fixed and going back to work, which was why he did not file for disability prior being terminated.

Respondent said he was placed on light duty following the March 19, 2015, injury, and he felt that the job duties he was given following that date were "impossible for him to achieve." Respondent said that he cannot clean things and he told his boss that he could not do so. Respondent said, however, that he felt he had been harassed by his boss since 2010. Respondent said that he felt he was only assigned impossible tasks following his injury and felt that had he not been injured, he would not have had to perform the tasks that led to his termination. Respondent admitted on cross-examination, however, that the job duties

assigned to him (i.e. cleaning the break room, driving the truck, identifying issues with manholes), were within his job description.

Respondent said he can no longer perform the job duties of a maintenance worker, and feels he should receive a disability retirement. He also stated that he felt if he had filed a disability retirement application while he had still been working, that he would have received it.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Applicable Law

2. Government Code section 21152 provides that application to the board for retirement of a member for disability may be made by the head of the office or department in which the member was last employed, the governing body of the contracting agency, or the member or someone acting on his or her behalf.

3. Government Code section 21154 provides that an application for disability retirement shall be made only while a member is in state service, is absent on military service, within four months after the discontinuance of the state service of the member, on an approved leave of absence, or is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application.

4. The courts in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (Haywood), *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (Smith), and the precedential decision issued by CalPERS's Board of Administration (Board) in *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (October 16, 2013) Precedential Decision 13-01, Case No. 2012-0287, OAH No. 2012050989 (*Vandergoot*), held that civil service employees may not apply for disability retirement if they have been dismissed for cause from their civil service employment. Two exceptions to this preclusion are recognized: (1) when the employee establishes that the dismissal was the ultimate result of a disabling condition; and (2) when the employee establishes that the dismissal preempted the employee's otherwise valid claim for disability retirement.

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Evaluation

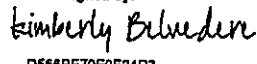
5. Respondent's termination for cause was not the result of his alleged disability and did not preempt an otherwise valid claim for an industrial disability retirement. *Haywood, Smith, and Vandergoot* preclude the acceptance of respondent's application for disability retirement.

Respondent's misconduct involved failure to perform his duties as instructed; ignoring his supervisors multiple directives; and generally using poor judgment while completing his duties. Neither the March The Notice of Disciplinary Action or the April Notice of Intent to Terminate contained any information regarding respondent notifying LACSD that he could not perform his duties because of a back condition. Respondent's grievance alleged mostly that he was being harassed by his boss; nothing in that document alleged, as respondent now alleges, that he could not perform his duties as instructed because of a disability. There were simply no facts presented to indicate that, at any time prior to his termination for cause, respondent had the right to receive a disability retirement. Finally, no evidence presented demonstrated that the investigation or respondent's subsequent termination for cause in any way hampered his ability to properly file a disability claim that had, in fact, matured.

ORDER

Respondent Timothy J. Beck's appeal is denied. CalPERS is not required to accept respondent's application for an industrial disability retirement and properly cancelled it.

DATED: January 9, 2017

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KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings