

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

WILLIAM E. FLORES,

and

PAROLE AND COMMUNITY SERVICES
DIVISION, CALIFORNIA DEPARTMENT
OF CORRECTIONS AND
REHABILITATION,

Respondents.

Agency No. 2016-0929

OAH No. 2016100934

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on January 5, 2017, in Los Angeles. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Charles H. Glauberman, Senior Staff Attorney, represented complainant California Public Employees' Retirement System (PERS).

William E. Flores (respondent) was present and represented himself. No appearance was made by or on behalf of respondent Parole and Community Services Division, California Department of Corrections and Rehabilitation (CDCR).

SUMMARY

Complainant seeks an order affirming its cancellation of respondent's application for an industrial disability retirement because respondent was terminated from his employment with the state for cause and has no reinstatement rights. Respondent contends he is entitled to apply for an industrial disability retirement for various reasons. As established by a preponderance of the evidence, the way in which respondent separated from his employment renders him ineligible for an industrial disability retirement as a matter of law.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED January 23 20 17

FACTUAL FINDINGS

Parties and Jurisdiction

1. Respondent was employed by CDCR as a Parole Agent effective April 27, 1998. By virtue of his employment, respondent was a state safety member of PERS subject to Government Code sections 21151 and 21154. (Ex. 1.)
2. On April 4, 2016, respondent submitted an application for industrial disability retirement. The primary disability claimed was an orthopedic (plantar fasciitis, bilaterally) condition. However, respondent also noted problems related to hypertension, both knees, cervical and spinal injuries, and hearing impairment. (Ex. 3.)
3. By a letter dated July 5, 2016, PERS notified respondent that, based on its review of decisional law, he was not eligible to apply for an industrial disability retirement because of the way he separated from employment with the State and, therefore, his application was cancelled. Respondent was advised of his right to appeal. (Ex. 4.)
4. By a letter dated July 28, 2016, respondent appealed PERS' determination and requested an administrative hearing. (Ex. 5.)
5. Anthony Suine signed a Statement of Issues in his official capacity as Chief of PERS's Benefit Services Division. The Statement of Issues requests an order affirming PERS's decision to cancel respondent's industrial disability retirement application. (Ex. 1.)
6. Based on the above, this appeal is limited to the issue of whether respondent is precluded by operation of law from filing an application for an industrial disability retirement. (Ex. 1.)

Respondent's Employment with and Separation from CDCR

7. Respondent was hired by CDCR in 1988 as a correctional officer. In 1998, he became a Parole Agent I. In 2006, he was promoted to a Parole Agent II.
8. On July 7, 2011, a Notice of Adverse Action (NOAA) was signed advising respondent that his employment with the State would be terminated, effective on September 1, 2011. (Ex. 6.)
9. The NOAA alleged respondent, while acting as a Parole Agent II, had engaged in improper, overly-familiar relationships and sexual misconduct with two female parolees during 2009, 2010 and 2011. As a result, causes for dismissal were alleged pursuant to the following subsections of Government Code section 19572:

- (d) Inexcusable neglect of duty;
- (l) Immorality;
- (m) Discourteous treatment of the public and other employees;
- (o) Willful misconduct;
- (t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment; and
- (w) Unlawful discrimination, including harassment, . . . against the public or other employees while acting in the capacity of a state employee. (Ex. 6, p. 7.)

10. Respondent timely appealed his dismissal to the State Personnel Board (SPB). As a result, the NOAA was filed with the SPB and a hearing on respondent's appeal was scheduled. (Ex. 7.)

11. On April 17, 2012, respondent signed a Withdrawal of Appeal. As a result, his appeal of the NOAA was withdrawn, SPB closed respondent's case, and respondent's termination of employment with the State became final. (Ex. 8.)

Respondent's Application for an Industrial Disability Retirement

12. Respondent testified his first job-related health problems were to his gastrointestinal system in 2001 and gout in 2002. Those problems grew worse over time. He also began experiencing symptoms of hypertension, neuralgia from his scalp to his shoulders, and hearing loss. He testified that, more recently, he has had surgery on both knees, arthroscopy on a hip, and suffers from neuroma and plantar fasciitis on both feet. He also has problems with his ankles, toes and back. Respondent presented written chronologies he created (exs. A & B), which provide specific dates of the onset and progression of his ailments and symptoms. He attributes all of these ailments to his employment with CDCR.

13. In his application for an industrial disability retirement, respondent noted his disability was the result of "cumulative trauma beginning in 11-14-88 through 10-31-11 and continuing through present." (Ex. 3, p. 2.) He wrote his last date of paid compensation was October 31, 2011, and that his retirement effective date was July 8, 2012. (*Id.* at p. 1.)

14. PERS staff reviewed information concerning respondent's termination. (Ex. 4.) PERS staff also reviewed the cases of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, as well as PERS's Precedential Decision 13-01 *In the Matter of the Application for Disability Retirement of Robert Vandergoot and California Dept. of Forestry and Fire Protection* (2013). (*Ibid.*) Based on staff review of this information, PERS determined respondent was terminated for cause and that his discharge was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, which barred respondent from an industrial disability retirement. PERS advised respondent that his application was not accepted but deemed cancelled. (*Ibid.*)

Respondent's Evidence and Contentions

15. Respondent testified he should be able to apply for an industrial disability retirement because he was injured on the job, his worker's compensation claim for those ailments was accepted, and it has been determined that several of his disabilities are permanent. Respondent argued CDCR therefore should be responsible for the impact his work-related injuries have caused him.

16. Respondent also testified that nobody from CDCR explained to him the industrial disability retirement process. He explained that he believed his only option was to retire when he turned 50, which was in 2013. Had he known he could have applied for a disability retirement at the point that his medical problems seriously impacted his work in 2006, he would have done so. He argued that if he had retired in 2006, he would not be in the legal situation he now faces, because he would not have come into contact with the two parolees in question. However, respondent admitted on cross-examination that, although he suffered from great pain and discomfort, he was still able to physically perform his duties as of April 5, 2011, which was his last day of actual employment. On that day, respondent was arrested during a meeting with one of the two female parolees in question, and immediately placed on administrative leave.

17. Respondent also testified that he unsuccessfully tried to settle his termination case before the SPB in a way that would have allowed him to turn 50 and then retire. He testified he knew of other CDCR cases "worse than mine," in which disciplined employees were allowed to retire after turning 50 and apply for a disability retirement.

18. Respondent concedes he will not be able to work again as a parole agent for CDCR due to his termination for cause. He contends that because he cannot work for CDCR as a matter of law, and is physically unable to do so now as a matter of fact, his only recourse should be an industrial disability retirement.

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 is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

Is Respondent Eligible for a Disability Retirement?

2. Government Code section 21151 provides, in pertinent part:

(a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service. . . .

3. A. However, termination of the employment relationship usually renders an employee ineligible for a disability retirement. (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1297; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206.)

B. In *Smith*, the court explained that the legislative intent of the disability retirement laws presupposed a continuing, if abated, employment relationship, i.e., the disabled annuitant could petition to return to active service, and/or the employing agency could compel testing to determine if the disability is no longer continuing, at which point it could insist on a return to active service. "Therefore if an applicant is no longer eligible for reinstatement because of a dismissal for cause, this also disqualifies the applicant for a disability retirement." (*Smith v. City of Napa, supra*, 120 Cal.App.4th at 203.) In *Smith*, the applicant in question had been terminated for cause. After he unsuccessfully appealed, the termination became final. The same thing happened in *Haywood*.

4. A. To make sure that an employer cannot unfairly abridge an employee's right to request an industrial disability retirement, the court in *Haywood* established that an employee who is fired for cause can still seek a disability retirement if the discharge was either (1) the ultimate result of a disabling medical condition or (2) preemptive of an otherwise valid claim for disability retirement. (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at 1307.)

B. The *Smith* court explained that to be preemptive, the right to a disability retirement must have matured before the employee was terminated. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at 206.) The *Smith* court further explained that this maturation did not occur at the time of the injury, but rather when the pension board in question determined that the employee was no longer capable of performing his duties. (*Id.* at p. 206.) The *Smith* court further allowed consideration of equitable principles to "deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause." (*Id.* at p. 207.)

C. Guidance also is provided by PERS's Precedential Decision 13-01 *In the Matter of the Application for Disability Retirement of Robert Vandergoot and California Dept. of Forestry and Fire Protection* [2013] (*Vandergoot*). An agency such as PERS may designate a final decision as precedential that contains a significant legal or policy determination of general application that is likely to recur. (Gov. Code, § 11425.60.)

D. The applicant in *Vandergoot* had voluntarily resigned his employment after being served with a NOAA. In exchange for agreeing to resign, his employing department agreed to withdraw the pending NOAA. (*Vandergoot* at p. 11.) Furthermore, Vandergoot agreed in a Stipulation and Settlement to not seek, transfer to, apply for or accept any employment in any capacity with his employing department in the future. If he returned to employment with the department in violation of the agreement, he would be subject to dismissal without any right of appeal. (*Vandergoot* at p. 4.)

E. PERS denied the application, arguing that because Vandergoot resigned while disciplinary charges were pending, he was no longer eligible for a disability retirement. During the appeal of PERS's denial of Vandergoot's disability retirement application, PERS argued that, "But for the pendency of the [NOAA and] disciplinary action, [Vandergoot] would never have entered into the Stipulation and Settlement resigning from his position." (*Vandergoot* at p. 6.) PERS further argued, "the fact respondent 'resigned' from employment is a distinction without a difference." (*Ibid.*)

F. The Decision in *Vandergoot* specified that the case "raises the question of whether [PERS] may properly apply *Haywood* in the absence of an actual dismissal for cause." (*Vandergoot* at p. 6.) After considering the above circumstances, it was determined in *Vandergoot* that "*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. (Citation omitted.) Such is not possible here. The employment relationship has not only been severed, but the terms of the Stipulation and Settlement Agreement expressly lock [Vandergoot] out from being reinstated." (*Id.* at p. 7.) It was concluded that, "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 in this case. For this reason alone, [PERS] can fairly consider the terms of the Stipulation and Settlement of respondent's [disciplinary] case as being tantamount to a dismissal for purposes of applying the *Haywood* criteria." (*Id.* at p. 8.)

5. In this case, respondent similarly is not eligible for an industrial disability retirement because his employment relationship with the State was terminated for cause. His withdrawal of his appeal before the hearing was the same as if he had not initially appealed his termination or he had lost after a hearing. As discussed in *Vandergoot*, the key is the way in which the employee in question separates from their employment. Where, as in this case, an employee is separated such that he or she cannot be rehired or reinstated by their former employer to their former position, the employee is not eligible for a disability retirement. The two exceptions to this rule articulated in *Haywood* and *Smith* do not apply to respondent, because it was not established that his termination was the ultimate result of a disabling medical condition or was preemptive of a valid claim for disability retirement. (Factual Findings 1-14; Legal Conclusions 1-4.)

6. A. Respondent's various arguments are contradicted by the cases discussed above and are rejected. For example, the fact he was injured on the job and received worker's compensation benefits is superseded by his inability to be reinstated to his former position should his physical disabilities abate. The fact respondent is uninterested in being reinstated is irrelevant; an employer can always seek to reinstate an employee not interested in doing so if the disability in question abates. The fact respondent is not eligible for reinstatement does not mean he is entitled to a disability retirement. The cases cited above mandate the opposite result.

B. Moreover, it is an emphatic postulate that ignorance of the law is no excuse. (*People v. Mayer* (2003) 108 Cal.App.4th 403, 413.) Thus, respondent's argument that he did not know he could seek a disability retirement before he turned 50 is not a defense in this case. In any event, his argument that, had he known of his right to do so, he could have retired before he committed the acts leading to his termination, is beyond fanciful and cannot be seriously considered.

C. Finally, respondent's argument that other unspecified individuals, who committed more serious misconduct, were allowed to apply for disability retirement is vague and uncorroborated. Even assuming arguendo such was the case, the fact that not every violator of the same law is prosecuted, by itself, does not establish a defense. (*People v. Smith* (1984) 155 Cal.App.3d 1103, 1134.) In an administrative case such as this, the fact that a government agency only takes action against one of several wrongdoers does not support a bar to administrative sanction, absent evidence of discriminatory intent. (*Ehrlich v. McConnell* (1963) 214 Cal.App.2d 280, 288.) In this case, there was no such showing. (Factual Findings 1-18; Legal Conclusions 1-5.)

ORDER

Respondent William E. Flores' appeal is denied and PERS's cancellation of his application for an industrial disability retirement is affirmed.

DATED: January 19, 2017

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ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings