

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:

KIRK A. ACOSTA,

Respondent,

and

DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2016-0968

OAH No. 2016120216

PROPOSED DECISION

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Bakersfield, California, on February 6, 2017.

Austa Wakily, Senior Staff Attorney, represented Petitioner Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Kirk A. Acosta (Respondent) represented himself.

Kelly Santoro and Luz Lujan were present on behalf of the Department of Corrections and Rehabilitation (Department), but did not present evidence or argument on the Department's behalf.

Petitioner seeks to prevent Respondent from proceeding with his Application for Industrial Disability Retirement (Application) on grounds that the Application is barred by *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 *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Decision 13-01 (*Vandergoot*). Respondent argues the Application should be processed.

Oral and documentary evidence was received at the hearing, and the matter was submitted for decision on February 6, 2017.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 8 Mar 20 17

Samuel D. Reyes

FACTUAL FINDINGS

1. Petitioner filed the Statement of Issues in his official capacity.
2. Respondent was employed by the Department as a Correctional Officer at the North Kern State Prison. By virtue of his employment, Respondent is a state safety member of CalPERS.
3. In August 2015, the Department filed and served on Respondent a First Amended Notice of Adverse Action (NOAA), seeking to dismiss Respondent from employment for cause, effective September 4, 2015. Respondent appealed the Department's NOAA.
4. On April 14, 2016, Respondent filed the Application for industrial disability retirement on the basis of orthopedic conditions involving his neck, left shoulder, upper back, cervical spine and left hand. CalPERS received the Application on April 15, 2016.
5. On April 18, 2016, Respondent and the Department entered into a Stipulation for Settlement and Release (Stipulation) in the pending NOAA appeal. On April 19, 2016, the State Personnel Board issued a Decision approving the Stipulation.
6. In pertinent part, the Stipulation stated:
 - "2. This Stipulation and Release is neither an admission of guilt nor of wrongdoing by either party.
 - "3. [DEPARTMENT] agrees to amend the penalty imposed by the NOAA from a Dismissal to a Suspension without pay effective from the close of business on September 4, 2015, to the close of business on April 18, 2016.
 - "4. [RESPONDENT] will be on unpaid leave status from the close of business on April 18, 2016, until CalPERS makes a final determination regarding [RESPONDENT]'s disability retirement as long as that occurs prior to the close of business on April 17, 2017. In the event CalPERS approves [Respondent]'s application for disability retirement prior to the close of business on April 17, 2017, Appellant's employment status with [DEPARTMENT] will conclude with his disability retirement.
 - "5. In the event that CalPERS has failed to make a final determination by the close of business on April 17, 2017, [RESPONDENT] agrees that his imposed penalty of dismissal will have been effective as of the close of business on April 18, 2016.
 - "6. [RESPONDENT] waives any and all backpay and benefits to which he normally may be entitled to from [the Department] from the close of business on September 4, 2015, through the period the disability retirement determination is pending.

“7. [RESPONDENT] waives rights to reinstate and agrees not [to] reapply for a position with [DEPARTMENT]. [¶] . . . [¶]” (Exh. 8, at pp. 1-2; emphasis in original.)

7. On July 14, 2016, CalPERS notified Respondent that it was unable to accept the Application because he left his employment for reasons which were not the result of a disabling medical condition. On August 8, 2016, Respondent appealed CalPERS’ determination.

LEGAL CONCLUSIONS

1. A Cal PERS member may apply for disability retirement. (Gov. Code, § 21152, subd. (d)). Government Code section 20026 defines the following relevant terms: “ ‘Disability’ and ‘incapacity for performance of duty’ as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.”

2. Under Government Code section 21154, the application for disability retirement “[s]hall 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. . . .”

3. Government Code section 21156 provides, in pertinent part: “If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability. . . .”

4. In *Haywood*, the court upheld the denial of the disability retirement application of a firefighter whose employment had been terminated for cause. The court concluded that disability retirement statutes administered by CalPERS contemplate a continuing employer-employee relationship. The court noted that statutes permit an employer to require the employee to undergo testing to determine if the disability continues, and the employee may apply for reinstatement on the ground of recovery. The court stated: “[W]e conclude that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor 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.” (*Haywood*, supra, 67 Cal.App.4th 1292, at p. 1308.) In *Napa*, another case involving a dismissal for cause, the court reaffirmed its ruling and clarified the circumstances under which the dismissal would be deemed preemptive of an otherwise valid claim for disability retirement.

5. In *Vandergoot*, the member's employer issued a notice of adverse action pursuant to Government Code section 19574 on March 25, 2010, seeking to terminate his employment. On April 9, 2010, the member filed an application for industrial disability retirement. He also appealed his discharge to the State Personnel Board. On February 6, 2011, before a hearing on his appeal was held, the member and the state agency entered into a stipulated settlement. The parties agreed, without an admission of guilt or wrongdoing by either party, that the member would resign from his employment, for personal reasons, effective December 9, 2010.

As set forth in the *Vandergoot* decision, the stipulated settlement agreement stated: "[Member] agrees that he will not seek, transfer to, apply for or accept any employment in any capacity with [Agency] at any time in the future. If [Member] returns to employment with [Agency] in violation of the terms of this Stipulation for Settlement, [Agency] may dismiss [Member] at such time as is convenient to [Agency] and [Member] waives any right of appeal of said dismissal in any forum." (*Vandergoot, supra* at p. 4.)

Administrative Law Judge Jonathan Lew, whose Proposed Decision CalPERS adopted, stated in his Proposed Decision: "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. . . ." (*Vandergoot, supra* at p. 7.) In denying the appeal, Judge Lew also concluded: "CalPERS demonstrated that respondent's separation from employment was tantamount to a dismissal for purposes of applying the *Haywood* criteria. (See Findings 16 through 19.) It was also established that respondent's separation from employment was not the ultimate result of a disabling medical condition." (*Vandergoot, supra* at p. 10.)

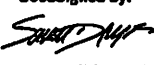
6. In accordance with *Haywood* and *Vandergoot*, absent termination of employment due to a disabling medical condition, Respondent's eligibility to file a disability retirement application is dependent on his having a continuing employment relationship with the Department. Respondent does not have such an employment relationship, and, accordingly, he is not eligible to file a disability retirement application. By the terms of the stipulated agreement he entered into, Respondent is on leave from the Department with no right of reinstatement. Moreover, he agreed not to reapply for a position with the Department. Nor did Respondent present evidence to establish that the filing of the NOAA involved an underlying disabling medical condition.

7. Accordingly, Respondent is not eligible to file a disability application and CalPERS must reject the Application, by reason of factual finding numbers 1 through 7 and legal conclusion numbers 1 through 6.

ORDER

The Application for disability retirement of Kirk A. Acosta is rejected.

DATED: March 7, 2017

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SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings