ATTACHMENT E
THE PROPOSED DECISION
BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

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

JOSEPH BUCHANAN,
Respondent.

and

CITY OF RIVERSIDE,
Respondent.

Case No. 2017-0301
OAH No. 2017040930

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, Office of Administrative Hearings (OAH), State of California on September 20, 2017, in Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by Preet Kaur, Senior Staff Attorney.

There was no appearance by or on behalf of Joseph Buchanan (respondent), or the City of Riverside (City). Respondent and the City were duly served with a Notice of Hearing. The matter proceeded as a default against respondent and the City pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and this matter was submitted for decision on September 20, 2017.

ISSUE

The issue for Board determination is whether respondent may file an application for disability retirement based on an orthopedic condition (upper and lower back), or whether his

FACTUAL FINDINGS

Respondent's Disability Retirement Application

1. Respondent was employed by the City as a Maintenance Worker, for the Riverside Transit Agency (Agency). On April 30, 2009, respondent signed and thereafter filed with CalPERS, an application for service retirement (service application). The service application noted that respondent’s last day on payroll was April 25, 2009. The effective date of respondent’s service retirement was April 26, 2009. By virtue of his employment, respondent is a local miscellaneous member of CalPERS, subject to Government Code section 21154.

2. On August 10, 2016, respondent signed an application for disability retirement (disability application) with CalPERS. On August 16, 2016, CalPERS received the application. In his disability application, respondent described his disability as “upper back and lower back.” He wrote that the injury occurred “at work” in September 2009 and between “1991-2001.” Respondent did not list any limitations or preclusions he had based on his claimed disability. However, he stated that his injury affected his ability to bend his upper and lower back.

3. By letter dated November 7, 2016, CalPERS notified respondent that “in general, a member cannot change their retirement status after they retire...” The letter further stated that an “exception can be made if the error or omission was the result of mistake, inadvertence, surprise or excusable neglect.” CalPERS asked respondent to respond to a series of questions regarding his claimed disability and whether respondent notified his employer that he had to retire because of a disability. Respondent was given until November 29, 2016, to respond to CalPERS.

4. CalPERS also sent a letter dated November 7, 2017, to the Agency. The letter explained that respondent applied for disability retirement and CalPERS was unable to determine whether the application could be accepted. CalPERS further stated that a determination needed to be made as to whether respondent’s disability application “fit within the case of Haywood... which holds that where ‘an employee is terminated for cause and the discharge is neither the ultimate result of the 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.”” CalPERS requested the Agency to provide information concerning respondent’s employment with the Agency, including any corrective or adverse actions taken against respondent. In response to CalPERS request for information, the Agency sent to CalPERS documentation demonstrating that respondent was terminated from his position.
5. By letter dated November 18, 2016, CalPERS informed respondent that his disability application could not be accepted because he “left employment for reasons which were not the result of a disabling medical condition.” As a result, CalPERS cancelled respondent’s disability application. CalPERS cited 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, “which provide further clarification for the purposes of applying Haywood.”

6. On January 10, 2017, respondent requested an appeal of the cancellation of his disability application. Respondent wrote that he had “sufficient evidence to present regarding [his] case.”


Notice of Intent to Terminate Employment

8. On April 15, 2009, the Agency issued respondent a “72 Hour Notice of Intent to Terminate Employment” (Notice). The Notice was based on allegations that on the evening of April 8, 2009, respondent made two telephone calls to a supervisor to report that he would not be reporting to work due to illness. During the second message, respondent failed to hang up his telephone before the voice of a second person in the background of the call indicated that respondent was not sick and that he was being dishonest with his supervisor.

The Notice alleged that respondent’s conduct was a violation of the current Memorandum of Understanding which allowed the Agency to discipline respondent for dishonesty. The Notice also alleged respondent violated the following relevant portions of the Agency Rules and Regulations:

1.22 Reporting for Duty: Employees must report for duty at the time and place designed by their assignments or as instructed by a proper Agency representative.

1.27 False Sick Leave: Employees who feign illness in order to be paid sick leave, avoid a miss-out, or to avoid working as assigned will be subject to disciplinary action.

4.01: Discipline, Attitude, Conduct Reports and Disciplinary Action: Employees who are careless of the safety
of themselves or others, indifferent in the performance of their duties, or who commit acts of dishonesty... conduct unbecoming an employee, violation of rules... making false reports or statements... will be subject to suspension or discharge.

9. On April 20, 2009, a hearing was held concerning the Notice. Respondent was present at the hearing, with a union “Shop Steward.” Respondent was given the opportunity to respond to the allegations. Respondent contended that he did not recall what happened on evening of April 8, 2009, when he called in sick to work.

10. By letter dated April 23, 2009, respondent was sent a letter from Robert Bach, Director of Maintenance for the Agency, informing respondent that based on the information presented at the hearing on April 20, 2009, his termination was upheld, effective on April 23, 2009. The same day, respondent signed an irrevocable “Letter for Resignation” with an effective resignation date of April 25, 2009.

11. On September 10, 2009, the Agency completed a “Termination Report” concerning respondent’s termination from employment. The Termination Report noted that respondent was terminated effective April 23, 2009, however, the Agency later accepted April 25, 2009, as respondent’s last day of employment to allow him to take advantage of an “early retirement incentive.”

Discussion

12. The sole issue in this hearing is whether respondent may file an application for disability retirement, or whether his application and eligibility for disability retirement is precluded by operation of Haywood. In Haywood, the employee “was terminated for cause following a series of increasingly serious disciplinary actions against him. After his discharge, the employee applied for disability retirement, claiming that stress from the disciplinary actions caused him to suffer a major depression, which rendered him incapable of performing his usual duties with the employer.” (Haywood, supra, 67 Cal.App.4th at p. 1295.) The Court of Appeals held that civil service employees may not apply for disability retirement if they have been dismissed from their civil service employment. The Court recognized two exceptions to this preclusion: (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.

13. In Smith, the same court reiterated the principles of Haywood. (Smith, supra, 120 Cal.App.4th at pp. 203-204.) The court further explained that a disability claim must have “matured” in order to find that a disciplinary action preempted the right to receive a disability retirement pension, and this maturation did not occur at the time of the injury, but rather when the pension board 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.)

14. In Vandergoot, the Board held that a resignation of an employee was tantamount to a dismissal for the purposes of applying the Haywood and Smith criteria when the employee: (1) resigned pursuant to a settlement agreement entered into to resolve a dismissal action; and (2) 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, Precedential Decision 13-01 at p. 7, ¶ 18.)

15. In this case, on April 15, 2009, respondent was served with a Notice. On April 20, 2009, a hearing was conducted concerning the allegations contained in the Notice. On April 23, 2009, respondent was informed that his termination was upheld and he was dismissed from service effective on April 23, 2009. The same day, respondent signed an irrevocable letter of resignation, with an effective retirement date of April 25, 2009, which was later accepted by the Agency. Respondent did not file his disability application until over seven years after his termination.

Respondent did not present any evidence that his dismissal was the ultimate result of a disabling condition, or that his dismissal preempted an otherwise valid claim for disability retirement. Likewise, there was no evidence that respondent had a matured right to a disability allowance prior to the time he was terminated, as required under Smith. Finally, respondent's irrevocable resignation was in response to the Notice, and occurred after the effective date of his termination. As under Vandergoot, respondent's resignation did not preempt his termination. Respondent's irrevocable resignation waived his rights to return to the Agency and ended any possible reinstatement.

16. In sum, when all the evidence and arguments are considered, respondent did not establish that he should be allowed to file an application for disability retirement. Consequently, his application for disability retirement should be precluded by operation of Haywood.

LEGAL CONCLUSIONS

1. Government Code section 21152, subdivision (d), provides that an application to the Board for Retirement of a member for disability may be made by the member or any person in his behalf.

2. Government Code section 21154, provides in pertinent part that:

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 an 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 of 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.

3. “As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including ... the burden of persuasion by a preponderance of the evidence....” (McCoy v. Board of Retirement (1986) 183 Cal. App. 3d 1044; Evid. Code §§ 115, 500.) In this matter, respondent has the burden of proving by a preponderance of the evidence that his disability application is not precluded by his termination from employment under controlling appellate authorities.

4. Where an employee is terminated 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, termination of the employment relationship renders the employee ineligible for disability retirement. (Haywood, supra, 67 Cal. App.4th at p. 1297.) The Third District Court of Appeal explained that the dismissal “constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement—the potential reinstatement of his employment relationship with the District if it ultimately is determined that he is no longer disabled.” (Ibid.)

5. CalPERS demonstrated that respondent’s separation from employment was a dismissal for cause for purposes of applying the Haywood criteria. (See Factual Findings 8 through 11.) It was also established that respondent’s separation from employment was not the ultimate result of a disabling medical condition. Respondent failed to demonstrate that his disability claim had “matured” prior to the time of his termination, as required under Smith.

6. Additionally, as set forth in Factual Findings 8 through 11, 14 and 15, pursuant to the holding in Vandergoot, respondent’s resignation did not preempt his dismissal for the purposes of applying the Haywood and Smith criteria.

7. For all the above reasons, cause exists to uphold CalPERS’ determination that respondent’s disability application and eligibility for disability retirement are precluded by operation of Haywood.
ORDER

The appeal of respondent Joseph Buchanan to be granted the right to file an application for disability retirement is DENIED.

DATED: October 2, 2017

MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings