ATTACHMENT E

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:

REYMUND L. DHEMING,
Respondent,

and

CALIFORNIA INSTITUTION FOR MEN,
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,
Respondents.

Case No. 2017-0444
OAH No. 2017060636

PROPOSED DECISION


John Shipley, Senior Staff Attorney, represented the California Public Employees’ Retirement System (CalPERS).

Respondent Reymund L. Dheming represented himself.

No one appeared for or on behalf of respondents California Institute for Men (CIM), and California Department of Corrections and Rehabilitation.

Evidence was received, the record was closed, and the matter was submitted for decision on August 7, 2017.
ISSUE


FACTUAL FINDINGS

Employment History

1. Mr. Dheming began working as a corrections officer on July 22, 1995, at the CIM, an institute that is part of the California Department of Corrections and Rehabilitation. As a result of such employment, Mr. Dheming was a state safety member of CalPERS, and subject to Government Code section 21151 and 21154. Mr. Dheming held this position for 21 years.

2. Mr. Dheming’s duties as a correctional officer included the supervision of the conduct of inmates or parolees of the state correctional facility or camp. A special requirement of his position as a correctional officer dictates that any person prohibited by state or federal law from possessing, using or having in his custody or control any firearm, firearm device, or other weapon authorized for use by the California Department of Corrections is not eligible to continue employment as a correctional officer. Immediately after an incident at his work on June 12, 2015, Mr. Dheming was placed on administrative leave from his position. He was dismissed from his employment on December 9, 2016, pursuant to a Notice of Disciplinary Action. On the same date, as a result of the incident at CIM on June 12, 2015, Mr. Dheming was convicted, upon his plea of no contest, of a misdemeanor violation of Penal Code section 422, subdivision (a), criminal threats. As a result of his conviction, Mr. Dheming was prohibited from possession of any firearm.

Application for Disability Retirement

3. Mr. Dheming signed an Application for Industrial Disability Retirement on May 16, 2016. He identified his specific disability as:

Acute PTSD, Depression, Anxiety, Paranoia.

He indicated that his disability occurred on February 6, 2012. In response to the question “How did the disability occur?” he responded “Injury caused by stress and strain of employment, retaliation, harassment, being called a ‘rat’.”

Mr. Dheming wrote that because of his disability he “no longer meet [sic] the psychological aspect of my employment.” In response to the question of “are you currently working in any capacity?” Mr. Dheming answered “no.”
4. On August 16, 2016, CalPERS sent a letter to the CIM regarding Mr. Dheming’s industrial disability application and requested additional information regarding Mr. Dheming’s employment, including his last day on pay, date of separation of employment, and additional information. By letter dated August 24, 2016, CIM provided CalPERS with the requested information. In the August 24, 2016, letter, CIM wrote that Mr. Dheming’s last day of pay was July 25, 2016, and that he was currently employed by CIM. The August 24, 2016, letter referenced many attachments regarding Mr. Dheming’s employment, but those attachments were not offered or received into evidence at this hearing.

5. On March 29, 2017, CalPERS sent Mr. Dheming a letter stating his application for disability retirement was cancelled because:

Our decision to cancel your application is based on the case of Haywood v. American River Fire Protection District (1998) 67 Cal. App. 4th 1292, 79 Cal. Rptr. 2d 749, which holds that where "an employee is terminated for cause and the discharge is neither the ultimate result of the disabling medical condition or preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement." The case of Smith v. City of Napa (2004) 120 Cal. App. 4th 194 and the Precedential Decision In the Matter of Application for Disability Retirement of Robert C. Vandergood and California Dept. of Forestry and Fire Protection (Respondents) (2013) provide further clarification for the purposes of applying Haywood.

6. Mr. Dheming timely appealed CalPERS’s decision to cancel his application. On June 8, 2017, Anthony Suine, Chief of the Benefit Services Division of CalPERS, signed the Statement of Issues, solely in his official capacity.

Evidence Regarding the Onset of Mr. Dheming’s Disability

7. According to Mr. Dheming’s application, his disability occurred on February 6, 2012. Mr. Dheming testified that his primary disability is Post Traumatic Stress Disorder (PTSD) and is a "cumulative injury over time." He testified that he was first diagnosed with PTSD sometime after February 6, 2012. Mr. Dheming stated that his PTSD caused him to suffer pain in his neck and shoulders causing him to have headaches. He made a workers’ compensation claim for injuries to his shoulders, neck, and other body systems. Mr. Dheming provided letters from the State Compensation Insurance Fund indicating that he receives workers’ compensation benefits for his "injury of February 6, 2012, to [his] shoulders (both), soft tissue – neck, body systems & multiple body systems." Except for this letter, a minute order from the Worker’s Compensation Appeal Board stating that Mr. Dheming’s employer will pay for some psychiatric treatment; some medical evaluation forms indicating that Mr. Dheming had a diagnosis of neck pain, muscle spasm of neck,
situational anxiety, tension headaches and acute stress reaction; and his own testimony to support his claims of medical injury, no other evidence was received regarding his medical condition. Mr. Dheming provided no direct evidence to demonstrate that he was disabled so that he could not work other than a handwritten note from his physician on a prescription pad dated August 13, 2015, which states in its entirety as follows:

This is to certify that Reymund Dheming is currently unable to work due to Acute PTSD symptoms 309-81. I declare him temporarily and totally disabled until he is fully treated and recovered completely.

8. Mr. Dheming testified that he began being subjected to ongoing harassment at work causing him emotional distress and its cumulative effect caused him to be diagnosed with PTSD. In response to the question of why he put that date of his injury on his industrial disability application as February 6, 2012, he stated that this was the date he reported his issues to his supervisor. Mr. Dheming stated that he was formally diagnosed with PTSD sometime after the February 6, 2012, date. Mr. Dheming further stated that he believes that the harassment at work started on or about February 6, 2012, and continued from that date. He stated that the harassment was caused by his fellow employees, and by the administration of the CIM, calling him a “rat” and a “snitch.” He stated that he feared going to work, had issues sleeping, and would vomit before going into work. Mr. Dheming stated that his emotional distress caused him to have problems with his shoulders, his back, his arms, his neck and caused him to have headaches. Mr. Dheming testified that his PTSD is causing his health to further deteriorate and it has affected his daily living.

According to Mr. Dheming, he is currently involved in ongoing litigation regarding his claims for workers’ compensation for his injuries.

Severance of the Employer-Employee Relationship

9. The evidence established that Mr. Dheming was terminated from his job at the CIM on December 9, 2016, as a result of a Notice of Proposed Dismissal. The evidence also established that he was placed on administrative leave immediately after the June 12, 2015, incident that resulted in his December 9, 2016, conviction, and he never attended work at the CIM after the June 12, 2015, incident. Mr. Dheming was placed on administrative leave because of the criminal investigation resulting in his December 9, 2016, conviction. Mr. Dheming remained an employee of the CIM and was on administrative leave from June 12, 2015, to December 8, 2016. Mr. Dheming also testified he never took any steps to appeal the CIM’s decision to terminate his employment. He also stated that he did not appeal the decision because he simply was not capable of doing his job because of his PTSD.

10. It is undisputed that Mr. Dheming was convicted on December 9, 2016, of violating Penal Code section 422, subdivision (a), criminal threats, a misdemeanor; and as a result of his conviction he is forbidden from possessing any firearm. It is also undisputed that a requirement of Mr. Dheming’s position as a correctional officer is that he be able to
possess a firearm while on duty. Mr. Dheming testified that the restriction regarding his possession of a firearm was placed on him at the time of his conviction on December 9, 2016. However, he also testified that he received correspondence from the CIM dated October 3, 2016, and October 28, 2016, regarding the restriction placed upon him to possess a firearm and advising him that he must have that restriction lifted by November 21, 2016. Mr. Dheming admitted that he had the firearm restriction at that time of receiving that correspondence in October 2016. No further evidence was provided regarding the date that the firearm restriction was placed on Mr. Dheming.

Relevant Legal Authority


[W]e conclude that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of the disabling medical condition or 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.

(Id. at p. 1307.)

The appellate court explained:

Thus, there is an obvious distinction between an employee who has become medically unable to perform his usual duties and one who has become unwilling to do so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. (See Schneider v. Civil Service Com., supra, 137 Cal.App.2d at p. 285 [upholding the termination of employment as a means to deal with an unwilling employee].) Nor are disability retirement laws intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. "The pension roll is a roll of honor—a reward of merit, not a refuge from disgrace; and it would be an absurd construction of the language creating it to hold that the intention of the Legislature was to give a life annuity to persons who, on their merits, as distinguished from mere time of service, might be

---

This unable/unwilling dichotomy, and the role of disability retirement in addressing only the unable-to-work prong, is apparent in the PERS law. For example, while nothing in the PERS law restricts an employer's right to fire an unwilling employee, the Legislature has precluded an employer from terminating an employee because of medical disability if the employee would be otherwise eligible for disability retirement. In such a case, the employer must instead apply for the disability retirement of the employee. In addition, while termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches the age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues. And an employee on disability retirement may apply for reinstatement on the ground of recovery. If an employee on disability retirement is found not to be disabled any longer, the employer may reinstate the employee, and his disability allowance terminates.

(Id: at pp. 1304-1305.)

12. Later, the same appellate court explained its rationale for the exception that applies when an employee is fired because he has a disabling medical condition or his termination preempts an otherwise valid claim for disability retirement:

This caveat flows from a public agency's obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability [citations] or indirectly through cause based on the disability [citation].

---


3 In Department of Justice v. Bd. of Administration of California Public Employees' Retirement System (2015) 242 Cal.App.4th 133, the appellate court explained that an employer's duty of unconditional reinstatement under Government Code section 21193 is mandatory "when a recipient of disability retirement is no longer incapacitated by the condition for which she was retired." (Id. at p. 142.)
Smith involved a firefighter who filed a backdated application for disability retirement on the effective date of the termination of his employment. Focusing on the latter part of the exception articulated in Haywood, the appellate court explained that even a dismissal based solely for a cause unrelated to the employee's disability "cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect." (Smith, supra, 120 Cal.App.4th at p. 206.) The right to a disability pension does not mature until the pension board has concluded the applicant is substantially incapacitated for the performance of his usual duties. (Ibid.) Concluding that was not the case with Mr. Smith's application, the court explained:

In the present case, a CalPERS determination of eligibility did not antedate the unsuccessful certification on the ladder truck. His right to a disability retirement was thus immature, and his dismissal for cause defeated it.

(Ibid.) The appellate court also explained that the fact that the applicant filed his application prior to his dismissal is simply "a procedural issue without any significance to the substantive entitlement to a disability retirement." (Id. at p. 205.) The court also emphasized that the event giving cause to dismiss is relevant in consideration of the timeline and further explained:

[I]f a plaintiff were able to prove that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot preempt the right to receive a disability pension for the duration of the disability. . . . Conversely, "the right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures . . ."

(Ibid.) (citations omitted).

The appellate court recognized an equitable exception to the rule that a right to a disability pension is not mature until the pension board has determined that the applicant is substantially incapacitated for the performance of his usual duties:

Conceivably, there may be facts under which a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause. This case does not present facts on which to explore the outer limits of maturity, however.

4 In the Smith case the event giving rise to his dismissal was Mr. Smith's failure to pass remedial tests of his competency at required skills as a firefighter.
It is not as if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal. Rather, he did not even initiate the process until after giving cause for his dismissal.

Nor, for that matter, is there undisputed evidence that the plaintiff was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb). At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers’ compensation claims. But a workers’ compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different. (Blanchi v. City of San Diego (1989) 214 Cal.App.3d 563, 567, 262 Cal.Rptr. 566; Summerford v. Board of Retirement (1977) 72 Cal.App.3d 128, 132, 139 Cal.Rptr. 814.) And for purposes of the standard for a disability retirement, the plaintiff’s medical evidence is not unequivocal. The defendants would have a basis for litigating whether this evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. (Hosford v. Board of Administration (1978) 77 Cal.App.3d 854, 862, 143 Cal.Rptr. 760; Mansperger v. Public Employees’ Retirement System (1970) 6 Cal.App.3d 873, 877, 86 Cal.Rptr. 450; In re Keck (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.) Thus, an entitlement to a disability retirement cannot rest on the medical evidence of the plaintiff.

(Id. at pp. 206-207.)

13. The Board of Administration extended the rule articulated in Haywood and applied in Smith to a state employee who voluntarily resigned his employment as a heavy equipment operator with the California Department of Forestry and Fire Protection in its precedential decision In re Vandergoot (2013) CalPERS Precedential Bd. Dec. No. 13-01.5

5 The specific sequence of events was that Robert Vandergoot was given notice on March 5, 2010, that his employment would be terminated, effective March 31, 2010. He appealed his dismissal to the State Personnel Board. On February 6, 2011, prior to a hearing on his appeal, he entered into an agreement with his former employer whereby the notice of dismissal was withdrawn in exchange for his resignation, effective December 9, 2010, and permanent waiver of any reinstatement rights. The agreement provided that he would be considered to be on “unpaid leave status” from March 31, 2010, through December 9, 2010. In the meantime, CalPERS received Mr. Vandergoot’s application for industrial disability retirement on April 12, 2010.
Concluding that Haywood's holding applies whether Mr. Vandergoot was terminated for cause or voluntarily resigned his employment and waived any reinstatement rights, the Board of Administration explained:

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. Such a circumstance must be viewed as wholly inconsistent with the policy behind and rationale for disability retirement ....


Application of Relevant Legal Authority

14. Haywood and its progeny make it clear that a prerequisite to granting a disability pension is the applicant's ability to be reinstated with his former employer should it subsequently be determined that he is no longer disabled. If an applicant cannot be reinstated because he was terminated for cause (Haywood and Smith) or voluntarily resigned and waived his reinstatement rights (Vandergoot) or is unable to fulfill the duties of his job for a reason other than his disability (Mr. Dheming's inability to possess a firearm), he is ineligible for a disability pension.

Here, the event giving rise to Mr. Dheming's termination for cause happened on June 12, 2015, which is the date by which he must have had a mature claim for disability. At some point prior to his termination on December 9, 2016, Mr. Dheming was legally prohibited from possession of a firearm, and accordingly could not be reinstated to his job. His own physician did not make a determination that he was "temporarily and totally disabled" and unable to return to his customary occupation "until he is fully treated and recovered" until August 13, 2015. He did not file his application for disability retirement until May 16, 2016, a date 11 months after the June 12, 2015, date of the incident resulting in his conviction.

15. The exception articulated in Haywood does not apply because: 1) the event giving rise to Mr. Dheming's termination occurred on June 12, 2015, and as a result of those events Mr. Dheming was legally unable to possess a firearm, and he therefore had no
reinstatement rights as a result, and 2) the event giving rise to Mr. Dheming’s termination, as well as his termination, did not preempt an otherwise valid claim for disability retirement because the Board of Administration had not yet determined him to be substantially incapacitated for the performance of his usual job duties.

16. The equitable exception announced in Smith does not apply either. Mr. Dheming did not apply for disability retirement until 11 months after the event giving rise to his termination. While he filed his application on May 16, 2016, about seven months prior to his formal dismissal, there is no evidence that a ruling on his application was delayed for any reason. Additionally, Mr. Dheming failed to establish that he had a matured right to a disability retirement prior to his termination on December 9, 2016. Accordingly, there was no impending ruling on his application that was delayed, for reasons beyond his control, until after his dismissal. Therefore, Mr. Dheming did not have a matured right to a pension when he was dismissed, and the severance of his employer-employee relationship with the CIM did not effectuate a forfeiture of a matured right to a disability retirement.

Summary

17. Mr. Dheming’s dismissal for cause on December 9, 2016, was the direct result of his actions on June 12, 2015, resulting in his criminal conviction. His actions on June 12, 2015, resulted in a legal restriction on his rights to possess a firearm by at least October of 2016 as indicated by his testimony and correspondence between Mr. Dheming and the CIM. Those firearm restrictions allowed for no reinstatement rights of Mr. Dheming as a corrections officer at the CIM because possession of a firearm is a requirement of the position. As a result he is ineligible for a disability retirement because that firearm restriction was not the result of a disabling medical condition.

Additionally, Mr. Dheming did not apply for a disability retirement until 11 months after the June 12, 2015, incident giving rise to his termination. Mr. Dheming’s termination did not preempt an otherwise valid claim for disability retirement, and Mr. Dheming failed to establish that he had a valid claim for disability retirement. Therefore, Mr. Dheming’s application for disability retirement should be cancelled.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. CalPERS has the burden of proving Mr. Dheming’s application for industrial disability retirement is barred by Haywood and its progeny. (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”].) It must meet its burden by 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

Applicable Law

2. Government Code section 21150 provides, in pertinent part:

A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age . . . .

3. Government Code section 21151, subdivision (a), provides: “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.”

4. Government Code section 21156, subdivision (a), provides, in pertinent part:

(1) 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 . . . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

5. Government Code section 21154 provides:

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.

6. The termination of a member’s employment or some other change in circumstance (such as a legal restriction against possession of fire arms when possession of fire arms is a requirement for the employment) or the occurrence of an event giving rise to his ultimate termination (such as a criminal investigation regarding his actions at work) such that there is no possibility of reinstating the employer-employee relationship in the future renders him ineligible for disability retirement so long as such termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. (Haywood, supra, 67 Cal.App.4th at pp. 1306-1307.) It is wholly irrelevant whether the employment was terminated because the member was fired for cause, or voluntarily resigned and waived his right to reinstatement, or the result of a legal restriction placed upon the employee by the court. (See, In re Vandergoot, supra, CalPERS Precedential Bd. Dec. No. 13-01, at pp. 7-8.) Under each of these scenarios, the termination constitutes “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 CMM] if it ultimately is determined that he is no longer disabled.” (Haywood, supra, 67 Cal.App.4th at p. 1306.)

Conclusion

7. Mr. Dheming is not eligible for disability retirement for the reasons explained above. Therefore, his application for disability retirement is canceled.

ORDER

Respondent Reymund L. Dheming’s application for disability retirement is canceled.

DATED: September 5, 2017

DEBRA D. NYE-PERKINS
Administrative Law Judge
Office of Administrative Hearings