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

In the Matter of Cancellation of the Industrial
Disability Retirement of:

KEVIN J. VENEMA,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2016-0960
OAH No. 2017030591

PROPOSED DECISION

Administrative Law Judge John E. DeCure, Office of Administrative Hearings
(OAH), State of California, heard this matter on September 1, 2017, in Fresno, California.

Kevin Kreutz, Senior Staff Attorney, California Public Employees' Retirement
System (CalPERS), appeared on behalf of petitioner.

Julia Lum, Attorney at Law, represented respondent Kevin J. Venema, who was
present.

There was no appearance by or on behalf of respondent California Department of
Corrections and Rehabilitation (CDCR). CalPERS established that CDCR was properly
served with the Notice of Hearing. Consequently, this matter proceeded as a default hearing
against CDCR under Government Code section 11520.

Evidence was received, argument was heard, and the hearing concluded. The record
was held open for the submission of written closing argument. Respondent's and CalPERS'
written closing arguments were received on September 15, 2017, and were marked as Exhibit
G and Exhibit 18, respectively, for identification.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED October 23, 2017

[Signature]
Respondent also submitted a Request for Protective Order Sealing Confidential Records form, which was marked as Exhibit H for identification, in which respondent requested that Exhibits A, C, D and F be sealed because they contain confidential medical information or records. Respondent indicated that CalPERS had no opposition to this request. Good cause appearing, respondent's request for a protective order sealing Exhibits A, C, D and F was granted.

CalPERS' reply brief was received on September 22, 2017, and marked as Exhibit 19 for identification. Respondent did not submit a reply brief. The record was closed and the matter was deemed submitted for decision on September 22, 2017.

ISSUES


FACTUAL FINDINGS

1. On March 7, 2017, Anthony Suine, Chief, Benefit Services Division, signed and thereafter filed the Statement of Issues in his official capacity.

2. Respondent was employed by CDCR – California Men's Colony, Deuel Vocational Institution (Deuel) - as a Correctional Officer, effective September 16, 1985. By virtue of his employment, respondent became a state safety member of CalPERS subject to Government Code sections 21151 and 21154.

3. Respondent has held several positions with CDCR. On October 1, 2000, respondent separated from employment with CDCR Deuel. On October 2, 2000, respondent was employed by CDCR – Valley State Prison (Valley State). On March 19, 2006, respondent separated from employment with Valley State. On March 20, 2006, respondent was employed by CDCR – Sierra Conservation Center (Sierra). On October 26, 2008, respondent separated from employment with Sierra. On October 27, 2008, respondent was employed by Valley State. On May 13, 2012, respondent separated from employment with Valley State. On May 14, 2013, respondent was employed by CDCR – California Men's Colony (Men's Colony). Respondent retained his CalPERS membership throughout all of these changes of position.
4. At hearing, CalPERS and respondent stipulated to the following facts:

(a) On September 25, 2012, respondent was questioned regarding allegations that respondent was selling contraband to inmates at California Men's Colony.

(b) On September 25, 2012, respondent, while on duty at California Men's Colony, was found in possession of several items of contraband on his person.

(c) Respondent resigned from employment at California Men's Colony on September 25, 2012.

(d) Respondent was charged with violation of Penal Code section 68, a felony. The charges were based in part upon his possession of contraband while on duty.

(e) Respondent pleaded nolo contendere to one count of violating Penal Code section 68.

5. On September 25, 2012, respondent and CDCR, acting through the Men's Colony warden, signed a "Stipulation and Release" (agreement) deeming that respondent had resigned from state service effective September 25, 2012. The agreement further provided, in relevant part, that:

[respondent's] resignation is irrevocable and is not contingent on the action of any other State agency, now or in the future. [CDCR] agrees to accept [respondent's] resignation. [Respondent] further agrees, as part of the consideration and inducement for execution of the stipulation and release, to never apply for or accept employment with [CDCR], or any entity providing services to inmates or wards within the CDCR.

6. On October 2, 2012, respondent signed an application for industrial disability retirement (application), which was received by CalPERS on October 23, 2012. The application was based on a claim of orthopedic conditions. The application asked, "What is your specific disability, when and how did it occur?" Respondent stated:

Herniated discs – lumbar region – range and motion, approximately 1995 – during an incident. Hurt on the job (Deuel Vocational Institution) (Valley State Prison for Women)

---

1 Penal Code section 68 prohibits state employees from asking for, receiving, or agreeing to receive, any bribe.
upcoming surgery 10-5-12.

7. The application asked, “What are your limitations/preclusions due to your
injury or illness’’ Respondent stated: “Limits, lifting, running – unable to conduct physical –
restraints and holds (stopping fights) as required. Bending, kneeling[.]”

8. The application asked, “Are you currently working in any capacity (full time
part time or modified work)? If yes please explain.” Respondent stated, in pertinent part:
“Resigned for upcoming 10-5-2012 R-hand carpal tunnel surgery, previous work injuries
...” Respondent did not indicate in the application that his resignation was precipitated by
his employer finding him in possession of contraband, and alleging he sold contraband to
inmates; nor did respondent indicate he had stipulated that he would not seek reemployment
with CDCR, thus making his resignation permanent.

9. On October 23, 2012, respondent submitted a hand-written letter, dated the
same, to CalPERS, requesting that his application be expedited. Respondent stated, “I am
unable to be employed due my work injuries,” and described his current economic
hardship.

10. By a letter dated February 15, 2013, CalPERS informed respondent that he
was approved for industrial disability retirement based on an orthopedic (left shoulder)

11. On July 10, 2013, respondent was convicted, on a no contest plea, in San Luis
Obispo County Superior Court Case No. 130000186, of one count of violating Penal Code
section 68 (bribery), a felony.

12. On July 22, 2013, CalPERS wrote to CDCR Men’s Colony thanking them for
informing CalPERS of respondent’s conviction and requesting further information regarding
the facts and circumstances surrounding the conviction. On September 20, 2013, CDCR
Men’s Colony responded to CalPERS’ request, providing a criminal docket for respondent’s
bribery case, a copy of the agreement between respondent and CDCR, and a copy of
respondent’s letter of resignation.

13. CalPERS determined that respondent was barred from any entitlement to
disability retirement because he was terminated for cause and the discharge was neither the
ultimate result of a disabling medical condition nor preemptive of any otherwise valid claim
for disability retirement. CalPERS notified respondent of its determination to cancel his
industrial disability application by a letter dated July 11, 2016, which further notified him of
his appeal rights.

14. On July 22, 2016, CalPERS sent a letter to respondent informing him that as a
result of his industrial disability retirement being cancelled retroactive to his retirement date,
“[t]he cancellation of your retirement benefit has resulted in an overpayment of retirement
monies paid to you in the amount of $149,624.50.” The letter requested that respondent reimburse CalPERS by that amount, and indicated that he was “now eligible for service retirement.”

15. On July 26, 2016, CalPERS wrote to respondent informing him that his industrial disability benefit had been cancelled effective September 25, 2012, and that as a result, his retired health and dental enrollment effective June 1, 2013, had been rescinded.

16. Respondent timely filed an appeal by letter dated August 10, 2016, challenging the cancellation of his eligibility for industrial disability retirement. Respondent argued that he was still eligible for industrial disability retirement because his eligibility “was a foregone conclusion” prior to his date of separation “given his substantial industrial injuries and scheduled surgery.” Respondent contended that even if he was not eligible for industrial disability benefits “going forward,” CalPERS would be violating “equitable principles to require [him] to repay over $150,000 in benefits due to CalPERS[’] inability to identify and quickly remedy its own error.” Respondent further asserted that he be allowed to receive service retirement, permitted to purchase service credits for which he had applied earlier, and permitted to retain his health coverage.

17. On December 5, 2016, CalPERS advised respondent in a letter dated the same that it had processed his service retirement with a retroactive effective date of August 14, 2013, his fiftieth birthday, pursuant to his request. CalPERS further calculated that respondent was credited a one-time retroactive service retirement payment of $120,197.05, which, when applied to the $149,600.68 industrial disability retirement overpayment, left him with a remaining balance due of $29,403.63.

18. None of the evidence presented indicated why CalPERS delayed in cancelling respondent’s industrial disability retirement benefits until July 2016, approximately 34 months after it was informed of his felony conviction and the circumstances of his retirement from CDCR’s employment.

Burden of Proof

19. CalPERS filed a statement of issues in this matter, framing the primary issue as whether CalPERS should accept, or cancel, respondent’s application for industrial disability retirement. CalPERS’ July 11, 2016 letter to respondent also references its “decision to cancel” his application based on several circumstances. This is not accurate, as CalPERS accepted respondent’s application in February 2013 and paid out benefits for well over three years based upon that acceptance. Instead, the primary issue in this case involves CalPERS’ determination to cancel respondent’s industrial disability benefits, based on its discovery that its approval of his application was erroneous as a matter of law.

---

2 CalPERS did not explain why this figure differed from the overpayment balance of $149,624.50 it referenced in its July 22, 2016 letter to respondent (see Finding 14).
20. Government Code section 20160, subdivision (b) provides:

Subject to subdivisions (c) and (d), the Board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

CalPERS is the party seeking correction of an error or omission, and therefore, has the burden of presenting documentation or other evidence to the Board establishing the right of correction. (Gov. Code, § 20160, subd. (d).)

Evidence Regarding the Onset of Respondent’s Disability

21. Respondent described a lengthy history of work-related injuries beginning with a back injury following an inmate attack in 1997. Respondent took pain-management medications for over 20 years to compensate for his pain while performing his duties. Those duties included constant sitting, standing, walking, bending, twisting, power-grasping, fine manipulation, driving, exposure to extreme temperatures, and lifting or carrying up to 35 pounds per day. Respondent occasionally had to lift up to 100 pounds. He carried weapons and safety equipment, and frequently had to break up inmate fights and restrain inmates. By 2011, respondent: 1) had sustained injuries from multiple assaults; 2) had sustained a concussion; was hit by a metal beam; had been kicked in his right knee, requiring surgery; 3) had been injured with razors and needles as part of “booby traps” set by inmates; 4) underwent a cardiac ablation procedure to address a cardiac rhythm problem; and 5) developed a hand problem with regard to gripping objects. Respondent further described an on-the-job bicycle injury he sustained in 2011 while riding on a detail in which he fell onto concrete, tearing his left-shoulder rotator cuff.

22. In February 2012, respondent re-injured his left shoulder lifting heavy bags at work, fracturing his distal clavicle. He began experiencing right-hand numbness in his middle and pinkie fingers and had trouble gripping objects. Respondent stated he was concerned he could not grip a baton in a fight. However, he did not report this to CDCR because he did not want to be placed on medical leave again, having exhausted his sick leave. Respondent’s daughter was receiving treatment for cancer, and his ex-wife, a CDCR employee, had transferred to Men’s Colony. Respondent continued taking Hydrocodone 10 mg, Tramadol 50 mg, and Ibuprofen 800 mg for pain, and kept working. His treating physician, Cyril Rebel, M.D., scheduled respondent to undergo surgery in October 2012 to address respondent’s symptoms of carpal tunnel syndrome.

23. Respondent admitted that in September 2012, he had brought contraband into the prison facility and sold it to inmates. He stated that he “was in fear for my family,” and suggested that “other circumstances” were involved in his misconduct, but he did not provide further details. He denied that CDCR discussed disciplining or terminating him before he resigned, stating that by then, he was “loaded up on meds” and no longer wanted to work at.
Men’s Colony. Respondent did not recall reading the agreement detailing his resignation, because at the time he was “distraught.”

24. Dr. Rebel, an orthopedic surgeon with over 20 years of experience, testified that he began treating respondent in February 2012 for a fractured clavicle and carpal tunnel syndrome. On February 27, 2012, Dr. Rebel completed a work release form on respondent’s behalf, describing respondent’s status as “temporarily totally disabled” due to a left-shoulder clavicle fracture and recommending physical therapy.

25. On May 11, 2012, Dr. Rebel wrote a chart note upon a follow-up visit with respondent, noting that respondent’s left shoulder showed “continued improvement” and was responding well to the physical therapy. Dr. Rebel further noted that respondent described right-hand paresthesia and the sensation of having a “dead hand.” Dr. Rebel released respondent for regular work, but requested a nerve conduction study for carpal tunnel syndrome.

26. On August 3, 2012, Dr. Rebel wrote a chart note upon a follow-up visit with respondent, noting that respondent’s shoulder was “doing quite well,” but that respondent’s nerve conduction study was positive and respondent continued to have right-hand numbness and paresthesia. Dr. Rebel described to respondent the carpal tunnel surgery procedure, its risks and benefits, and stated that he would obtain authorization for the surgery, since respondent “very much” wished to proceed with it.

27. On October 5, 2012, Dr. Rebel performed right carpel tunnel release surgery on respondent. In his operative notes, Dr. Rebel noted no intraoperative complications and stated that respondent tolerated the procedure well.

28. On November 19, 2012, Dr. Rebel wrote a chart note upon a post-surgical follow-up visit with respondent, noting that respondent’s incision was healing well, but respondent was experiencing some stiffness and tenderness. Dr. Rebel provided a note “that will keep him on medical disability” and scheduled a follow-up visit in four weeks.

29. On January 21, 2013, Dr. Rebel wrote a chart note upon a post-surgical follow-up visit with respondent, noting that respondent was “doing about the same as at his last visit.” Respondent reported having problems with gripping and could not “grip things like his baton or weapon,” or “engage in physical restraints because of his hand . . . .” Respondent also complained of a previous work-related injury to his left knee intermittently causing it to lock up. Dr. Rebel’s note for this date does not comment about whether respondent was medically disabled.

30. On February 11, 2013, CalPERS sent a letter to Dr. Rebel asking him to indicate, in a faxed response, the date upon which respondent became “too disabled to work due to his left shoulder and right [carpal tunnel syndrome].” On the same date, Dr. Rebel sent a faxed response to CalPERS indicating that respondent’s left-shoulder disability
occurred on February 7, 2012, and respondent’s right-hand carpal tunnel syndrome disability occurred on October 5, 2012.

31. On February 25, 2013, Dr. Rebel wrote a chart note upon a post-surgical follow-up visit with respondent, noting that respondent was experiencing continued symptoms and problems as follows:

He feels his thumb is catching. He still feels some binding and tenderness in the wrist area. He states he cannot do pushups, and he certainly cannot do his usual activity of cuffing and restraining inmates. However, he feels he is making improvements and progress.

In the note, Dr. Rebel also discusses respondent’s left-knee issue, stating that more medical records regarding prior treatment of the knee would be requested. Dr. Rebel made no comment about whether respondent was medically disabled.

32. On July 22, 2013, Dr. Rebel wrote a chart note upon a follow-up visit with respondent, noting that respondent’s “main reason he is here today is for follow-up regarding his left knee.” Respondent complained of joint pain but had not had recent swelling. Dr. Rebel further noted that respondent “is also not carrying his duty belt and therefore he is having less knee pain.” Dr. Rebel concluded that the left knee was stable and minimally symptomatic. He further offered an opinion regarding whether respondent was medically disabled, stating:

As a point of clarification, the patient is at a permanent and stationary level regarding his right hand and the carpal tunnel syndrome surgery that he had. In my last dictation, I dictated that he would be able to return to full and regular duty but that was incorrect. [Respondent] has been medically disabled due to all of his injuries. It was recommended that he not go back to work based on all his injuries. Therefore, he is not able to go back to usual and customary duty. Regarding the right carpal tunnel surgery, he is at a permanent and stationary level and no further medical treatment is recommended nor anticipated for that.

33. Dr. Rebel testified that if an employee is suffering from impairments, he typically does not immediately take the employee off work. Instead, he attempts to work with the employee on resolving the medical problem. In regard to respondent’s scheduled October 5, 2012 carpal tunnel surgery, Dr. Rebel opined that the date of surgery was still the most accurate date of substantial disability because respondent was disabled post-surgically. Regarding respondent’s left shoulder pain, Dr. Rebel recalled that on May 11, 2012, he had recommended respondent be released for regular work. He further stated that in general, he would not release an employee back to work if the employee could not perform his or her
duties due to a medical disability. Dr. Rebel did not opine that during respondent’s employment with CDCR, respondent suffered from any other injuries, individually or collectively, which were tantamount to a substantial disability.

34. Respondent was not compelled to undergo an independent medical evaluation before CalPERS made a determination on his application. At hearing, CalPERS presented no medical-expert testimony. Thus, the basis of CalPERS’ approval of respondent’s application “based upon your orthopedic (left shoulder) condition” was not established.

Summary of Medical Evidence

35. The evidence available at hearing did not establish that respondent was substantially incapacitated from the performance of his usual duties as a Correctional Officer based on an orthopedic (left shoulder) condition prior to September 25, 2012. It was undisputed that respondent was working full-time without medical restrictions on the day he was confronted by his employer and resigned. It was undisputed that respondent did not incur a medical injury which precipitated his resignation. Respondent’s treating physician, Dr. Rebel, evaluated and treated him on multiple occasions prior to that date, yet Dr. Rebel did not assert in his medical records, or when testifying, that respondent was either substantially incapacitated from his left-shoulder condition prior to respondent’s resignation, or was required to stop working full-time due to this condition.

36. Regarding respondent’s carpal tunnel syndrome, Dr. Rebel credibly established respondent’s date of disability to be the October 5, 2012 date of the carpal tunnel surgery.

Relevant Legal Authority

37. In Haywood v. American River Fire Protection District (1998) 67 Cal.App.4th 1292, the Court of Appeal held that an employee’s termination for cause rendered him ineligible for disability retirement:

[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 dismissed from the force for misbehavior." (MacIntyre v. Retirement Board of S.F., supra, 42 Cal.App.2d at p. 736.) 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. (§ 21153.) In such a case, the employer must instead apply for the disability retirement of the employee. (Ibid.) In addition, while termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship (§ 19583.1), 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. (§ 21192.) And an employee on disability retirement may apply for reinstatement on the ground of recovery. (Ibid.) 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. (§ 21193.)

(Haywood, supra, 67 Cal.App.4th at pp. 1304-1305.)

38. 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].

(Smith v. City of Napa (2004) 120 Cal.App.4th 194, 205.)

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 such 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 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:

5 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.)
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.

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. (Bianchi 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.

(Smith, supra, 120 Cal.App.4th at pp. 206-207.)

39. 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. 13-01.6

6 The specific sequence of events were 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
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....


Discussion of Relevant Legal Authority

40. Haywood and its progeny establish 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), he is ineligible for a disability pension.

41. Here, respondent resigned from service on September 25, 2012, by way of an agreement specifically stating that respondent could never seek re-employment with CDCR. As of that date he could not be reinstated to his job. While he asserted in the application that his medical conditions were the reason for his resignation, respondent worked full-time until the date of resignation in a full-duty capacity. Respondent did not suffer from a work-related injury the day he resigned; instead, he was confronted with allegations of extremely serious misconduct and chose to leave his employment permanently rather than face disciplinary proceedings. His own physician did not make a determination that he was disabled and unable to return to his customary occupation until the month after he resigned - and this 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.
related to carpal tunnel syndrome. Regarding respondent's left shoulder condition, his physician similarly did not find respondent to have been substantially incapacitated by that condition prior to his resignation.

42. The exception articulated in Haywood does not apply because: 1) the complete severance of the employer-employee relationship between CDCR and respondent was the result of his sales of contraband to inmates, and by a stipulated agreement, he therefore had no reinstatement rights as of September 25, 2012; and 2) the severance of that relationship did not preempt an otherwise valid claim for disability retirement because CalPERS had not yet determined him to be substantially incapacitated for the performance of his usual job duties.

43. The equitable exception announced in Smith does not apply either. Respondent did not apply for disability retirement until after the effective date of his resignation. Accordingly, there was no impending ruling on his application that was delayed, for reasons beyond his control, until after his resignation. Respondent did not have a matured right to a pension when he was dismissed, and the severance of his employer-employee relationship with CDCR did not effectuate a forfeiture of a matured right to a disability retirement.

Additional Issues

44. Respondent contends the Board lacks the authority to collect retroactive industrial disability overpayments, and further that CalPERS failed to introduce evidence to prove it made a timely demand for correction. If it is determined that the Board has legal authority to collect the overpaid benefit retroactively, respondent alternatively argues that consideration be given to the severe financial hardship such collection would cause him, and the collateral hardships CalPERS’ actions have already caused. Respondent contends that principles of equitable estoppel, judicial estoppel, and laches should be applied and that the Board should exercise its discretion to forgive repayment by respondent of the overpaid retirement benefits.

Hardship

45. Respondent asserted that in September 2011 he submitted an Election to Purchase Service Credit form (election form) to CalPERS, after his ex-wife was awarded approximately 11 years of service credit as a result of their divorce. Respondent submitted the election form but did not hear back from CalPERS regarding whether the election form was approved. Respondent surmised that perhaps his election form process was cancelled without his knowledge when his industrial disability application was approved. However, no evidence was presented at hearing regarding any outcomes or determinations of the election form process.

46. Respondent asserted that because he service retired more than 120 days after his separation from employment with CDRC, he lost his medical and dental coverage, and
that of his dependent daughter, who was recently treated for leukemia. Respondent's daughter is currently in remission, but requires ongoing medical monitoring. Without medical insurance, this represents a financial hardship for respondent. Respondent recently attempted to buy a home, but his current monthly income is $2,372.48 per month, which despite his creditworthiness, renders him incapable of securing a home loan. His low income has prevented him from purchasing a health insurance policy.

47. The 120-day time frame to apply in which a new retiree must apply for service retirement is a standard CalPERS requirement. Another standard option available to CalPERS retirees is to apply for service retirement pending the outcome of an industrial disability retirement application, in order to preserve the retiree's medical and dental benefits. Respondent argued in his closing brief that he had "no opportunity to seek service retirement" within 120 days of his separation, yet he presented no evidence at hearing regarding how, or why, this apparent lack of opportunity occurred. Respondent did not contend either that he timely applied for service retirement, or that CalPERS prevented him from applying.

Right of Correction

48. The evidence established that an error was made in CalPERS' approval of respondent's industrial disability retirement application, based on CalPERS' lack of notice from respondent that his resignation amounted to a permanent severance from employment and was not, as he stated in the application, for medical reasons, but instead was precipitated by allegations of serious misconduct. As a result, respondent was overpaid in his retirement benefit in the amount of $149,624.50 for the time period from September 25, 2012 until July 11, 2016. CalPERS thereafter awarded a one-time retroactive payment of $120,197.05 to respondent, which it applied to satisfy the overpayment, leaving a balance due of $29,427.45. CalPERS proposed a repayment plan of $490.06 per month, which would be withheld from respondent's service benefit each month for approximately 60 months.

49. For purposes of establishing a right of correction, CalPERS has demonstrated that a mistake was made in the approval of respondent's industrial disability application based on respondent's representation that he was retiring for medical reasons, and CalPERS' reasonable assumption that respondent's retirement was, therefore, not irrevocable.

50. By reason of the above, CalPERS has met its burden of presenting documentation or other evidence to the Board establishing the right to correction under Government Code section 20160, subdivision (b).

51. Respondent argues that the doctrines of equitable estoppel, judicial estoppel, and laches, should bar CalPERS from recovering its overpayment of benefits. These contentions are discussed below.
LEGAL CONCLUSIONS

Denial of Benefits

1. The termination of a member's employment in such a manner 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. (In re Vanderhoot, supra, CalPERS Precedential Bd. Dec. No. 13-01, at pp. 7-8.) Under either scenario, 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 school district] if it ultimately is determined that he is no longer disabled." (Haywood, supra, 67 Cal.App.4th at p. 1306) As set forth in Findings 40 through 43, none of the exceptions to this rule as established by case law apply to this case. The evidence established that respondent resigned at a time when he did not possess a matured right to receive industrial disability benefits.

Correction

2. Government Code section 20160 provides, in relevant part:

[(...) ... (')]

(b) Subject to subdivisions (c) and (d), the Board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 23164.

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same.
that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

CalPERS established a right of correction as set forth in Findings 48 through 50.

Statute of Limitations on Collection

3. For purposes of payments into the retirement fund for adjustment of errors or omissions, the period of limitation of actions shall be three years, and the system’s right to collect shall expire three years from the date of payment. (Gov. Code, § 20164, subd. (b)(1).) The period of limitation shall be as long as 10 years where any payment has been made as a result of fraudulent reports for compensation made, and the board shall determine the applicability of the period of limitations in any case, and its determination with respect to the running of any period of limitation shall be conclusive and binding for the purposes of correcting the error or omissions. (Gov. Code, § 20164, subd. (d).) The evidence did not establish that the industrial disability payments were made as a result of fraudulent reports for compensation made; hence, the three-year statute of limitations applies.

Here, CalPERS learned of respondent’s felony conviction as early as July 2013, yet it delayed making a correction to respondent’s disability benefits, and requesting reimbursement for its overpayment of benefits, until July 11, 2016. The delay was inexplicable, as CalPERS called no witnesses and offered no evidence to explain its lapse. As a result, CalPERS has attempted to collect a portion of overpayments several years after the fact.

Subdivision (d)(1) states: “In cases where this system makes an erroneous payment to a member or beneficiary, this system’s right to collect shall expire three years from the date of payment.”
The three-year statute of limitations operates solely in retrospect, and requires an analysis of certain dates in relation to one another.

The starting point of benefits overpayments was respondent's retirement date of September 25, 2012. From that date forward, respondent received erroneous overpayments until July 11, 2016, the date CalPERS notified him that it was cancelling the benefits. On that date, CalPERS exercised its right to collect. (See Finding 13.)

On July 22, 2016, CalPERS again exercised its right to collect and, citing a specific balance due, sought to recoup its benefits overpayments. (See Finding 14.) At this juncture, CalPERS was limited to collecting only the overpayments it had dispensed within three years from the date of payment; because CalPERS first exercised its right to collect overpayments on July 11, 2016, it could only collect overpayments it had disbursed from July 11, 2013 to July 11, 2016. Any erroneous overpayments CalPERS made to respondent for the time period preceding July 11, 2013, lay beyond the three-year time limit in which CalPERS could exercise its right to collect.

CalPERS cannot turn back the clock more than three years from July 11, 2016, to reclaim additional erroneous disbursements. More specifically, CalPERS is prohibited from collecting overpayments for benefits paid to respondent for the time period from September 25, 2012 to July 11, 2013.

**Estoppel**

4. Respondent argues that CalPERS is equitably estopped from collecting retroactive industrial disability benefits overpayments to him. The doctrine of equitable estoppel rests upon a foundation of conscience and fair dealing and has long been established in the judicial decisions of this state: "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." (Seymour v. Oelrichs (1909) 156 Cal. 782, 795, quoted in City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 488.)

5. "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury . . . . The doctrine of equitable estoppel may be applied against the government where justice and right require it." (Driscoll v. City of Los Angeles (1967) 67 Cal.2d 297, 305-306.) The party asserting the

---

8 In the letter, CalPERS informed respondent that a warrant dated August 1, 2016, would be his last disability retirement check.
estoppel bears the burden of proof. (Killian v. City and County of San Francisco (1978) 77 Cal.App.3d 1, 16.)

6. “The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.” (City of Long Beach v. Mansell, supra, 3 Cal.3d at 496-497.) However, it is generally “held that the power of a public officer cannot be expanded by application of this doctrine.” (Page v. City of Montebello (1980) 112 Cal.App.3d 658, 667.) In other words, the doctrine may not be applied when doing so “would have the effect of granting to the state’s agents the power to bind the state merely by representing that they have the power to do so.” (Ibid.)

7. Respondent failed to establish all four elements for equitable estoppel, as the evidence did not establish that respondent was ignorant of the true state of facts. While respondent credibly recounted that he was “distraught” when confronted by his employer with the Stipulation and Release agreement on his last day of employment, he knew the true circumstances surrounding his resignation because they are plainly set forth in that agreement, which he signed and dated. Respondent did not resign from employment for medical reasons, as he misleadingly stated in his application for industrial disability benefits; instead, he was forced out of his job due to serious allegations of misconduct, permanently severing his employer-employee relationship. These true facts he knew.

8. For all these reasons, it is determined that CalPERS is not equitably estopped from correcting errors of benefits overpayment.

9. Respondent argues that principles of judicial estoppel should be applied to CalPERS’ argument that respondent was not substantially incapacitated at the time of his separation from employment. Respondent relies on Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 183, which held that the doctrine of judicial estoppel should apply when “(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.” This argument fails. Here, there has been but one quasi-judicial proceeding, in which CalPERS steadfastly held to one position: that respondent is ineligible for industrial disability benefits as a matter of law. Moreover, CalPERS “first position” – that respondent’s application qualified him for industrial disability benefits – was taken as a result of CalPERS’ ignorance of the true facts surrounding respondent’s resignation.

Laches

10. Respondent contends the doctrine of laches must bar CalPERS from prevailing. However, CalPERS’ delay in correcting respondent’s benefits is appropriately
addressed by operation of Government Code section 20164, subdivision (b)(1), as set forth in Legal Conclusion 3.

ORDER

Respondent Kevin Venema's appeal of CalPERS' determination that he is ineligible to receive industrial disability retirement benefits is DENIED.


DATED: October 19, 2017

JOHN E. DeCURE
Administrative Law Judge
Office of Administrative Hearings