ATTACHMENT A

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

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

KAREN HELTON-JORGENSEN,
 Respondent.

and

THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,
 Respondent.

Case No. 2018-0254
OAH No. 2018040858

PROPOSED DECISION

This matter was heard before Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, in Sacramento, California, on January 17, 2019.

The California Public Employees' Retirement System (CalPERS) was represented by Senior Attorney Cynthia Rodriguez.

There was no appearance by or on behalf of Karen Helton-Jorgensen (respondent), or the California Department of Industrial Relations (DIR). Respondent and DIR were properly served with a Notice of Hearing. The matter proceeded as a default against respondent and DIR pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and this matter was submitted for decision on January 17, 2019.

ISSUE

Is respondent precluded from filing an application for disability retirement, given her voluntary resignation after being served with a notice of adverse action dismissing her from state service?
FACTUAL FINDINGS

Respondent's Employment History with DIR

1. Respondent was employed by DIR as an Associate Safety Engineer. By virtue of her employment, respondent is a local miscellaneous member of CalPERS, subject to Government Code section 21154.

2. On a date not established at hearing, DIR served on respondent a Notice of Adverse Action (NCAA), seeking to dismiss her from employment for cause, effective August 12, 2016. The NCAA was based on the following causes for discipline specified under Government Code section 19572:

   (d) Inexcusable neglect of duty.
   (e) Insubordination.
   (f) Dishonesty.
   (m) Discourteous treatment of the public or other employees.
   (o) Willful disobedience.
   (r) Violation of prohibitions set forth in accordance with [Government Code] Section 19990.
   (t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

3. These causes for discipline were based on allegations that, during the performance of her duties, and during workplace interviews regarding the performance of her duties, respondent: (a) made false allegations and representations; (b) made inappropriate and discourteous comments and demonstrated inappropriate and discourteous treatment towards co-workers; (c) engaged in threatening, hostile, intimidating and/or discourteous conduct; and (d) was dishonest during an investigatory interview.

4. Respondent appealed the NCAA to the State Personnel Board (SPB) and requested a hearing to challenge the bases for her termination. The matter was set for a pre-hearing settlement conference with SPB. Before participating in the pre-hearing settlement conference, respondent and DIR entered into a stipulated settlement agreement that, in part, specifies:

   The parties to this matter, desire to avoid the expense, inconvenience, and uncertainty of litigation of an appeal to the
[SPB], now submit to the [SPB] for approval, pursuant to Government Code section 18681, the following stipulation and waiver agreement:

1. [DIR] agrees to withdraw the [NOAA] and to remove it and all supporting documentation, including this Agreement, from [respondent’s] Official Personnel File.

2. [Respondent] agrees to voluntarily resign and hereby does resign, for personal reasons, from her position as an Associate Safety Engineer, and DIR accepts her resignation effective September 6, 2016. [Respondent] further waives all rights under Government Code section 19996.1.

3. [Respondent] agrees not to seek or accept employment with [DIR] and all of its Divisions, Boards and Commissions, at any time in the future and hereby waives all permissive or mandatory reinstatement rights to any position with [DIR]. Should [respondent] obtain employment with [DIR], at any time in the future through any means, [respondent] agrees that [DIR] may deem any such employment as a just cause basis for dismissal without any right of appeal by [respondent] of that dismissal in any forum.

5. SPB approved the stipulated settlement agreement on September 29, 2016. Consequently, DIR withdrew the NOAA in exchange for respondent’s resignation and agreement not to seek re-employment with DIR, its divisions, board, or commissions.

**Respondent’s Disability Retirement Application**

6. On May 5, 2017, respondent signed and thereafter filed with CalPERS, an application for service pending disability retirement (Application). In the Application, respondent indicated her last day on the payroll was September 7, 2016, and that the effective date of her retirement was January 7, 2017.

7. In her Application, respondent described her disability as “Workers Comp Injury – permanent disability rating & Auto Immune Disease/Lupus.” In response to the question on the Application that asked when the disability occurred, respondent provided the following information: “MVA/Work Comp [on July 7, 2009 and] Lupus [in] 2014.” In response to the question on the Application that asks how the disability occurred, respondent provided the following additional information: “Part of the reason I have 35 [percent] Disability Rating from Work Comp/[State Compensation Insurance Fund] – Have Open Medical – Will have to have knee [and] back surgery in (illegible).”
8. In response to the question on the Application that asks what respondent’s limitations or preclusions are due to her condition, respondent indicated she has “[l]imitations on standing, sitting, walking, driving, lifting, kneeling, [and] bending, on a daily basis.” Respondent specified that her condition affected her ability to perform her job as follows: “[I]t has limited my ability to perform my duties both full-time or part-time, both in office and out in the field. Auto immune flare ups compound issues and make me bedridden.” Respondent also included the following additional information in her Application: “Accident and Auto Immune/Lupus affect me on a daily basis, make it extremely difficult to work consistently. Have had numerous long extended leave of absences over past several years.”

CalPERS’s Cancellation of Respondent’s Application for Disability Retirement

9. Effective September 8, 2016, respondent service retired. By way of a letter, dated August 30, 2017, CalPERS informed respondent that it was unable to determine whether her Application could be accepted. The letter specified that because DIR informed CalPERS that respondent “resigned in lieu of termination and a settlement agreement was reached,” CalPERS needed to determine whether respondent’s disability application “fit within the case of Haywood v. American River Fire Protection District (1998) 67 Cal.App.4th 1292 (Haywood). In Haywood, the court held that 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, the termination of the employment relationship renders the employee ineligible for disability retirement.”

10. In the August 30, 2017 letter, CalPERS further explained that the case of 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 (Vandergoot), “provide further clarification for the purposes of applying Haywood.” CalPERS requested that respondent provide it with a copy of the signed settlement agreement and resignation that led to her separation from employment, to assist CalPERS in determining whether her Application could be accepted.

11. By letter dated December 15, 2017, CalPERS informed respondent that her disability application could not be accepted because she “left employment for reasons which were not the result of a disabling medical condition.” As a result, CalPERS cancelled respondent’s disability application. CalPERS specified that its decision was based on the courts determinations in the cases of Haywood, Smith, and Vandergoot. The letter also specifies that respondent had a right to appeal the determination, and, although her disability retirement application had been cancelled, she would continue to receive service retirement benefits.
12. By letter, dated February 7, 2018, respondent appealed from CalPERS’s cancellation of her application for disability retirement. In this letter, respondent provided the following information to support her appeal:

I resigned my position with [DIR] effective September 6, 2016, due to work-related medical restrictions and limitations that prohibited me from performing my job duties and responsibilities... I have been out on medical leave several times for long extended periods of time over the prior few years (2012 through 2016). Most recent was from August 2015 [until] July 2016. I returned to work [with] restrictions and required accommodations. This caused a huge hardship on management and on the management and operations of the office. This resulted in a very difficult work environment for both parties from my medical restrictions and all the accommodations that had to be made for me.

For my health and for medical reasons, rather than pursue a discrimination case against [DIR], I entered into a settlement agreement waiving my rights to sue in [lieu] of being terminated for not being able to perform my job duties. For this reason, I believe I’m entitled to receive disability retirement benefits.


Discussion

14. The sole issue for determination at hearing was whether respondent may file an application for disability retirement, or whether her 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.
15. In *Smith*, the same court reiterated the principles of *Haywood*. (*Smith*, supra, 120 Cal.App.4th at pp. 203-204.) The court 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.)

16. 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.)

17. In this present case, DIR served respondent with a NOAA which specified that she would be terminated from employment for cause, effective August 12, 2016. The NOAA specified that the bases for respondent’s termination, included inexcusable neglect of duty, insubordination, dishonesty, discourteous treatment of the public or other employees, and willful disobedience. Respondent appealed her termination to SPB, but settled with DIR prior to having a hearing before SPB regarding the bases for her termination. The settlement agreement specifies that DIR will withdraw the NOAA in exchange for respondent’s resignation and agreement not to seek reemployment with DIR. Respondent’s resignation pursuant to the stipulated settlement agreement was in response to the NOAA, and occurred after the effective date of her termination. Finally, respondent did not file her Application until approximately seven months after resigning, pursuant to the SPB-approved stipulated settlement.

18. Respondent resigned to settle a dismissal action against her. As part of the settlement, she gave up all return rights to DIR. Given these facts, in accordance with *Vandergoot*, respondent’s resignation must be treated as tantamount to the dismissals at issue in *Haywood* and *Smith*.

19. Although respondent specified in her letter of appeal that her termination from employment with DIR was due to their failure or inability to provide her with reasonable accommodations, that assertion was not supported by the evidence introduced at hearing. The NOAA specifies that her termination was due to repeated and multiple violations of California Government Code section 19572, which, among other things, regulates state employee performance expectations. Neither the NOAA nor the stipulated settlement make any reference to a medical condition or need for reasonable accommodations.
20. Respondent presented no evidence to support that her dismissal was the ultimate result of a disabling condition, or that her dismissal preempted an otherwise valid claim for disability retirement. Likewise, there was no evidence that respondent had a matured right to a disability allowance before she separated from employment, as required under *Smith*.

21. In sum, when all the evidence and arguments are considered, respondent did not establish that she should be allowed to file an application for disability retirement. Consequently, her 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 on the member's 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 her disability application is not precluded by her termination from employment.
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. As set forth in Findings 1 through 3, and 17 through 20, CalPERS demonstrated that respondent’s separation from employment was a dismissal for cause for purposes of applying the Haywood criteria. 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 her disability claim had "matured" before her termination, as required under Smith.

6. Additionally, as set forth in Findings 4, 5, and 17 through 20, pursuant to the holding in Vandergoot, respondent’s resignation did not preempt her 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 Karen Helton-Jorgensen to be granted the right to file an application for disability retirement is DENIED.

DATED: February 19, 2019

[Signature]

ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings