

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of Accepting the Application for
Industrial Disability Retirement of

ELIZABETH SERRATO,

Respondent,

and

SALINAS VALLEY STATE PRISON,
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Respondent.

Agency Case No. 2018-1252

OAH No. 2019021015

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Monterey, California, on July 8, 2019.

Rory J. Coffey, Senior Staff Counsel, represented petitioner Anthony Suine (Petitioner), Chief, Benefits Services Division, California Public Employees' Retirement System (CalPERS), State of California.

Brittany C. Jones, Attorney at Law, represented respondent Elizabeth Serrato (Serrato), who was present throughout the administrative hearing.

No appearance was made by or on behalf of respondent employer Salinas Valley State Prison (SVSP), California Department of Corrections and Rehabilitation (CDCR).

On July 8, 2019, the matter was submitted.

ISSUE

Is Serrato precluded from applying for an industrial disability retirement as a result of her resignation from employment with CDCR and her agreement to not seek reemployment as a result of her settlement of a Notice of Adverse Action?

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED August 6, 2019
K. Hall

FACTUAL FINDINGS

Serrato's Employment with CDCR and SVSP

1. Serrato testified she began working for CDCR as a correctional officer in October 2006.¹ The precise date she began employment is not relevant to any issue raised in this matter. By reason of her employment as a correctional officer with CDCR, Serrato was a CalPERS state safety member.

Elizabeth Serrato's Application for an Industrial Disability Retirement

2. On July 31, 2018, CalPERS received Serrato's application for industrial disability retirement.

In her application, Serrato represented she had been employed by SVSP as a Correctional Officer; her last day of paid service with CDCR was April 27, 2017; she retired from employment on May 22, 2018; and, her disabilities arose out of injuries to her left knee and leg, left hip, back, head, right shoulder, left hip, "psyc," right hip and right knee. Serrato provided a brief summary of the circumstances giving rise to the injuries that included falling through an opening in a roof, being involved in a riot, discrimination at work related to her sexual orientation and disability status, and repetitive work-related activities. She was not working when she filed her application. She represented she could not perform duties required of a correctional officer and was unable to protect herself from inmate attack. Serrato provided names of treating physicians and information related to workers' compensation claims.

The Disciplinary Allegations and Notice of Adverse Action

3. On June 15, 2016, Serrato was accused of leaving an inmate alone in a running vehicle on prison grounds. On August 31, 2016, Serrato was interviewed by a CDCR internal affairs investigator concerning the alleged incident. CDCR found the allegations related to the incident true and asserted Serrato was dishonest or misleading in the internal affairs interview and in her interactions with other CDCR employees.

Serrato denied, and continues to deny, that she engaged in any wrongdoing in connection with the June 15, 2016, incident; she denies that she was dishonest or misleading during the internal affairs interview or in her interactions with other CDCR employees concerning the alleged incident.

¹ On February 28, 2018, approximately five months after she applied for industrial disability retirement, Serrato filed an unverified civil complaint in the Superior Court of California, County of Monterey, bearing Case No. 18CV000762. The complaint alleged Serrato was employed as a correctional officer at SVSP "from 2007 to April 2017."

4. On April 20, 2017, Warden W. L. Muniz signed a Notice of Adverse Action (NOAA) directing that Serrato be dismissed from employment as a correctional officer. The NOAA stated in part:

As a departmental employee, you are charged with having knowledge of facility, institutional, and departmental rules, policies, procedures and regulations. Your neglect of duty, by leaving an inmate unattended in a running vehicle put yourself and others in serious danger. You failed your duty of honesty when you made false and dishonest statements during your OIA interview and to other employees when questioned about your conduct. By neglecting your duties, and being dishonest, you have brought discredit to yourself and to the Department. By conducting yourself in this manner you have failed to demonstrate professionalism, responsibility and integrity in the performance of your duties. Your failure to do so was a danger to the institution. This behavior is unacceptable and will not be tolerated by CDCR. As a Peace Officer, you are held to a higher standard with regard to honesty and integrity and your actions failed to meet this standard.

The NOAA alleged that previously, beginning on August 29, 2016, Serrato's salary had been reduced by five percent for three months for conduct allegedly occurring on May 13, 2016, which related to inexcusable neglect of duty and other failure of good behavior.

While Serrato admitted prior discipline had been imposed, she denied that she engaged in any wrongdoing in connection with the May 13, 2016, incident.

5. The NOAA was not based on any physical or mental disability. Serrato did not file an application for industrial disability retirement before the NOAA was issued and did not have a disability retirement claim pending.

6. Serrato requested a *Skelly* hearing after CDCR served her with the NOAA. On May 5, 2017, CDCR conducted a *Skelly* hearing at the prison. Serrato and her attorney attended that hearing. Following the *Skelly* hearing, Warden Muniz determined the penalty of dismissal was warranted and sustained it.

7. After she was notified of Warden Muniz's decision, Serrato timely appealed the NOAA to the State Personnel Board. Serrato and CDCR were parties to that appeal. Serrato and CDCR were represented by counsel in the course of the appeal. CalPERS was not a party to Serrato's appeal.

Settlement of the State Personal Board Appeal

8. Negotiations between Serrato, CDCR and SVSP ultimately resulted in the signing of a Stipulated Settlement Agreement and Release. That settlement agreement was filed with and approved by the State Personnel Board. CalPERS was not a party to the agreement and did not become aware of it until mid-October 2019.

The Serrato/CDCR/SVSP settlement agreement was prepared by a CDCR attorney. Serrato signed the agreement on May 21, 2018. Karine Bohbot, one of several other signatories to the agreement, signed the agreement on May 21, 2018, in her capacity as “Attorney for the Appellant [Serrato].”²

9. The settlement agreement did not mention or preserve any right Serrato may have had to apply for a CalPERS industrial disability retirement, although it specifically referred to Serrato’s right to seek “back pay, interest, and benefits . . . [but] only as such back pay, interest and benefits relate to the current pending action filed in Monterey County Superior court, case number 18CV000762” in which Serrato sought unspecified damages for injuries she allegedly suffered as the result of wrongful, retaliatory and discriminatory conduct by CDCR, SVSP, SVSP’s warden, and her immediate supervisor at SVSP.

10. On June 21, 2018, the State Personnel Board filed a decision Approving Stipulation for Settlement in Case No. 17-0801, adopting “the stipulation for settlement as its decision in the case.”

Terms of the Stipulated Settlement Agreement and Release

11. The written settlement agreement is five pages long, including the pages for signatures. It contains 16 specifically numbered paragraphs. Serrato is referred to as “Appellant” in the settlement agreement. Relevant portions of the stipulation follow:

1. Appellant [Serrato] agrees that she is deemed to have resigned from State Service effective at the close of business on May 21, 2018. This resignation is irrevocable and is not contingent on the action of any other State agency, now or in the future.
2. Appellant understands and agrees that no back pay, interest, and benefits as defined in Government Code section 19585 are due to her as a result of this

² Attorney Bohbot and Ike M. Kaludi, Jr. are identified as Serrato’s attorneys in the unverified civil complaint filed in the Superior Court of California, County of Monterey, bearing Case No. 18CV000762. The complaint was filed about ten months after the NOAA was served on Serrato and about two months before the stipulated settlement agreement was signed.

Stipulation, and she specifically waives any and all rights she might have to seek such back pay, interest, and benefits within this forum only and only as such back pay, interest, and benefits relate to the current pending action filed in Monterey County Superior court, case number 18CV000762.

3. Appellant agrees to withdraw her appeal to the Notice of Adverse Action, effective at the close of business on May 21, 2018, and to waive any and all rights she may have to appeal this Notice of Adverse Action either before the State Personnel Board or any court of law which might have jurisdiction over the matter except for the current pending action filed in Monterey County Superior Court, case number 18CV000762. Specifically, Appellant waives any rights she may have as set forth in section V – Appeal Rights of the Notice of Adverse Action, and Code of Civil Procedure, Part 3, title I, sections 1067 through 1110(b), inclusive.
4. Appellant agrees, as part of the consideration and inducement for the execution of the Agreement, to never apply for or accept employment with CDCR or with any entity that provides services to inmates or wards within CDCR. If CDCR inadvertently offers Appellant a position, Appellant breaches this agreement by accepting a position with CDCR. Appellant shall be terminated at such time as is convenient to CDCR and excluded from all institutions. Appellant hereby waives any right Appellant may have to appeal that determination and/or exclusion in any forum.

[¶] . . . [¶]

7. Appellant executes this Stipulation and Release without reliance upon any statement of representation by the Department, or its representatives except as set forth in this document. Appellant is of legal age and is responsible and competent to execute this Stipulation and Release. Appellant accepts fully the responsibility therefrom, and executes this Stipulation and Release after having read it. Appellant understands its provisions and enters into this Stipulation and Release voluntarily.

[¶] . . . [¶]

10. This Stipulation and Release sets forth the entire understanding of the Parties in connection with the subject matter herein. It is expressly understood and agreed that this Stipulation and Release may not be altered, amended, modified or otherwise changed in any respect whatsoever except by a writing duly executed by authorized representatives of the Parties.
11. Nothing in this Stipulation and Settlement Agreement and Release shall be considered or construed as an admission of fault and/or liability by either Appellant or CDCR.
- [¶] . . . [¶]
16. Respondent [CDCR] agrees to remove the Notice of Adverse Action and all supporting documents from the Appellant's Official Personnel file upon approval of this Stipulation and Release by the State Personnel Board. This Stipulation and Release are to remain in the Appellant's Office Personnel file upon approval of this Stipulation and Release by the State Personnel Board.

Serrato's Testimony Regarding the Settlement Agreement and Right to Apply for an Industrial Disability Retirement

12. Serrato testified a major concern in reaching the Stipulated Settlement Agreement and Release involved making certain she retained the right apply for industrial disability retirement. Serrato testified Attorney Bohbot assured her during negotiations that she would retain that right if she signed the Stipulated Settlement Agreement and Release.³ Serrato said she was not told and was not aware that resigning from employment with dismissal charges pending on appeal might preclude her from seeking industrial disability retirement. Serrato testified she would not have entered into the stipulated settlement agreement had she known that doing so might prevent her from applying for an industrial disability retirement allowance.

13. No evidence suggested Serrato, Attorney Bohbot, or any other person contacted CalPERS to determine what effect, if any, Serrato's resignation from employment might have on her right to apply for or receive an industrial disability retirement.

³ Attorney Bohbot did not testify in this proceeding and no evidence was presented to corroborate Serrato's testimony that she and Attorney Bohbot discussed the impact of the stipulated settlement agreement on Serrato's right to apply for or to receive disability retirement. Serrato testified she had filed a claim against Attorney Bohbot for legal malpractice within the two weeks preceding the hearing in this matter.

14. On July 31, 2018, just over two months after she signed the settlement agreement, Serrato filed an application for industrial disability retirement with CalPERS.

By letter dated September 25, 2018, CalPERS notified Serrato that her application had been approved based on the condition of her right knee. The September 25, 2018, letter confirmed, to Serrato's way of thinking, that the NOAA settlement had no impact on Serrato's eligibility to receive an industrial disability retirement allowance and that Attorney Bohbot provided sound legal advice.

It was not until Serrato received the CalPERS letter dated October 17, 2018 - which stated CalPERS had determined Serrato was not entitled to an industrial disability retirement because her "employment ended for reasons which were not related to a disabling medical condition" - that Serrato first had any concern about her eligibility to receive an industrial disability retirement.

The Statement of Issues

15. By letter dated October 25, 2018, Serrato timely appealed CalPERS's decision "not to grant my Industrial Disability Retirement that was previously approved by my employer and Calpers [*sic*]."

16. On February 14, 2019, Petitioner signed the Statement of Issues. On March 8, 2019, the Statement of Issues and Notice of Hearing were served on respondents.

Respondent Serrato filed two motions for a continuance in addition to a request to stay the proceedings. Petitioner opposed the motions and request. The motions and request were denied as respondent failed to establish good cause. The hearing date of July 8, 2019 was confirmed following each ruling denying the motions and request.

On July 8, 2019, the record in this matter was opened; stipulations were received; opening statements were given; official notice was taken; sworn testimony and documentary evidence was received; closing arguments were given; the record was closed; and, the matter was submitted.

Other Factual Matters

17. Serrato resigned employment with SVSP and CDCR to avoid going through the appeal of her dismissal-for-cause from employment. The NOAA was not based on a disabling medical or mental condition. Although Serrato asserted she suffered from longstanding injuries that entitled her to receive industrial disability retirement, her application for disability retirement was not filed until about 15 months after she was served with the NOAA and about 17 months after she left work on a total temporary disability leave authorized by a physician associated with her workers' compensation claim.

18. No medical record, expert testimony, or other form of competent medical opinion was offered to corroborate Serrato's testimony about her disabling medical conditions. But, there must have been some evidence of some disability that supported CalPERS's initial approval of Serrato's application for an industrial disability retirement since CalPERS notified Serrato by letter dated September 25, 2018, that an "industrial disability retirement had been approved based on her orthopedic (right knee) condition."

Medical records or other documentation on which CalPERS relied, if any, to support its initial decision to grant Serrato's application were not identified or produced. Serrato did not undergo a medical examination conducted by a physician selected by CalPERS. The reason for CalPERS's "initial" approval of Serrato's application was not established.

Serrato did not establish, as a matter of fact, that she was incapacitated for the performance of her duties as a correctional officer when she filed her application and was eligible to retire as a result of such a disability.

19. Corina Rodriguez (Rodriguez), an Employee Relations Officer with CDCR, worked at SRVP. Rodriguez was responsible for employee discipline and internal affairs investigations. Rodriguez knew the reasons for the April 20, 2017, NOAA served on Serrato and its resolution via the stipulated settlement agreement. The NOAA had nothing to do with a physical or mental disability. Rodriguez was quite clear about the intent of the settlement agreement – under the agreement, Serrato can never again hold employment with CDCR under any circumstance.

Factual Summary and Discussion

20. On April 20, 2017, Serrato was served with a NOAA dismissing her from employment as a CDCR correctional officer. No physical or mental disability gave rise to the alleged misconduct described in the June 2016 NOAA. While Serrato had been off work on temporary total disability for about two months before the NOAA was issued, she had worked continuously for about eight months after the alleged misconduct giving rise to the NOAA. She did not file an application for disability retirement in that eight month period. In fact, Serrato did not file an application for disability retirement until more than 15 months after the NOAA was issued. No medical evidence was presented to establish the nature and extent of any disability Serrato may have experienced before the alleged misconduct giving rise to the June 2016 NOAA.

On May 21, 2018, Serrato and CDCR settled the appeal related to Serrato's dismissal. In the settlement agreement, Serrato resigned her employment with CDCR and agreed to never apply for or accept employment with CDCR or any entity that provides services to inmates or wards within CDCR. Slightly more than two months later, on July 31, 2018, Serrato filed the application for industrial disability retirement.

By letter dated September 25, 2018, CalPERS notified Serrato that her industrial disability retirement application was approved. CalPERS was unaware at that time of

Serrato's resignation, her agreement to never work again for CDCR, or the circumstances giving rise to those matters. By letter dated October 17, 2018, and after learning of her resignation, CalPERS advised Serrato that it had cancelled her application for industrial disability retirement since her employment ended for reasons which were not related to a disabling medical condition. In reaching this decision, CalPERS relied on the appellate court decisions in *Haywood v. Am. River Fire Prot. Dist.* (1998) 67 Cal.App.4th 1292 and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, as well as Precedential Decision 13-01, *In the Matter of Robert Vandergoot* (2013).

Petitioner established Serrato terminated employment with CDCR for reasons unrelated to a physical or mental disability, and as a result of her resignation, Serrato was unable to return to work at CDCR.

Serrato did not establish the alleged misconduct that gave rise to the NOAA was the result of a disability, or that her right to an industrial disability allowance had matured before she resigned, or there was an impending ruling on a claim for a disability pension that was delayed, through no fault of her own, until after her resignation, or that undisputed evidence existed that would establish that she was eligible for a CalPERS disability retirement such that a favorable decision on her claim would have been a foregone conclusion. CalPERS did not advise Serrato that settling the dismissal-for-cause appeal would have no impact on her right to seek an industrial disability allowance; according to Serrato, her attorney provided that mistaken advice. Nor does CalPERS's acceptance and initial approval of Serrato's application for industrial disability retirement provide sound reason in law or equity to depart from CalPERS's position that when resignation arises out of the settlement of a dismissal-for-cause situation, the resignation is tantamount to a dismissal for purposes of applying the *Haywood* criteria.

21. The factual twist in this matter is CalPERS's acceptance and initial approval of Serrato's application for industrial disability retirement. Otherwise, the fact pattern in this matter is nearly identical to that presented in Precedential Decision 13-01, *In the Matter of Robert Vandergoot* (2013).

The reason CalPERS initially granted the application was not established. No medical record, expert testimony, or other form of competent medical opinion was introduced to establish when or where Serrato suffered the right knee injury, the nature and extent of any disability arising out of the injury, the kinds of work-related activities Serrato could not perform as a result of any disability, or that her injury and resultant disabling condition was such that she could never recover from it and be reinstated. CalPERS did not know Serrato was dismissed from employment and permanently resigned her employment to avoid a dismissal-for-cause hearing. CalPERS took prompt action to correct its mistake after learning of Serrato's resignation.

22. Good cause exists to cancel Serrato's application and find her ineligible for industrial disability retirement under all the circumstances established in this matter.

LEGAL CONCLUSIONS

Public Employee Pension Programs

1. The legislative purpose of public employee pension programs is well-established. They serve two objectives: to induce persons to enter and continue in public service, and to provide subsistence for disabled or retired employees and their dependents. Disability pension laws are intended to alleviate the harshness that would accompany the termination of an employee who has become medically unable to perform his duties. PERS legislation is to be construed liberally in favor of the employee to achieve these objectives. (*Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 459.)

2. A public employee has a fundamental vested right to a disability pension if he or she is in fact disabled. (*Martinez v. Pub. Employees' Ret. Sys.* (2019) 33 Cal.App.5th 1156, 1164.)

Interpretation of Pension Legislation

3. It often is said that public employee pension legislation should be construed liberally in favor of the member. It must be kept in mind, however, that the legislative purpose is paramount. The rule of liberal construction cannot be permitted to eradicate the legislative purpose of the law or to allow eligibility for those for whom it obviously is not intended. (*Haywood v. Am. River Fire Prot. Dist.* (1998) 67 Cal.App.4th 1292, 1304.)

4. Courts have given great weight to CalPERS's construction of California's Public Employees' Retirement Law. (*Martinez v. Pub. Employees' Ret. Sys.*, *supra*, at p. 1164.)

Statutes Relevant to a CalPERS Industrial Disability Retirement

5. Government Code section 21152 authorizes a CalPERS member and others, including employers, to file an application with the Board for a member's disability retirement.

Government Code section 21153 prohibits a member's employer from terminating a member because of disability if the member is otherwise eligible for disability retirement. In such a case, the employer must apply for the member's disability retirement.

Government Code section 21154 sets forth certain timelines related to the filing of an application for disability retirement. Upon receipt of an application for disability retirement, the Board 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.⁴

⁴ Government Code section 20026 provides in part: "'Disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended

Under Government Code section 21156, the Board must retire a member who is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability unless the member is qualified for and seeks a service retirement. In determining whether a member is eligible to retire for disability, the Board must make a determination on the basis of competent medical opinion and must not use disability retirement as a substitute for the disciplinary process.

The PERS disability retirement law contemplates the potential reinstatement of a member retired on disability if the member recovers and is no longer disabled. Until a member receiving a disability retirement allowance reaches the age of voluntary retirement, his or her employer may require the member receiving disability retirement to undergo a medical examination to determine whether the member's disability continues. (Government Code section 21192.) Under Government Code section 21193, whenever a member receiving a disability retirement allowance is found to no longer be disabled, the employer may reinstate the member and the member's disability allowance terminates.

Haywood, Smith, Vandergoot, and Martinez

6. *Haywood v. Am. River Fire Prot. Dist.* (1998) 67 Cal.App.4th 1292

Haywood was employed by the District as a fireman. The District terminated Haywood's employment for cause following a series of disciplinary actions. After his employment was terminated, Haywood applied for disability retirement, claiming stress from the disciplinary actions caused him to suffer a major depression that rendered him incapable of performing his usual duties. There was no claim or evidence that established Haywood's termination for cause was due to behavior caused by a physical or mental condition; and, there was no claim or evidence to support Haywood's eligibility for disability retirement before the disciplinary actions were taken. The evidence presented at the administrative hearing established that Haywood had recovered from his depression by the time of the hearing and was fully capable of performing the duties of his former job.

The Third Appellate District issued the published opinion that arose out of Haywood's application for disability retirement. The appellate court observed that Haywood's dismissal for cause 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 was determined he no longer was disabled. The PERS law contemplates a member's potential return to active service. (*Haywood*, at pp. 1306-1307.) The *Haywood* opinion concluded: "[W]here, as here, an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible

duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion."

for disability retirement regardless of whether a timely application is filed.” (*Haywood, supra*, at p. 1307.)

7. *Smith v. City of Napa* (2004) 120 Cal.App.4th 194

Smith was employed by the City as a fireman. The City dismissed Smith from employment after he failed remedial tests related to his competency. Smith applied for disability retirement on the effective date of his dismissal, asserting “stress” related to his employment was the reason he failed the required testing. While Smith’s disability application was pending, the City affirmed his dismissal. CalPERS eventually denied Smith’s disability claim - citing *Haywood v. Am. River Fire Prot. Dist.* (1998) 67 Cal.App.4th 1292 – concluding Smith’s dismissal for cause extinguished his right to disability retirement.

The Third Appellate District issued the published opinion in *Smith*. The appellate court noted its holding in *Haywood* would not apply where a cause for dismissal was the result of a disabling medical condition or where the dismissal would preempt an otherwise valid claim for disability retirement. These exceptions were the result of 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, or indirectly through a cause arising out of the disability. If a dismissed employee could prove the right to disability retirement matured before the date of the event giving rise to cause for dismissal, the employee’s dismissal would not preempt the right to receive a disability pension for the duration of the disability. The duty of a pension board to grant a disability pension does not arise at the time of a member’s injury, but, instead, matures when the pension board determines the member’s disability renders retirement necessary. The appellate court concluded Smith’s right to disability retirement was defeated by his dismissal for cause, which occurred before any CalPERS decision regarding eligibility for disability retirement.

In reaching its conclusion, the *Smith* court cautioned: “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.⁵ This case does not present facts on which to explore the outer limits of maturity, however.” (*Smith, supra*, at pp. 206-207.

8. *Vandergoot/California Department of Forestry*, Precedential Decision 13-01

⁵ The appellate court provided two examples of facts to support an equitable exception to the general rule that a dismissal for cause precludes the granting of a disability retirement allowance: (1) If an employee “had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal,” or (2) if there is undisputed evidence that the employee “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).” (*Smith, supra*, at p. 207.)

Official notice was taken that on October 16, 2013, the Board designated its final Decision in the matter of the application of Robert Vandergoot as a Precedential Decision (Precedential Decision 13-01).

Vandergoot was employed as a heavy fire equipment operator. By letter dated March 5, 2010, the Department provided Vandergoot with a NOAA that dismissed him from employment. On March 25, 2010, following a *Skelly* hearing, the dismissal-for-cause was affirmed. Vandergoot appealed to the State Personnel Board. On April 9, 2010, Vandergoot filed with CalPERS an application for industrial disability retirement, claiming various employment-related medical and mental disabilities. On February 6, 2011, while his application for disability retirement was pending, Vandergoot and the Department entered into a settlement agreement that was similar to the agreement between Serrato and CDCR. The parties agreed that Vandergoot would resign from employment and “will not seek, transfer to, apply for or accept any employment in any capacity with [Department] at any time in the future”

CalPERS learned of Vandergoot’s settlement of the NOAA and the terms of the settlement agreement. As noted in the Precedential Decision, “The sole issue. . . is whether respondent may file an application for disability retirement, or whether his application and eligibility for disability is precluded by operation of *Haywood*.” To resolve that issue, it was necessary to determine whether CalPERS could apply *Haywood* in the absence of an actual dismissal for cause. In that regard, it was observed that the settlement agreement stated Vandergoot had “resigned” employment for “personal reasons,” the Department withdrew the NOAA, and neither party admitted any guilt or wrongdoing.

Haywood’s reasoning was carefully analyzed. On the need for there to be the potential reinstatement of an employment relationship to grant disability retirement, the Precedential Decision states:

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. [Citation.] Such is not possible here.

and,

Were respondent to receive a disability retirement allowance, he would have no employer who could require him to undergo a medical examination under Government Code section 21192. And it is no longer possible for him to be reinstated under Government Code section 21193. These necessary prerequisites

for receiving a disability retirement allowance are simply not present in this case. For this reason alone, CalPERS can fairly consider the terms of the Stipulation for Settlement of respondent's [State Personnel Board] case as being tantamount to a dismissal for purposes of applying the *Haywood* criteria.

On the issue of Vandergoot's dismissal-for-cause preempting an otherwise valid disability retirement claim, the Precedential Decision applied factors set forth in the *Smith* decision. On that issue, the Precedential Decision states in part:

Smith recognized that even where there has not yet been a determination of eligibility, there may be facts which a court, applying principles of equity, will deem an employee's right to a disability retirement. [Citation.] *Smith* then went through a number of situations where equitable principles might apply. They are also considered here. As in *Smith*, this is not a case where respondent had an impending ruling on a claim for a CalPERS disability pension that was delayed through no fault of his own. [Citation.] Here, he did not even initiate the process for receiving an industrial disability retirement allowance until after he received the NOAA and after he received the adverse Skelly determination. Nor was there "undisputed evidence" that respondent 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)." [Citation.] The fact that he had been placed on industrial disability leave on two occasions is not binding on the issue of eligibility for industrial disability retirement. As was the case in *Smith*, for purposes of the standard for disability retirement the medical evidence here is not unequivocal. CalPERS would have a basis for litigating whether the evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. . . .

The final factual finding in the Vandergoot Precedential Decision states in part:

Any right to an industrial disability retirement allowance cannot be deemed to have matured in this case. For all these reasons, [Vandergoot's] application for disability retirement should be precluded by operation of *Haywood*.

9. *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156

In Martinez, the First Appellate District neatly summarized *Haywood* and *Smith* as follows at p. 1161:

Government Code section 21156, part of the Public Employees Retirement Law, has always equated disability with a state employee being “incapacitated physically or mentally for the performance of his or her duties.” And ordinarily, a governmental employee loses the right to claim disability benefits if terminated for cause. A pair of decisions from the Third Appellate District carved out three exceptions to this general rule. First, under *Haywood* . . . a terminated-for-cause employee can still qualify for disability retirement when the conduct which prompted the termination was the result of the employee’s disability. Second, under *Smith* . . . a terminated employee may qualify for disability retirement if he or she had a “matured right” to a disability retirement prior to the conduct which prompted the termination. Third, *Smith* further recognized that there might be instances where “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.” [Citation.]

Martinez acknowledged the basis of the *Vandergoot* precedential decision at p. 1161:

Applying *Haywood* and *Smith*, the Board of Administration of the California Public Employees Retirement System (CalPERS) adopted a precedential decision that, when an employee settles a pending termination for cause and agrees not to seek reemployment, this is “tantamount to a dismissal,” thus precluding a disability retirement. (*In the Matter of Application for Disability Retirement of Vandergoot* (2013) CalPERS Precedential Dec. No. 12–01 [sic] (*Vandergoot*).

Martinez was employed by the State Department of Social Services (DSS). In 2014, DSS moved to terminate *Martinez*’s employment with a NOAA, citing numerous grounds for dismissal. *Martinez* contested the dismissal. In September 2014, the parties negotiated a settlement in which DSS agreed to pay *Martinez* \$30,000, withdraw the NOAA, and remove certain matters from *Martinez*’s personnel file. In the settlement agreement, *Martinez* agreed to “voluntarily resign from her position . . . effective at the close of business on September 30, 2014. [DSS] hereby accepts *Martinez*’s voluntary resignation as of the day of the execution of this settlement agreement [September 22, 2014].” *Martinez* also agreed she would never again apply for or accept any employment position with DSS. *Martinez* then filed a disability retirement application, claiming she could no longer function as a disability evaluation analyst because of various job-related disabilities.

In June 2015, CalPERS notified Martinez: “Your application has been cancelled.” Citing *Haywood, Smith, and Vandergoot*, CalPERS explained: “We have determined that you were dismissed from employment for reasons which were not the result of a disabling medical condition. Additionally, the dismissal does not appear to be for the purpose of preventing a claim for disability retirement. Therefore, you are not eligible for disability retirement.” CalPERS’s denial was the subject of the appellate court’s opinion in *Martinez*.

In her appeal, Martinez requested the First Appellate District to hold that *Haywood* and *Smith* were superseded by newly enacted legislation and were inconsistent with subsequent case law, and that *Vandergoot* be declared to no longer be precedential authority.

The First Appellate District declined Martinez’s invitation. After carefully reviewing legislative history related to the new legislation, the appellate court concluded all five parts of the bill at issue declared the sole point for eligibility for disability retirement should be on the basis of medical evidence, not the desire to get rid of an employee without going through the process of disciplining that employee. There was not a single mention of either *Haywood* or *Smith* in the legislative history. In short, the central pillar of *Haywood* and *Smith* - the employee’s inability to resume performing his or her duties - had not changed. The First Appellate District also concluded that *Haywood* and *Smith* were not inconsistent with newer case law. Finally, and with respect to the *Vandergoot* precedential decision, the First Appellate District held that within the context of an agreement to never return to state service, the reasoning of *Vandergoot* was eminently logical: resignation in these circumstances identified appears to be tantamount to a dismissal for purposes of applying the *Haywood* criteria. (*Martinez, supra*, at pp. 1173-1176.)

In closing, the First Appellate Court observed a long-standing principle that the Board’s interpretation of the Public Employees Retirement Law should be accorded great weight unless clearly erroneous. The Board designated *Vandergoot* as a precedential decision because the Board believed it contained a significant legal or policy determination of general application that was likely to recur, presumably because employees leaving state service with a settlement of a pending termination for cause was becoming sufficiently common to merit a statement of policy. The First Appellate Court could not condemn *Vandergoot* under those circumstances. (*Martinez, supra*, at 1176.)

10. Based on the factual findings and legal conclusions set forth herein, it is determined that Serrato is ineligible to receive an industrial disability retirement. Serrato is barred from employment with CDCR. Serrato did not establish that she was incapacitated physically or mentally for the performance of her duties when she filed her application for an industrial disability retirement, or that she had a matured right to an industrial disability retirement before the alleged misconduct prompting her resignation, or that she had an impending ruling on a claim for a disability pension that was delayed, through no fault of her own, until after her resignation, or that there was undisputed evidence that a favorable decision on her claim for an industrial disability retirement would have been a foregone conclusion. Serrato’s application for industrial disability retirement, which was previously filed with and acted upon by CalPERS, is cancelled.

ORDER

The application for industrial disability retirement filed with CalPERS on July 31, 2018, by Elizabeth Serrato is cancelled.

Dated: August 2, 2019

DocuSigned by:
James Ahler
BAC70B854399431..

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings