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 Industrial Disability Retirement of:

VANESSA ALCARAZ, Respondent, and

CITY OF SEASIDE, Respondent.

Case No. 2018-1260

OAH No. 2019010565

PROPOSED DECISION

Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, heard this matter on August 6, 2019, in Monterey, California.

Elizabeth Yelland, Senior Attorney, represented complainant California Public Employees' Retirement System (CalPERS).

Barry J. Bennett, Attorney at Law, represented respondent Vanessa Alcaraz, who was present throughout the hearing.

No appearance was made by or on behalf of respondent City of Seaside.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED October 1 20 19

The record remained open for the filing of closing briefs. On August 29, 2019, CalPERS's closing brief was filed and marked for identification as Exhibit 14[1]. On August 30, 2019, respondent's post-hearing argument was filed and marked for identification as Exhibit E.

The record closed and the matter was submitted for decision on August 30, 2019.

ISSUE

Is respondent precluded from applying for industrial disability retirement as a result of her resignation from employment with the City of Seaside and her agreement not to seek reemployment as a condition of her settlement?

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent Vanessa Q. Alcaraz (respondent) began working for respondent City of Seaside (City) as a police officer in 2015. By virtue of her employment, she is a local safety member of CalPERS subject to Government Code sections 21151, 21154, and 21156.

2. On June 21, 2018, respondent submitted to CalPERS an Application for Industrial Disability Retirement (application) with a requested retirement date of December 17, 2017. She listed her disability as "psychiatric" which occurred as a result

[1] CalPERS second request to take official notice of two nonprecedential decisions, filed on August 15, 2019, and marked for identification as Exhibit 13, was denied.

of coworkers' actions toward her including "discrimination, harassment, bullying and life threatening situations."

3. On September 10, 2018, CalPERS notified respondent that her application was cancelled.

4. On October 17, 2018, respondent filed an appeal and requested an administrative hearing.

5. On June 27, 2019, Keith Riddle filed the Amended Statement of Issues in his official capacity as Chief of the Disability and Survivor Benefits Division, CalPERS.

Background

6. Respondent was employed by the City as a code enforcement officer beginning in 2007, and she decided to seek employment as a police officer. She put herself through the Police Academy in 2013, and worked as a police officer for the City of Pacific Grove for two years.

7. From 2015 to 2017, respondent worked as a police officer with the City. She received promotions to the position of field training officer and police corporal. She was the sole female police officer in the City.

8. Upon commencing work at the City's police department, however, respondent immediately began to encounter hostility from certain male employees in the police department, largely organized by her former brother-in-law, an officer named Sakhrani, and his associates.

9. Sakhrani attempted to get respondent's field training officer to fail her during her probationary period. Sakhrani also spread rumors through the police

department that respondent had slept with an officer to insure that she passed her probationary period and that she had affairs with her superiors. Sakhrani and other officers refused to respond to respondent's calls for back-up when she was on patrol alone and radioed for assistance. Sakhrani and others audibly commented, and snickered, when respondent spoke at shift briefings, and deliberately turned their backs on respondent when she entered a room. When she complained to her sergeant about the male officers' continuous denigration of her, the sergeant just replied that he was "sorry," and he would "talk to" Sakhrani and the others.

10. As a result of the harassment, respondent began to experience physical symptoms, including daily vomiting before she reported to work, a loss of her hair as stress set in, changes in her menstrual cycle, sleeplessness, and bouts of crying at, before, and after work. Respondent filed a workers' compensation claim for injuries to her psyche, head, and digestive system as a result of stress "due to harassment at work."

11. In January 2017, respondent was placed on modified duty and worked at City Hall, where she still had visual contact with her tormentors.

12. In June 2017, respondent filed an internal complaint with the City's Human Resources Department and later filed a charge of sex discrimination and retaliation with the California Department of Fair Employment and Housing (DFEH).

13. On June 5, 2017, Helayna F. Taylor, Ph.D., performed a qualified medical evaluation of respondent where she examined respondent, administered psychological tests, took a personal history and reviewed respondent's medical records. Dr. Taylor found that respondent suffered from industrially caused adjustment disorder, anxiety disorder, and somatoform disorder. Respondent had not reached a permanent and

stationary status. Dr. Taylor prescribed a work preclusion from working with the officers that caused her stress. Dr. Taylor recommended psychotherapeutic intervention of 20 individual psychotherapy sessions.

14. On October 27, 2017, Acting Police Chief Judy Veloz issued a Notice of Intent to Terminate to respondent due to violations of the following personnel rules:

Seaside Police Department Policies

Policy 340 Standards of Conduct:

Section 340 5 g(f) – Discourtesy

Section 340 5 8 – Performance, subsections (c) and (d)

Section 340 3 3(h) – Malicious Statements

Section 340 5 7 – Efficiency, subsections (a) and (b)

Section 340 5 8 – Performance, subsection (c)

Section 340 5 9, subsections (h) and (m)

Policy 341 Section 341 6 – Performance of Duty

Policy 348 – Subpoenas and Court Appearances

Section 348 2

Section 348 4 1 – Employee Responsibility

Section 348 6 – Courtroom Protocol, subsection (a)

City of Seaside Personnel Rules, Rule 12:

> Section 1 04 (4) Inefficiency in performance of work which results in performance lower than that which is typically expected of a similar position
>
> Section 1 04 (5) Neglect of duty
>
> Section 1 04 (6) Insubordination, which shall mean refusal or failure to follow a direct, lawful order which the employee is capable of following
>
> Section 1 04 (13) Conduct either during or outside of duty hours which damages the City or its reputation
>
> Section 1 04 (21) Discourteous or disrespectful treatment of the public, other employees, or City officials
>
> Section 1 04 (22) Violation of City personnel rules, administrative policies and procedures, departmental rules and regulations, safety rules, resolutions, ordinances or codes
>
> Section 1 04 (24) Any conduct related to employment which impairs, disrupts or causes discredit to the employee's employment or the public service, including but not limited to conduct which is or would be cause for discipline under any other provisions of this section.

15. The Notice of Intent to Terminate alleged that respondent: (a) failed to appear in court after being subpoenaed to defend a citation; (b) was dishonest during an investigative interview; (c) was unprofessional with a deputy district attorney; (d)

provided incomplete testimony at a trial; and (e) made an inappropriate comment about Sakhrani.

16. On December 14, 2017, respondent was served with a letter terminating her employment with the City, effective December 14, 2017. Respondent appealed.

17. On May 3, 2018, respondent and the City entered into a Settlement Agreement and General Release stating, in relevant part, that: . . . "During the pendency of the hearing officer scheduling process and the workers' compensation process, the parties, wishing to avoid the costs, acrimony and uncertainty of litigation, have agreed to settle their differences consistent with this Agreement."

In particular, the City agreed to withdraw the charges against respondent and reinstate her to her position, conditioned on respondent's agreement to simultaneously resign from her position, settle her workers' compensation claim, and withdraw her charge of discrimination with prejudice. The Settlement Agreement further provided, in relevant part, that:

> 1. ALCARAZ will, at the same time this settlement agreement and general release is signed by her, submit a letter of resignation from her employment with the City of SEASIDE for personal reasons, post dated back to December 14, 2017. That letter of resignation will constitute the official reason for the termination of ALCARAZ' employment with THE CITY.
>
> 2. ALCARAZ will, if she has not already done so by the time this Agreement is signed by all parties, immediately

file an application for industrial disability retirement with CalPERS and with the City of SEASIDE.

3. Once received, SEASIDE will be required to submit ALCARAZ' application for an industrially related disability retirement to CalPERS for its initial review for eligibility. The determination of her eligibility to apply for and move forward with an industrially related disability retirement is in the exclusive authority of CalPERS and may include a review of the contents of ALCARAZ' personnel file, including but not limited to, any and all internal affairs investigations, past and present, involving ALCARAZ and any and all prior and current disciplinary actions taken against ALCARAZ. ALCARAZ understands and acknowledges that review by CalPERS is required to be conducted before her application moves forward and that a determination of ineligibility is in the exclusive authority of CalPERS. Assuming CalPERS determines ALCARAZ is eligible to move forward with her application for an industrially related disability retirement, then;

¶ . . ¶

10. ALCARAZ agrees never to re-apply for any employment with THE CITY of SEASIDE, to never in the future seek to undo or in any way further challenge the denial of her CCW [carry a concealed weapon] privilege and to never petition CalPERS to reverse her industrial disability

retirement in order to again work for the SEASIDE Police Department.

18. Pursuant to the terms of the Settlement Agreement and General Release, respondent settled her workers' compensation claim against the City; she withdrew her charge of discrimination with DFEH; and she submitted a voluntary letter of resignation to the City dated December 14, 2017, stating that her resignation was "for personal reasons."

19. On June 21, 2018, respondent submitted an application to CalPERS with a requested retirement date of December 17, 2017. CalPERS sent the City a request for additional information regarding respondent's employment so that CalPERS could process her application. CalPERS received documents from the City regarding respondent's employment with the City, including the Notice of Intent to Terminate, termination letter, respondent's resignation letter and the Settlement Agreement and General Release.

20. CalPERS reviewed respondent's employment status with the City and the cases of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194; CalPERS Precedential Decisions *In the Matter of Robert Vandergoot* (2013) No. 13-01; and *In the Matter of Phillip MacFarland* (2016) No. 16-01; and subsequently, *Martinez v. CalPERS* (2019) 33 Cal.App.5th 1156. CalPERS determined respondent's employment ended for reasons which were neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement; that respondent's termination permanently severed her employment relationship with the City; and she had no right to return to her employment which is a prerequisite in qualifying to apply for disability retirement under the Public Employees' Retirement Law (PERL), Government Code

section 21154. Consequently, CalPERS determined that respondent is ineligible to apply for disability retirement and cancelled her application.

21. On September 10, 2018, respondent and the City were notified of CalPERS' determination to cancel respondent's application based on her termination of employment by the City.

22. On October 17, 2018, respondent filed an appeal and requested an administrative hearing. This hearing ensued.

23. In 2019, CalPERS re-reviewed all information provided by the City in conjunction with *Martinez v. CalPERS, supra*, and confirmed its determination that respondent's termination, voluntary resignation, and settlement agreement permanently severed her employment relationship with the City, with no right to return to her employment with the City, which is a prerequisite in qualifying to apply for disability retirement under Government Code section 21154. Again, CalPERS determined that respondent is ineligible to apply for disability retirement.

Respondent's additional evidence

24. On January 29, 2018, Dr. Taylor performed a qualified medical re-evaluation of respondent. Dr. Taylor reviewed new medical records, including records that respondent had completed weekly psychotherapy sessions with Linda Sue Marshall, LCSW, starting in August 2017. Dr. Taylor confirmed her original diagnoses and also diagnosed respondent with major depression and generalized anxiety. Dr. Taylor found that respondent's psychological condition had worsened, but she was likely to improve within six months with further treatment and after her termination case had final resolution. Dr. Taylor determined that:

> [I]t no longer appears that [respondent] can return to the Seaside police department, even though she has appealed for her job termination. I do not think that it would be healthy for her, but she has a right to try for it. It is possible that she might be validated if she did get that opportunity and might be able to deal with it. If that did occur, she still should not have to work with the officers that were involved in her case, especially since she did win that case against them.

25. Allan George Hedberg, Ph.D., is clinical psychologist who has been in private practice since 1975, and he has served as the Foundation Director of Avante Health since 1991.

26. On April 20, 2018, Dr. Hedberg reviewed Dr. Taylor's reports and other medical records; and respondent's employment record. He interviewed respondent and administered psychometric testing. In his report. Dr. Hedberg agreed with Dr. Taylor's diagnoses. Dr. Hedberg concluded that respondent's condition probably had caused or contributed to the conduct which caused her to be disciplined. Dr. Hedberg also found that respondent was permanently disabled from ever holding a position as a police officer, or any other public safety position again.

27. At hearing, Dr. Hedberg testified that respondent had manifested symptoms of Post-Traumatic Stress Disorder (PTSD), and that loss of memory and confusion were frequent symptoms of PTSD. Furthermore, Dr. Hedberg opined that respondent had been disabled since sometime in late 2016 - early 2017 prior to her temporary position at City Hall.

28. At hearing, respondent confirmed her medical condition and the impact that the conduct of her co-workers had on her health and her employment status.

29. Respondent did not establish that the alleged misconduct that gave rise to the Notice to Terminate Employment was the result of a disability, or that her right to an industrial disability allowance had matured before she resigned, or that 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. Neither did respondent establish 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. There is no 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 and its progeny.

LEGAL CONCLUSIONS

1. The applicant for a benefit has the burden of proof to establish the right to the claimed benefit; the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; Evid. Code, § 115.)

2. Public employee pension legislation should be construed liberally in favor of the member; however, 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., supra,* 67 Cal.App.4th at p. 1304.) Courts have given great weight to CalPERS's construction of PERL. (*Martinez v. CalPERS, supra,* at p. 1164.)

Relevant Statutes

3. Government Code section 21152 authorizes a CalPERS member to file an application with the CalPERS Board of Administration (Board) for 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.[2]

Government Code section 21156 provides that 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 CalPERS 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

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[2] 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 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."

disability continues. (Gov. Code, § 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.

Relevant Case Law

HAYWOOD V. AM. RIVER FIRE PROT. DIST.

4. Haywood, a firefighter, was terminated for cause. Haywood applied for disability retirement claiming that 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 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. A necessary requirement for disability retirement is the potential reinstatement of the employment relationship if it is determined that a member is no longer disabled. (*Haywood v. Am. River Fire Prot. Dist.*, 67 Cal.App.4th at pp. 1296-1297.)

SMITH V. CITY OF NAPA

5. Smith, a firefighter, was terminated after he failed remedial tests related to his competency and applied for disability retirement asserting "stress" related to his employment was the reason that he failed the required testing. CalPERS denied

Smith's disability claim concluding that his dismissal for cause extinguished his right to disability retirement. The court in *Smith* noted that 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. 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. 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.[3] This case does not present facts on which to explore the outer limits of maturity, however." (*Smith v. City of Napa, supra*, 120 Cal.App.4th at pp. 206-207.)

VANDERGOOT/CA DEPARTMENT OF FORESTRY

6. Vandergoot, a heavy fire equipment operator, was dismissed from state employment and appealed to the State Personnel Board. Less than one month later, Vandergoot filed an application for industrial disability retirement, claiming various employment-related medical and mental disabilities. While his application for disability retirement was pending, Vandergoot and the Department entered into a settlement agreement that Vandergoot would resign from employment and "will not seek,

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[3] 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.)

transfer to, apply for or accept any employment in any capacity with [Department] at any time in the future . . . ." *Vandergoot* applied the factors set forth in the *Smith* decision, including:

> 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 [Notice of Adverse Action] 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.
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> . . .

The *Vandergroot* decision concluded that Vandergoot's application for disability retirement was precluded by operation of *Haywood*.

IN THE MATTER OF PHILLIP MACFARLAND

7. MacFarland, a clinical psychologist was served with a NOAA and dismissed from state employment. Two days after the NOAA was served, he filed for disability retirement. The *MacFarland* decision found evidence that he had retired to avoid termination from employment and his resignation did not prevent the agency from enforcing the NOAA should he attempt to reinstate. The decision found: "His relationship with his employer had been severed prior to his retirement, when the NOAA was served on him. His severance became irrevocable when he withdrew any appeal he filed." (p. 8, para. 29.)

MARTINEZ V. CALPERS

8. In *Martinez*, the court summarized *Haywood* and *Smith* and acknowledged the basis of the *Vandergoot* 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.

9. Martinez was employed by the California Department of Social Services (DSS) and was terminated. 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. Martinez agreed to voluntarily resign from her position and agreed that she would never again apply for or accept any employment position with DSS. Martinez then filed a disability retirement application because of various job related injuries. CalPERS cancelled her application because she was dismissed from employment.

In her appeal, Martinez requested the court 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. However, the court concluded that *Haywood* and *Smith* were not inconsistent with newer case law. Furthermore, within the context of an agreement to never return to state service, the reasoning of *Vandergoot* was eminently logical: resignation in these circumstances appears to be tantamount to a dismissal for purposes of applying the *Haywood* criteria. (*Martinez, supra*, at pp. 1173-1176.)

DISCUSSION

10. Respondent contends that "equitable circumstances" exist, because respondent was psychologically battered by her fellow officers and when she sought help from the police department and the City, she received none except a reassignment to a clerical position. In addition, she contends that she was subjected to an investigation into allegations based on reports by those same fellow officers. Respondent's contentions are compelling.

11. However, based on the factual findings and legal conclusions set forth herein, it is determined that respondent is ineligible to receive an industrial disability retirement. She is barred from employment with the City. She did not establish that she had a matured right to an industrial disability retirement before the alleged misconduct prompting her eventual resignation.

The equitable exception to the principles articulated in *Haywood* and *Smith* were considered and do not apply in this case. At the time of her separation, respondent had not been awaiting a ruling on a claim for disability retirement that had been delayed through no fault of her own. She had not even initiated the application

process. Neither was there "undisputed evidence" that respondent's claimed psychological disability was so severe that it rendered a favorable decision by CalPERS a "foregone conclusion (as perhaps a loss of limb)." (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 206-207. At the time respondent was separated from employment, the City had not determined whether she demonstrated a substantial inability to perform her duties as a police officer. Respondent's psychiatric conditions did not constitute undisputed evidence or a foregone conclusion that she would have been eligible for disability retirement had she not been terminated for cause prior to her application date.

Moreover, the Notice of Intent to Terminate issued by the chief of police was not based on any physical or mental disability and respondent did not file an application for industrial disability retirement before the Notice was issued. Therefore, respondent's application for disability retirement is precluded by the holdings in the cases of *Haywood, Smith, Vandergoot, MacFarland,* and *Martinez, supra.* Her termination from employment, subsequent reinstatement, and voluntary resignation with no means to seek reemployment extinguished any right to file an application for disability retirement. Consequently, CalPERS correctly determined that respondent is ineligible to apply for disability retirement and respondent's appeal is denied.

ORDER

The appeal of Vanessa Alcaraz is denied.

DATE: September 30, 2019

DocuSigned by:
Regina Brown
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REGINA BROWN

Administrative Law Judge

Office of Administrative Hearings