ATTACHMENT A

THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

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

CURT HAWKER, and COUNTY of BUTTE, Respondents

Agency Case No. 2019-0255

OAH No. 2019050166

PROPOSED DECISION

John E. DeCure, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on December 10, 2019, in Sacramento, California.

Helen Louie, Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Curt Hawker (respondent) represented himself at the hearing.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED January 9 20 20
JEH

No one appeared for or on behalf of the County of Butte (County). As to the County, this matter proceeded as a default proceeding pursuant to Government Code section 11520.[1]

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on December 10, 2019.

ISSUE

The sole issue on appeal is whether respondent may file an application for industrial disability retirement, or whether his application and eligibility are precluded by operation of law. Respondent was terminated from his employment at the County with no right of reemployment in March 2018, after receiving notice of intent to terminate his employment with the County. CalPERS received respondent's application for industrial disability retirement in July 2018. CalPERS notified respondent he was not eligible to submit an application for industrial disability retirement pursuant to the appellate court's decision in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), and its progeny.

Jurisdictional Matters

1. Anthony Suine is the Chief of CalPERS' Benefit Services Division. He signed the Statement of Issues on May 3, 2019, solely in his official capacity.

---

[1] Because the County did not appear or participate, any references to "respondent" herein are to Curt Hawker.

2. On July 24, 2018, respondent filed, and CalPERS received, his application for service retirement (service application). Respondent retired for service effective March 11, 2018, and has been receiving his service retirement allowance since that date.

3. On September 5, 2018, respondent signed, and CalPERS received, his service pending disability retirement application (disability application). Respondent identified his disabilities as "back [and] neck injury, [right] knee [and] heel injury, anxiety [and] depression disorder, [and] insomnia." He stated the disability "started with [an] auto accident in 1998", causing him limited mobility, restrictions, and diminished concentration. He further stated his lack of concentration and limitations when communicating with others caused his insomnia and anxiety.

4. CalPERS acknowledged receipt of the disability application by letter dated January 4, 2019. The letter explained, in relevant part:

> We received your application for industrial disability retirement; however, we have found you are not eligible for disability retirement benefits at this time. . . .
>
> We have determined that your employment ended for reasons which were not related to a disabling medical condition. . . . When an employee is separated from employment as a result of disciplinary action or the employee enters into a settlement agreement where the employee chooses to voluntarily resign in lieu of termination, and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an

> otherwise valid claim for disability retirement, termination and/or a mutual understanding of separation from employment due to a pending adverse action renders the employee ineligible to apply for disability retirement.

5. On February 1, 2019, respondent timely appealed CalPERS' determination that he was not eligible to apply for disability retirement. All jurisdictional requirements have been met.

Employment History

6. Karen Gillespie, a Program Manager with the County's Department of Employment and Social Services, testified regarding respondent's work history and personnel issues with the County. Respondent began his employment with the County as a social worker in 2011; he held the position of Senior Social Worker when he was terminated from employment, effective March 9, 2018. He is a local miscellaneous member of CalPERS by virtue of his employment.

7. On February 26, 2018, the County sent respondent notice of its intent to terminate his employment with the County following an investigation revealing that he had been discourteous or disrespectful toward a member of the public in the course of his duties for the County. The County's investigation began when the daughter of an Adult Protective Services client (daughter) complained that respondent had sent her two inappropriately personal text messages. In the first message, respondent made sexual overtures to the daughter, propositioning her to "hook up" and asking if she had private pictures she might want to show him. In the second message, respondent described a person he had discussed with the daughter as "the scandalous care provider bitch." During an interview with the City's investigator, respondent admitted

sending the initial message but did not recall sending the second message. He also confirmed that the sender's phone number appearing on both text messages was his phone number. The February 26, 2018 letter informed respondent of his right to respond to the letter, and set a *Skelly*[2] hearing for March 6, 2018. Respondent participated in the *Skelly* hearing on that date.

8. On March 8, 2018, Dorian Kittrell, MFT, the County's Director of Behavioral Health assigned to conduct the *Skelly* hearing, sent a Letter of Intent to Impose Disciplinary Action to respondent. In the letter, Mr. Kittrell informed respondent that "[a]fter considering the information [you] provided [during the *Skelly* hearing], I have determined the proposed disciplinary action is appropriate." The County formally separated respondent from employment effective March 9, 2018.

9. Ms. Gillespie stated respondent's personnel file and documents established that he was terminated for cause due to disrespecting the public, bringing discredit to the County, violating a non-discrimination policy, and overall unsatisfactory job performance. Respondent was not terminated due to any medical disability he may have claimed. Respondent retained no reemployment rights. Were he to seek employment again with the County, he would have to submit to an entirely new recruitment process.

Respondent's Testimony

10. Respondent testified at the hearing. He began working as a social worker for Monterey County in approximately 1993, and later earned a Master's degree in

---

[2] *Skelly v. State Personnel Board* (1974) 15 Cal.3d 194 (holding that a permanent civil service employee has a due process right to a pre-disciplinary hearing).

social work in 1998. He also worked in Monterey County's child protective services. In 1999, he went out on a case regarding an abandoned girl and found the girl's deceased mother next to the child; the mother's skin was blue and grey in color. Respondent was reminded of his daughter, who was born in 1998 with complications, including blue-grey skin coloring. The incident triggered anxiety and depression in respondent. In 1998, he was also in an automobile accident and suffered from whiplash. He had an ongoing workers' compensation case for years thereafter, and was left with "neck and back issues" as a result. He was also being treated for anxiety, depression, and chronic insomnia. In 2000, he moved to Colorado and did county social work there until his marriage ended and he returned to California in 2010.

11. Respondent stated he was a "committed, dedicated" County employee respected by clients and coworkers alike. However, he suffered from insomnia, chronic back and nerve pain, and medication problems, and constantly felt "foggy-headed." The County reduced his work schedule to accommodate his conditions. Respondent recalled the incident that led to his termination, conceding he made a "poor decision" and "shouldn't have done it." He noted that the girl he propositioned "wasn't interested" in him "but complained anyway." He considered the County's decision to terminate him to be "extreme" because other County employees he knew had done worse and had received lighter discipline. Respondent contended his disability was present before he was terminated from his job and is now permanent. His workers' compensation case was resolved in 2018 in a settlement compensating him for future medical expenses. He hoped CalPERS would recognize that he was a longtime committed social worker worthy of disability retirement, and accept his application.

Discussion

12. As further described below, the holdings in *Haywood* and its progeny establish that the permanent termination of the employer-employee relationship renders the former employee ineligible to apply for a disability retirement, so long as termination is neither the ultimate result of a disability nor preemptive of a valid claim for disability retirement. It does not matter whether termination of the relationship was caused by the former employee's dismissal from employment for cause (*Haywood*) or his voluntary resignation and permanent waiver of any right to reinstate to his former position (*Vandergoot*)[3], or that there was an impending ruling on a claim for disability pension that was delayed (*Smith*).[4]

13. Respondent's dismissal for cause permanently terminated his employer-employee relationship with the County in March 2018. Termination of the employer-employee relationship extinguished any right he had to reinstate to his former position. There was no evidence that his termination was related to any disability from which he may have been suffering at the time or was preemptive of a valid claim for disability retirement. Although respondent claimed he had a long-standing history of insomnia, anxiety, depression, back problems, and an ongoing workers' compensation claim, the evidence did not establish that he would have had a valid claim for disability retirement at the time he was terminated from his position, or that the workers' compensation settlement was dispositive on this issue. (See, *Smith*, 120 Cal.App.4th at

---

[3] *In re Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01 (*Vandergoot*).

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

207 ["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." (citations)].) In addition, the propriety of respondent's termination is not at issue, and the fact that he was terminated in the regular course of County business was established by the evidence and not in dispute. Under the circumstances, respondent's attempt to impeach his termination was inappropriate and unpersuasive. Accordingly, respondent is not eligible to apply for disability retirement.

LEGAL CONCLUSIONS

1. CalPERS has the burden of proving respondent's submission of a Disability Retirement Election Application is barred by Haywood and its progeny. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."].) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Bd. of Retirement* (1984) 152 Cal.App.3d 775, 783.) To be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.) CalPERS met its burden.

Applicable Law

2. Government Code section 21152 establishes the parties that may apply for disability benefits, stating, in pertinent part:

> Application to the board for retirement of a member for disability may be made by:
>
> [¶] . . . [¶]

(d) The member or any person in his or her behalf.

3. Government Code section 21154 sets forth the time-frame required for applications, stating:

> 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.

4. The appellate court in *Haywood* held that an employee's termination for cause rendered him ineligible for disability retirement benefits. (*Haywood, supra.*, at p. 1292.) The court explained that "while termination of an unwilling employee for cause

results in a complete severance of the employer-employee relationship (citation), disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. (Citation.)" (*Id.*, at p. 1305.). The court further explained:

> [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.)

5. In *Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01, CalPERS' Board of Administration (Board) extended the rule articulated in *Haywood* to the termination of an employer-employee relationship caused by an employee's voluntary resignation and irrevocable waiver of any rights to reinstate to his former position in. Mr. Vandergoot was a heavy fire equipment operator with the California Department of Forestry and Fire Protection. He was dismissed from his employment for cause, and appealed his dismissal to the State Personnel Board. He ultimately settled his appeal by agreeing to voluntarily resign his employment and waive any rights to reinstate to his former position in exchange for his employer withdrawing his dismissal for cause.

6. In concluding that *Haywood* applies whether Mr. Vandergoot was terminated for cause or voluntarily resigned his employment and waived any reinstatement rights, the Board 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 . . . .
>
> (*Vandergoot*, *supra*, CalPERS Precedential Bd. Dec. No. 13-01, at p. 7; quoting, *Haywood*, *supra*, 67 Cal.App.4th at p. 1305.)

6. *Smith v. City of Napa (2004)* 120 Cal.App.4th 194 (Smith) involved a firefighter whose employment was terminated for cause. He filed an application for disability retirement on the effective date of his termination. The city council affirmed his termination, and the Board subsequently denied his application for disability retirement pursuant to *Haywood*. (*Smith*, *supra*, 120 Cal.App.4th at p. 198.)

7. Analyzing the *Haywood* court's qualification that an employer's dismissal may not preempt "an otherwise valid claim for disability retirement," the *Smith* court

identified "the key issue [as] thus whether his right to a disability retirement matured before plaintiff's separation from service." (*Smith*, *supra*, at 120.) The court then explained that "a vested right matures when there is an unconditional right to immediate payment," and "a duty to grant the disability pension . . . [does] not arise at the time of injury itself but when the pension board determine[s] that the employee [is] no longer capable of performing his duties." (*Ibid*.) But the appellate court also recognized an equitable exception when there is an impending ruling on an application for disability retirement that is delayed, through no fault of the applicant, until after his employer-employee relationship has been terminated. (*Id*., at pp. 206-207.) Similar to the facts of *Vandergoot*, respondent did not initiate the process for receiving industrial disability benefits until after he was terminated from his position with the County with no reemployment rights, and there was no evidence that he was eligible for disability retirement at the time he resigned "such that a favorable decision on his claim would have been a forgone conclusion (as perhaps with a loss of limb)." (*Vandergoot*, *supra*, at p. 7; quoting, *Smith*, at p. 9; see also *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156 [finding that *Haywood* and *Smith* have not been superseded by legislation, are consistent with subsequent case law and *Vandergoot* remains precedential authority].)

8. The County permanently terminated its employer-employee relationship with respondent, and he retained no right of reemployment for reasons unrelated to any disability he may have been suffering at the time. Although he stated he was on a modified duty schedule at an indeterminate time before he received the notice of intent to terminate his employment, he was capable of working in his position at the time he was terminated, and a work-related incident led to the termination. No evidence was submitted to show that he was suffering from a disabling medical condition at the time he resigned from his position or that the termination of the

employment relationship was the ultimate result of a disabling medical condition. Nor did the evidence establish that termination of that relationship preempted an otherwise valid claim for an industrial disability pension.

9. Cause does not exist to overturn CalPERS' determination that respondent is ineligible to apply for industrial disability retirement, as set forth in Findings 7 through 13. Respondent's application and eligibility for disability retirement is precluded by operation of law. For all these reasons, CalPERS was correct in denying respondent's application for industrial disability retirement benefits. Therefore, respondent's appeal of CalPERS' decision finding him not eligible to apply for disability retirement is denied.

ORDER

The appeal of Curt Hawker to be granted the right to file an application for industrial disability retirement is DENIED.

DATE: January 9, 2020

DocuSigned by:
John DeCure
17FD47F60F0543E...

JOHN E. DeCURE

Administrative Law Judge

Office of Administrative Hearings