

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 WON B. BAEK, Respondent,**

and

**MULE CREEK STATE PRISON, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondent.**

Case No. 2019-0218

OAH No. 2019040025

PROPOSED DECISION

This matter was heard before Administrative Law Judge (ALJ) Ed Washington, Office of Administrative Hearings (OAH), State of California, in Sacramento, California, on October 14, 2019. Jacki J. Noh, Certified Court Interpreter No. 300150, was sworn and provided translation between the English and Korean languages.

Senior Staff Attorney Rory J. Coffey represented complainant Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Attorney Andrew B. Shin represented Won B. Baek (respondent).

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED December 16 2019

Kathleen Schmitt

CalPERS properly served Mule Creek State Prison, California Department of Corrections and Rehabilitation (CDCR), with the Statement of Issues and Notice of Hearing. CDCR made no appearance. This matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

The hearing concluded on October 14, 2019. However, the record remained open to allow the parties to submit written closing briefs. Both respondent and CalPERS submitted written closing briefs, which were marked for identification as Exhibit F and Exhibit 10, respectively. The record was closed and the matter was submitted for decision on November 15, 2019.

ISSUE

Is respondent precluded from applying for disability retirement because he was dismissed from employment with CDCR, effective October 13, 2017?

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity.

Respondent's Employment

2. Respondent was employed by CDCR as a Correctional Supervising Cook. By virtue of this employment, respondent became a state safety member of CalPERS subject to Government Code section 21151.

3. On October 4, 2017, CDCR served on respondent a Notice of Adverse Action (NOAA), seeking to dismiss him from employment for cause. The dismissal

became effective October 13, 2017, and was based on the following causes for discipline specified under Government Code section 19572:

- (d) Inexcusable neglect of duty.
- (f) Dishonesty.
- (m) Discourteous treatment of the public or other employees.
- (o) Willful disobedience.
- (t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

4. These causes for discipline were based on allegations, which include the following: (a) between October 1, 2015 and October 5, 2016, respondent engaged in a pattern of abusive, unprofessional or discourteous conduct that included horseplay and use of abusive and profane language; (b) on October 11, 2016, respondent locked inmates in a walk-in cooler; (c) on November 13, 2016, respondent threatened to harm an inmate; (d) from December 2016 through January 2017, respondent engaged in conduct that included pushing an inmate, pulling on the beard of an inmate, was reportedly observed "karate chopping" an inmate, and engaged in other inappropriate actions towards inmates; and (e) that respondent was dishonest with Office of Internal Affairs investigators during the investigation of his alleged misconduct.

5. The NOAA also advised respondent of his right to appeal the adverse action to the State Personnel Board (SPB). Respondent appealed his dismissal to SPB

and requested a hearing to challenge the basis for his termination. On June 7, 2018, SPB issued a decision approving respondent's withdrawal of his appeal due to his failure to proceed at hearing.

Respondent's Disability Retirement Application

6. Respondent filed a Disability Retirement Election Application (Application) with CalPERS on November 28, 2018. In the Application, respondent indicated his disability application type as "Industrial Disability Retirement" and indicated that his last day on the payroll was October 11, 2017, and that the effective date of his retirement was October 13, 2017.

7. In the Application, respondent described his disability as "Neck (C4-5, C6-7, nerves), shoulder, right arm pain and right index finger numb, Gabapentin 400 mg need to take it." Respondent also indicated that his disability occurred November 4, 2013, as follows:

On Nov 4/2013, at building B7 . . . I was pulling a food cart that weighed approximately 3,000 pound. I strained to pull the cart [but the] wheel [was] jammed. I looked down to see something was stuck in the wheel. I turned [my] body to the right side of the wheel and pulled and pushed tweaking my neck.

8. In response to a question on the Application that asks what his limitations or preclusions are due to his condition, respondent replied, "No climbing ladders, no use of scaffolds, and no lifting more than 10 pounds. Dr. noted cervical epidural injection again and possible surgery to the cervical spine." Respondent also specified that his condition affected his ability to perform his job as follows: "After

[the] injury I [transferred to Mule Creek State Prison] and I don't have to [engage in] heavy physical work. No climbing ladders, no use of scaffolds, no lifting more than 10 pounds, but still pain is back in force."

9. To review respondent's Application, CalPERS requested and obtained documents and information from CDCR regarding respondent's employment. This included the NOAA, a Final Decision Regarding Skelly Hearing, and the SPB Decision Approving Withdrawal of Action or Appeal.

10. By letter dated January 25, 2019, CalPERS notified respondent that it could not accept his application for disability retirement because his "employment ended for reasons which were not related to a disabling medical condition." On February 8, 2019, respondent appealed from CalPERS' cancellation of his application for disability retirement and this hearing followed.

CalPERS' Challenge to Respondent's Application

11. At hearing, CalPERS argued that respondent is precluded from seeking disability retirement pursuant to the courts' holding in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*). As set forth in the Legal Conclusions below, the courts in *Haywood* and *Smith* held that civil service employees may not apply for disability retirement if they have been dismissed from their civil service employment. These courts recognized two exceptions to this preclusion: (1) when the employee establishes that the dismissal was the ultimate result of a disabling condition; and (2) when the employee establishes that the dismissal preempted the employee's otherwise valid claim for disability retirement. CalPERS argued that respondent is precluded by *Haywood* and *Smith* from applying for disability retirement as a result of

his dismissal from employment for cause, effective October 13, 2017, and that neither of the recognized exceptions to preclusion apply.

Respondent's Evidence

12. Respondent worked as a Supervising Cook at Mule Creek State Prison for CDCR for nearly four years. Besides performing supervisory tasks, his regular job duties included frequent pushing and pulling of heavy equipment weighing as much as 3,000 pounds when loaded with food or supplies, and lifting items weighing up to 50 pounds.

13. Respondent testified to the circumstances that resulted in his November 2013 injury. After that injury, he was off work for approximately four months. He testified that when he returned, his physician prohibited him from engaging in strenuous physical activity. Respondent worked in a supervisory capacity for most of 2015 and 2016. In September 2016, respondent attempted to lift a box of bananas and reinjured his shoulder and neck. He received two "spinal injections" to treat the resulting pain. Respondent testified that he "really could not work" after the September 2016 injury. However, he continued to work until he was dismissed in October 2017, because his employment with CDCR was his only source of income.

14. Respondent asserted he was not terminated from employment for cause, but instead was the victim of an unlawful termination. He claimed the circumstances described in the NOAA leading to his termination were fabricated in retaliation for his reporting a correctional officer's violation of prison rules by bringing a television into the institution and watching football games with inmates. Respondent testified that the correctional officer's actions were prohibited and interfered with respondent's

ability to do his job, because the inmates he supervised were watching football rather than working.

15. After filing his appeal with SPB, respondent requested that he be provided a Korean language interpreter for his SPB hearing. According to respondent, when he appeared for his SPB hearing, no Korean interpreter was provided and he was given 15 minutes to decide whether he would proceed without the assistance of an interpreter or effectively withdraw his request for hearing due to his failure to participate. Respondent did not proceed with the SPB hearing. His failure to proceed resulted in the SPB Decision Approving Withdrawal of Action or Appeal. He received no judgment from SPB setting aside the NOAA or his dismissal from employment with CDCR.

16. To support his assertion that he was not terminated for cause, respondent submitted a January 18, 2018 decision issued by the California Unemployment Insurance Appeals Board (CUIAB) in which a CUIAB ALJ determined that respondent was not disqualified from unemployment benefits due to being discharged for workplace misconduct. This document was admitted into evidence, over CalPERS' objection, as administrative hearsay and has been considered to the extent permitted under Government Code section 11513, subdivision (d).¹ The CUIAB decision includes the following conclusions:

¹ Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely

With respect to the [workplace events presented to the CUIAB], the evidence presented in this matter supports a finding that [CDCR] did not meet its burden of proving misconduct. [Respondent] therefore was discharged for reasons other than misconduct and is not disqualified from receiving [unemployment] benefits . . .

17. Respondent also submitted the following documents into evidence as administrative hearsay: (a) two Primary Treating Physician's Progress Reports, dated August 7 and September 15, 2017, which both indicate that he may continue to perform his job duties as a cook supervisor, and prescribe 100 mg of Gabapentin for pain; and (b) a Panel Qualified Medical Evaluation Report, dated December 19, 2014, prepared by Mark Bernhard, D.O., which specifies, in pertinent part, that respondent may continue to work with restrictions to avoid lifting over 40 pounds overhead on an intermittent basis, and no prolonged turning or twisting position of the head, and no prolonged rotation or hyperextension.

Discussion

18. The sole issue for determination is whether respondent's Application and eligibility for disability retirement is precluded by operation of *Haywood*. Respondent was dismissed from employment for cause pursuant to an NOAA, effective October 13, 2017. That dismissal has not been set aside or otherwise rendered invalid. He appealed his termination to SPB, but did not complete the appeal process. Despite his failure to complete the SPB appeal process, respondent claimed he was wrongfully terminated in

objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

retaliation for reporting a correctional officer's misconduct rather than for engaging in misconduct himself that warranted termination. This claim is relevant only to the extent it supports either exception specified in *Haywood* and *Smith*. (1) that the dismissal was the ultimate result of a disabling condition; or (2) that the dismissal preempted the employee's otherwise valid claim for disability retirement.

19. Respondent did not establish that his dismissal was the ultimate result of a disabling condition. His primary objection to his termination is that he was wrongfully terminated in retaliation for being a whistleblower. There was no evidence that his stated work limitations were a factor in his termination. The NOAA specifies that he was terminated for being profane and engaging in horseplay at work. Although respondent asserted that he could not perform his duties as a Correctional Supervising Cook due to workplace injuries sustained in 2013 and 2016, he continued to perform his job on a full-time basis until his termination.

20. Respondent also did not establish that his termination was preemptive of an otherwise valid claim for disability retirement. He asserted the injuries he sustained to his neck, shoulder, right arm and right index finger in November 2013, and exacerbated in September 2016, constitute an otherwise valid claim for disability retirement. He is mistaken.

21. Where an agency dismisses an employee solely for a cause unrelated to a disabling medical condition, it does not result in the forfeiture of a matured right to a pension allowance. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206.) "Thus, if a plaintiff were able to prove that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot preempt the right to receive a disability pension for the duration of the disability. [Citations omitted.] Conversely, 'the right may be lost upon occurrence of a condition subsequent such as

a lawful termination of employment before it matures . . . ' (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749 (*Dickey*).)" (*Ibid.*)

22. Respondent had a vested right to apply for disability retirement upon acceptance of employment with CDCR. While that "right" vests upon acceptance of employment, an employee would not be entitled to receive the benefit until all conditions to receive it have been met. (*Dickey, supra*, 16 Cal.3d 745.) There is a marked difference between the vesting of a pension right and the accrual of a cause of action to enforce a vested right. "The right to a pension is a vested right; the amount of the pension may not always be ascertained until the last contingency has occurred." (*Id.* at p. 750.) The vested right to the pension benefit may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures, or because of the nonoccurrence of one or more conditions precedent. (*Id.* at p. 749.) Thus, the issue here is whether respondent's vested interest in disability retirement "matured" before his separation from employment.

23. A vested right matures when there is an unconditional right to immediate payment. (*Smith, supra*, 120 Cal.App.4th at p. 206.) Typically, this arises when a pension board determines that the employee was no longer capable of performing his or her duties. (*Ibid.*) Here, respondent continued to perform his job duties until he was terminated for cause. There has been no determination by CalPERS that respondent was eligible for disability retirement at any time. Accordingly, respondent's right to disability retirement could not have matured before his dismissal.

24. Even where there has not yet been a determination of eligibility, there may be facts under which a court, applying principles of equity, will deem an employee to still have a right to disability retirement. (*Smith, supra*, 120 Cal.App.4th at pp. 206-

207.) The equitable principles described in *Smith* have been considered and found not applicable to the facts established at hearing.

25. Respondent did not establish by “undisputed evidence” that he was eligible for a CalPERS disability retirement, “such that a favorable decision on [respondent’s] claim would have been a foregone conclusion (as perhaps with a loss of limb).” (*Smith, supra*, 120 Cal.App.4th at pp. 206-207.) That he was off for four months due to his November 2013 injury and worked more in a supervisory capacity after his September 2016 exacerbation of that injury is insufficient to conclude that he was eligible for disability retirement at any time prior to his termination—particularly considering that he continued to work on a full-time until his termination.

26. Respondent’s testimony regarding his medical condition was primarily subjective complaints of pain and he produced medical evidence entirely through hearsay documents. This is insufficient to support a finding in an administrative hearing.² As 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 provided by respondent demonstrated a substantial incapacity to perform his job duties or instead only made it difficult to perform his duties, which is insufficient. (*Smith, supra*, 120 Cal.App.4th at pp. 206-207.)

27. Respondent was permitted to submit into evidence the CUIAB decision related to his request for unemployment insurance benefits. That decision indicates that CDCR failed to establish that respondent was terminated for misconduct. The CUIAB decision does not, however, establish that respondent’s dismissal was the

² See footnote 1, *ante*, page 5.

ultimate result of a disabling condition or preemptive of valid claim for disability retirement.

28. When the above matters are considered, respondent has not presented unequivocal medical evidence of such nature that approval of his application for disability retirement was a foregone conclusion. Respondent's stated claim to any right to disability retirement allowance cannot be deemed to have matured prior to his termination from employment for cause. For all these reasons, respondent's application for disability retirement is precluded by operation of *Haywood* and *Smith*.

LEGAL CONCLUSIONS

1. By reason of his employment, Mr. Baek is a member of CalPERS and eligible to apply for disability retirement pursuant to Government Code section 21151. Government Code section 21151, in relevant part, provides:

(a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

(b) This section also applies to local miscellaneous members if the contracting agency employing those members elects to be subject to this section by amendment to its contract.

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2. Government Code section 21152 provides, 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. "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence. . . ." (*McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044; Evid. Code §§ 115, 500.) Respondent has the burden of proving by a preponderance of the evidence that his disability application is not precluded by his termination from employment.

4. Where an employee is terminated for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination of the employment relationship renders the employee ineligible for disability retirement. (*Haywood v. American River Fire Protection District* (1998) 67 Cal. App.4th 1292, 1297.) The Third District Court of Appeal explained that the dismissal "constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement — the potential reinstatement of [the] employment relationship with the [employer] if it ultimately is determined that [the employee] is no longer disabled." (*Ibid.*)

5. As specified in Findings 3 through 5 and 18, CalPERS established that respondent's separation from employment was a dismissal for cause for purposes of applying the *Haywood* criteria. As specified in Findings 19 and 27, respondent failed to

established that his separation from employment was the ultimate result of a disabling medical condition.

6. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the Third District Court of Appeal reiterated the principles of the *Haywood* decision. The court explained that a disability claim must have "matured" in order to find that a disciplinary action preempts the right to receive a disability retirement pension, and this maturation did not occur at the time of the injury, but rather when the pension board determined that the employee was no longer capable of performing his or her job duties. (*Id.* at p.206.) The *Smith* court further allowed consideration of equitable principles to "deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause." (*Id.* at p. 207.)

7. As set forth in Findings 24 through 26, when the principles of equity are applied to the facts established at hearing, respondent did not produce undisputed evidence that he was eligible for a CalPERS disability retirement allowance at the time of his dismissal, such that a favorable decision on a claim would have been a "foregone conclusion." There was no evidence that respondent had a vested interest in a disability retirement allowance that "matured" before his separation from employment.

8. In sum, CalPERS established that respondent was terminated from employment for cause, and respondent did not establish that the dismissal was the ultimate result of a disabling condition or preemptive of an otherwise valid claim for disability retirement. For these reasons, cause exists to uphold CalPERS' determination that respondent is not entitled to file an application for disability retirement allowance.

ORDER

The appeal of Won B. Baek to be granted the right to file an application for disability retirement is DENIED.

DATE: December 16, 2019

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Ed Washington
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ED WASHINGTON

Administrative Law Judge

Office of Administrative Hearings