

ATTACHMENT B

FINAL DECISION

(ADOPTED BY THE BOARD ON NOVEMBER 20, 2018)

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**BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

In the Matter of Accepting the Application for Industrial Disability Retirement of:)	CASE NO. 2018-0045
)	OAH NO. 2018040068
CHARLES A. THERRIEN,)	DECISION
Respondent,)	
and)	
CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION,)	
Respondent.)	

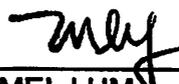
RESOLVED that the Board of Administration of the California Public Employees' Retirement System, pursuant to Government Code section 11517 (c)(2)(C) which authorizes the Board to "make technical or other minor changes in the proposed decision," hereby modifies the Proposed Decision, by adding "an Industrial" on page 13, sentence 1 of the Proposed Decision, so it states ". . . an Industrial Disability Retirement. . ."and hereby adopts as its own Decision the Proposed Decision dated September 6, 2018, as modified, concerning the appeal of Charles A. Therrien; **RESOLVED FURTHER** that this Board Decision shall be effective 30 days following mailing of the Decision.

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1 I hereby certify that on November 15, 2018, the Board of Administration,
2 California Public Employees' Retirement System, made and adopted the foregoing
3 Resolution, and I certify further that the attached copy of the Administrative Law
4 Judge's Proposed Decision is a true copy of the Decision adopted by said Board of
5 Administration in said matter.

6 BOARD OF ADMINISTRATION, CALIFORNIA PUBLIC
7 EMPLOYEES' RETIREMENT SYSTEM
8 MARCIE FROST
9 CHIEF EXECUTIVE OFFICER

10 Dated: 11/20/18 BY 
11 DONNA RAMEL LUM
12 Deputy Executive Officer
13 Customer Services and Support
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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:

Case No. 2018-0045

CHARLES A. THERRIEN,

OAH No. 2018040068

Respondent,

and

CALIFORNIA DEPARTMENT OF
FORESTRY AND FIRE PROTECTION,

Respondent.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, State of California, on August 14, 2018, in Sacramento, California.

Preet Kaur, Senior Staff Attorney, California Public Employees' Retirement System, appeared on behalf of petitioner.

Charles A. Therrien appeared on his own behalf.

There was no appearance on behalf of the California Department of Forestry and Fire Protection.

Evidence was received, closing argument was considered, and the matter was submitted for decision on August 14, 2018.

FACTUAL FINDINGS

1. Anthony Suine, Chief, Benefits Services Division, California Public Employees' Retirement System (CalPERS), made and filed the Statement of Issues in his official capacity.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Sep. 11 2018
Kadiy Kooler

2. Charles A. Therrien (respondent) was employed by the California Department of Forestry and Fire Protection (Department) as a Fire Captain, effective June 6, 1983. By virtue of this employment, respondent became a state safety member of CalPERS subject to Government Code sections 21151 and 21154.

Procedural History

3. On or about April 27, 2017, respondent signed an application for industrial disability retirement, which was received by CalPERS on April 28, 2017. In filing the application, disability was claimed on the basis of an orthopedic (shoulder), cardiologic (heart stent), and neurological conditions. Respondent requested an effective retirement date of November 15, 2007.

4. Earlier, by letter from the Department dated October 16, 2007, respondent was informed of a Notice of Adverse Action (NOAA) against him pursuant to Government Code section 19574. The notice informed respondent that he was dismissed from his position as a Fire Captain effective November 16, 2007, due to inefficiency, dishonesty, inexcusable absence without leave, and other failure of good behavior either during or outside duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment. The NOAA included information advising respondent of his right to appeal the NOAA to the State Personnel Board (SPB) by written appeal, within 30 calendar days after the date of the NOAA.

Respondent timely filed an appeal of the NOAA with SPB.

5. On November 9, 2007, respondent signed an application for service retirement, which was received by CalPERS on November 13, 2007. Respondent retired for service effective November 15, 2007. He has been receiving his retirement allowance from that date. This was one day before the effective date of his dismissal pursuant to the NOAA.

6. On September 3, 2008, SPB issued an order dismissing respondent's appeal from dismissal on the basis that the employer-employee relationship was permanently severed on the effective date of his service retirement.

7. CalPERS received and reviewed information and documents concerning respondent's termination from employment. CalPERS determined that respondent is ineligible to apply for industrial disability retirement because he was dismissed from his employment with the Department, effective November 16, 2007, and cannot return to his position.

8. CalPERS notified respondent of its determination by letter dated October 26, 2017, which included notice that respondent could appeal.

9. Respondent, through a representative, filed an appeal on December 19, 2017, and requested a hearing.¹ As noted in the Statement of Issues, the appeal is limited to the issue of whether respondent may file an application for industrial disability retirement under Government Code section 21151, or whether his application and eligibility are precluded by operation of law. (See *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*).

Employment Background and Termination

10. Respondent was employed by the Department as a Fire Captain at Moreno Beach Station #58 in the Moreno Valley Battalion in the Riverside Unit. He had served as a Fire Captain for approximately 20 years, and had been employed by the Department for approximately 24 years.

The incident leading to the NOAA occurred in August 2007. As alleged in the NOAA, respondent was scheduled to work on August 21, 22 and 23, 2007. He asked for vacation time for those three days but his request was denied. On Monday, August 20, 2007, respondent notified his supervisor that he could not work his scheduled shift due to illness. He provided a note from his physician indicating that he could not work on August 21, 22 and 23, "due to illness." He also submitted standard Department forms related to his use of sick leave for those three days.

The Department later discovered that respondent had been employed from July 19, 2007, as a Battalion Chief with the Hualapai Valley Fire District (HVFD) located in Kingman, Arizona. A Department investigation revealed that respondent worked for HVFD on August 21 and 22, 2007, and also in a supervisory capacity had signed a HVFD Personnel Action Report dated August 23, 2007. Due to his absence, the Department had to call back additional personnel to cover his shifts, and incurred overtime costs. The Department alleged that in connection with these events, respondent was dishonest for having indicated that he was ill at a time he was working for HVFD. The Department further alleged that adverse action was being taken against him for inefficiency, inexcusable absence without leave, and failure of good behavior either during or outside of duty hours that caused discredit to the Department.

11. No findings are made in this case respecting the factual basis underlying any disciplinary action taken by the Department against respondent. The above matters were considered for the sole purpose of determining whether

¹ The Statement of Issues indicated that respondent filed an appeal by letter dated October 18, 2017, probably based upon a handwritten reference on the letter to "10/18/17." Closer examination of respondent's letter indicated that it was written in response to a telephone conversation on December 18, 2017, and the document itself had a small print date stamp of "12-19-2017."

respondent's termination from employment with the Department was the result of a disabling medical condition.

SPB Appeal

12. As noted earlier, respondent filed an appeal of his termination with SPB in Case No. 07-4839. This appeal was dismissed on September 3, 2008. The dismissal was pursuant to a motion to dismiss the appeal brought by the Department. Respondent opposed the motion. Both parties were represented by counsel. SPB determined that respondent's service retirement was akin to a resignation, thereby rendering any appeal moot. The September 3, 2008 Order in Case No. 07-4839 explained:

Unlike the appellant in *Gray*,² [respondent] in this matter sought and received a *service* retirement, which is akin to a resignation. To this end, his employment relationship with the State terminates upon the effective date of the retirement. (*Mary Gray*, SPB Dec. No. 99-08, citing to 29 Ops.Cal.Atty.Gen. 115 (April 5, 1967).) Because the employer-employee relationship is permanently severed on the effective retirement date, [the Department's] adverse action for dismissal is of no significance as there is no relationship to sever. Without an adverse action, there is nothing to appeal. Hence, the Board does not have jurisdiction to entertain [respondent's] appeal from dismissal.

13. CalPERS offered the testimony of Bruce Crane, Acting Chief Counsel for the Department. Mr. Crane represented the Department in the dismissal action (Case No. 07-4839) against respondent. He may have had a hand in drafting the NOAA. He brought the successful motion to dismiss respondent's appeal before SPB.

Mr. Crane explained that respondent is not prohibited from seeking employment with the Department. He is eligible to apply for a Fire Captain position based upon having achieved civil service status as a Fire Captain in the past. However, Mr. Crane indicated that were respondent to seek reemployment with the Department, the NOAA would be considered again. Mr. Crane believes the Department would likely re-serve the 2007 NOAA and attempt to re-effectuate the dismissal should respondent seek re-employment. Respondent does not have return rights to the Department.

² The SPB Administrative Law Judge noted that in the *Mary Gray* matter the employee's disability retirement was a temporary, not permanent, separation from state service so that SPB continued to have jurisdiction to hear the appeal in that case.

14. Following the September 3, 2008 Order dismissing his appeal, respondent filed a Petition for Rehearing which SPB denied on April 28, 2009. Respondent did not exhaust judicial remedies with respect to Case No. 07-4839.

Application for Disability Retirement

15. By letter to CalPERS dated April 21, 2017, respondent explained his request to change his retirement from service to disability retirement as follows:

Prior to making the decision to retire, I was not aware that when I did retire that I needed to complete and file for a classification of my retirement. In other words, I needed to file for either an Industrial/Medical or a regular retirement status. At the time of my retirement application, I had no support from my superiors, including the Chief officers or any CDF representative. I moved out of State to get further medical assistance. The day I went to the retirement office I was under severe emotional stress and anxiety because I was back in California. When talking to the employee at the retirement center while turning in my application, we never discussed any options for retirement, we never discussed my work-related injuries or my disabilities/disability ratings. We did not discuss how these work-related disability [*sic*] might affect the status of my retirement and allow me to retire as a result of an industrial or disability rather than just a retirement.

Discussion

16. The sole issue in this hearing is whether respondent may file an application for industrial disability retirement, or whether his application and eligibility for disability retirement is precluded by operation of *Haywood*. In *Haywood*, the employee “was terminated for cause following a series of increasingly serious disciplinary actions against him. After his discharge, the employee applied for disability retirement, claiming that stress from the disciplinary actions caused him to suffer a major depression, which rendered him incapable of performing his usual duties with the [employer].” (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. 1295. The Court of Appeals concluded that the employee was not entitled to disability retirement, stating as follows:

As we shall explain, there is an obvious distinction in public employment retirement laws between an employee who has become medically *unable* to perform his usual duties and one who has become *unwilling* to do

so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. Nor are they intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. In addition, while termination of an unwilling employee for cause completely severs the employer-employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled.

In this case, Haywood challenged his employer's authority and lost when, after a series of disciplinary actions, he was terminated for cause. The behavior which resulted in Haywood's firing--his unwillingness to faithfully perform his duties--was not caused by a physical or mental condition, and Haywood had no valid claim for disability retirement which could have been presented before he was fired.

Haywood's firing 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 is determined that he no longer is disabled. Moreover, to award Haywood a disability pension would interfere with the District's authority to discipline recalcitrant employees. Such an award in effect would compel the District to pension-off an employee who has demonstrated unwillingness to faithfully perform his duties, and would reward Haywood with early retirement for his recalcitrance. In other words, granting Haywood disability retirement would override Haywood's termination for cause despite his inability to set aside the termination through the grievance process.

It follows that where, 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, termination of the employment relationship renders the employee ineligible for disability retirement.

(*Id.* at pp. 1296-1297, footnote omitted.)

17. Respondent contends that he was not terminated for cause from employment and therefore he is eligible to apply for industrial disability retirement. He believes that *Haywood* and *Smith* do not preclude his application, because his service retirement, effective November 15, 2007, preceded the effective date of the NOAA and therefore he was never terminated. Respondent does not contend that his termination was the result of a disabling medical condition.

18. CalPERS contends that respondent was essentially terminated for cause pursuant to the NOAA. It further contends that once respondent service retired, his employment relationship with the Department was permanently severed, thus eliminating a necessary requisite for disability retirement. Although respondent is eligible to apply for a Fire Captain position based upon having achieved civil service status as a Fire Captain in the past, the NOAA would be considered in any reemployment decision. Mr. Crane also indicated that the Department would likely re-serve the 2007 NOAA and attempt to re-effectuate the dismissal. Respondent does not have return rights to the Department.

Termination for Cause

19. This case raises the question of whether CalPERS may properly apply *Haywood* in the absence of an actual dismissal for cause. Two CalPERS precedential decisions have considered this issue. (*In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot*, dated February 19, 2013, made precedential on October 16, 2013; *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland*, dated November 20, 2015, made precedential on June 15, 2016.)

20. In *Vandergoot*, the applicant received and appealed from a NOAA. He later entered into a Stipulation and Settlement resigning from his position. The Department agreed to withdraw the NOAA. The Stipulation for Settlement expressly provided that it was “neither an admission of guilt or of wrongdoing by either party.” It was noted in that case that but for the pendency of the disciplinary action, the applicant would never have entered into the Stipulation and Settlement resigning from his position. CalPERS also considered the language in the Stipulation and Settlement in which the applicant agreed that he would “not seek, transfer to, apply for or accept any employment in any capacity with the Department at any time in the future.” The Department expressly reserved the right to dismiss the applicant should he be employed again, and the applicant expressly waived any right of appeal of such dismissal.

Vandergoot noted that *Haywood* made 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 an applicant is no longer disabled.

(*Haywood v. American River Fire Protection District*, *supra*, 67 Cal.App.4th at pp. 1296 - 1297.) Such was not possible in that case. These factors weighed in favor of determining that CalPERS could find the terms of the Stipulation for Settlement of the SPB case to be tantamount to a dismissal for purposes of applying the *Haywood* criteria.

21. In *MacFarland*, the applicant similarly received and appealed from a NOAA. He then filed a Disability Retirement Election Application requesting service-pending industrial disability retirement. He subsequently signed a Withdrawal of Appeal, withdrawing the SPB appeal of the disciplinary action and noted that he had service-retired three days prior to the effective date of the adverse action. *MacFarland* found the evidence to be persuasive that the applicant had retired to avoid termination from employment.³ There was testimony that the applicant was terminated pursuant to the NOAA under unfavorable circumstances and that his letter of resignation did not prevent the agency from enforcing the NOAA should he attempt to reinstate. Thus, *MacFarland* 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." (*MacFarland*, *supra*, p. 8, ¶ 29.)

22. This case is not unlike *Macfarland*. Respondent service-retired one day prior to the effective date of the adverse action. He left under unfavorable circumstances. It can be presumed that but for the pendency of the disciplinary action, respondent would never have applied for service retirement. Importantly, the Department views its employment relationship with respondent to be severed. Respondent has no return rights to the Department. Mr. Crane recognized that there is nothing to prohibit respondent from applying for a Department Fire Captain position based upon his having achieved that civil service status in the past. However, the Department would likely re-serve the 2007 NOAA, and attempt to re-effectuate the dismissal should respondent seek re-employment. Nearly 11 years have transpired since respondent retired. Nothing has occurred over that lengthy period to suggest any interest by either party in reestablishing, or the actual reestablishment of an employment relationship between the Department and respondent.

23. In *MacFarland*, the applicant withdrew his SPB appeal. In this case, respondent opposed the dismissal of his SPB appeal. Arguably, had his SPB appeal not been dismissed, respondent may have prevailed in defending against the NOAA allegations and there would have been no termination for cause. However, once the

³ As noted in *McFarland*: "The law does not respect form over substance. (*Pulaski v. Calif. Occupational Safety and Health Standards Board* (1999) 75 Cal.App.4th 1315, 1328.) The courts look to the 'objective realities of the transaction rather than to the particular form the parties employed. Thus, we focus on the actual rights and benefits acquired, not the labels used.' (*General Mills v. Franchise Tax Bd.* (2009) 172 Cal.App.4th 1535, 1543.)" (*MacFarland*, *supra*, p. 7, ¶ 29.)

SPB appeal was dismissed, he no longer had opportunity to contest the NOAA. As was the case in *MacFarland*, his "relationship with his employer had been severed prior to his retirement, when the NOAA was served on him," and the severance became irrevocable once his appeal was dismissed. (*Ibid.*) While respondent opposed dismissal of his SPB appeal, it is also true that respondent failed to exhaust his judicial remedies with respect to SPB Case No. 07-4839. For all these reasons the fact of respondent's opposition to dismissal of his SPB appeal does not serve to distinguish this case from *MacFarland*.

24. In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a service retirement 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 been severed. Such a circumstance is wholly inconsistent with the policy behind and rationale for disability retirement:

[D]isability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches an age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues. (§ 21192.) And an employee on disability retirement may apply for reinstatement on the ground of recovery. (*Ibid.*) If an employee on disability retirement is found not to be disabled any longer, the employer may reinstate the employee, and his disability allowance terminates. (§ 21193.)

(*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. 1305.)

25. 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. 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 properly consider the NOAA, the timing and effect of respondent's service retirement, and the dismissal of respondent's SPB appeal as being tantamount to a dismissal from employment for purposes of applying the *Haywood* criteria.

Preemptive of Valid Claim

26. Respondent may contend in the alternative that the Department's NOAA was preemptive of an otherwise valid claim for disability retirement. Thus, even if an agency dismisses an employee solely for a cause unrelated to a disabling medical condition, this will 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, ...) (*Ibid.*)

27. Respondent had a vested right to apply for industrial disability retirement upon acceptance of employment with the Department. While the "right" to the benefits vests upon acceptance of employment, an employee would not be entitled to receive the benefit until all the conditions prescribed have been met. (*Dickey v. Retirement Board of the City and County of San Francisco* (1976) 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; *Brooks v. Pension Board* (1938) 30 Cal.App.2d 118, 123.) 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" prior to his separation from employment.

28. A vested right matures when there is an unconditional right to immediate payment. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 206.) Typically, this arises at the time a pension board determines that the employee was no longer capable of performing his/her duties. (*Ibid.*; *Tyra v. Board of Police etc. Comms.* (1948) 32 Cal.2d 666, 671-672.) Here, a CalPERS determination of eligibility does not antedate respondent's separation from employment. His right to industrial disability retirement has thus not matured.

29. *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. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at pp. 206-207.) *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. (*Id.* at p. 207.) Here, he did not even initiate the process for receiving an industrial disability

retirement allowance until nearly 10 years after he received the NOAA and service-retired from employment. 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)." (*Ibid.*)

30. When the above matters are considered as a whole, respondent has not presented unequivocal medical evidence of such nature that approval of his application for disability retirement was a "foregone conclusion." Any right to an industrial disability retirement allowance cannot be deemed to have matured in this case. For all these reasons, his application for disability retirement should be precluded by operation of *Haywood*.

LEGAL CONCLUSIONS

1. Government Code section 21152 reads, 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.

2. Government Code section 21154 reads, in pertinent part:

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 any 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 on its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

3. Where 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, 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 his employment relationship with the District if it ultimately is determined that he is no longer disabled.” (*Ibid.*)

4. CalPERS demonstrated that respondent’s separation from employment was tantamount to a dismissal for purposes of applying the *Haywood* criteria. (See Findings 19 through 25.) It was also established that respondent’s separation from employment was not the ultimate result of a disabling medical condition.

5. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the same court reiterated the principles of the *Haywood* decision. The court further 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 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.)

As noted in Finding 29, even where principles of equity are applied, this was not a case where there was undisputed evidence that respondent was eligible for a CalPERS industrial disability retirement allowance, such that a favorable decision on his claim would have been a “foregone conclusion.” (*Id.* at pp. 206-207.) Respondent’s vested interest in an industrial disability retirement allowance never “matured” prior to his separation from employment.

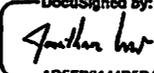
6. As set forth in the Findings, respondent’s application for industrial disability retirement is precluded by the holdings in *Haywood* and *Smith*, as well as CalPERS precedential decisions. Respondent’s deemed termination from employment extinguished any right to file a Disability Retirement Election Application. For all the above reasons cause exists to uphold CalPERS’ determination that respondent is not entitled to file an application for an industrial disability retirement allowance.

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ORDER

The determination of CalPERS that Charles A. Therrien may not file a Disability Retirement Election Application is Affirmed. Charles A. Therrien's appeal is DENIED.

Dated: September 6, 2018

DocuSigned by:

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JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On November 20, 2018, I served the foregoing document described as:

DECISION – In the Matter of Accepting the Application for Industrial Disability Retirement of CHARLES A. THERRIEN, Respondent, and CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION, Respondent.; Case No. 2018-0045; OAH No. 2018040068.

on interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Charles A. Therrien

**Office of Administrative Hearings
2349 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833-4231
(Via OAH SECURE e-FILE)**

**Personnel Officer
California Department of Forestry and
Fire Protection
P. O. Box 944246
Sacramento, CA 94244-2460**

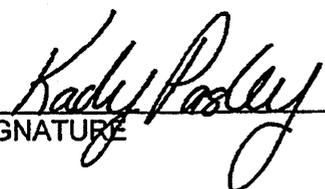
- [XX] **BY OVERNIGHT DELIVERY:** I caused such envelope(s) to be delivered to the above address(es) within 24 hours by overnight delivery service.
- [XX] **BY ELECTRONIC FILING:** I caused such documents to be e-filed via OAH SECURE e-FILE.

Executed on **November 20, 2018**, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Kady Pasley

NAME



SIGNATURE