

**ATTACHMENT A**

**THE PROPOSED DECISION**

**BEFORE THE  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

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

**DUSTIN E. MORGAN, Respondent**

**and**

**CALIFORNIA STATE PRISON CORCORAN, CALIFORNIA  
DEPARTMENT OF CORRECTIONS AND REHABILITATION,  
Respondent**

**Agency Case No. 2019-0995**

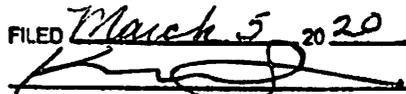
**OAH No. 2019110516**

**PROPOSED DECISION**

John E. DeCure, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on February 4, 2020, in Fresno, California.

Rory J. Coffey, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Dustin E. Morgan (respondent) represented himself at the hearing.

PUBLIC EMPLOYEES RETIREMENT SYSTEM  
FILED *March 5* 20 *20*  


No one appeared for or on behalf of the California State Prison, Corcoran, California Department of Corrections and Rehabilitation (CDCR). As to the CDCR, this matter proceeded as a default proceeding pursuant to Government Code section 11520.<sup>1</sup>

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on February 4, 2020.

### **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. CalPERS received respondent's application for industrial disability retirement in July 2019. Complainant contends respondent has a pending adverse action that, if and when he returns to his position at CDCR, will lead to his separation from his employment at CDCR with no right of reemployment. In August 2019, 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.

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<sup>1</sup> Because CDCR did not appear or participate, any references to "respondent" herein are to Mr. Morgan.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Keith Riddle is the Chief of CalPERS' Disability and Survivor Benefits Division. He signed the Statement of Issues on November 12, 2019, solely in his official capacity.

2. On July 29, 2019, respondent signed, and CalPERS received, his industrial disability retirement application (disability application). Respondent identified his disabilities as "(Psychological stress) Post Traumatic Stress Disorder major depressive disorder and anxiety (Right Eye) Orbital fracture." He stated the disability occurred on February 13, 2018, while escorting an inmate who violently attacked him; respondent was injured during the struggle that followed. Respondent contended he could no longer perform the essential functions of his job.

3. CalPERS acknowledged receipt of the disability application by letter dated August 5, 2019. CalPERS reviewed the application, contacted respondent's employer, and determined to cancel respondent's application.

4. By a letter dated August 19, 2019, CalPERS notified respondent that his application was denied. 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. . . . On September 13, 2018, [CDCR] sent you a Letter of Intent,

informing you that you will be dismissed as a disciplinary result of your misconduct. Therefore, you are not eligible to apply for disability retirement because you and your employer have a mutual understanding of a pending adverse action that will lead to separation. The discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. . . . Our decision is based on the determination of the court in the cases of *Haywood* [et al].

5. On September 13, 2019, respondent timely appealed CalPERS' determination that he was not eligible to apply for industrial disability retirement. All jurisdictional requirements have been met.

### **CalPERS' Evidence**

6. Emelia Orosco is a Staff Services Manager I in the Employee Relations office at CDCR. She completed an investigation on behalf of CDCR regarding three alleged incidents of misconduct pending against respondent while he was employed at CDCR. At hearing, Ms. Orosco identified the Letter of Intent, dated September 11, 2018, CDCR issued to respondent explaining that a CDCR Internal Affairs "direct action" inquiry was completed and three allegations of on-the-job misconduct<sup>2</sup> were sustained. The Letter of Intent further informed respondent that a decision was made to take disciplinary action against him and "[t]he recommended penalty is a Dismissal."

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<sup>2</sup> The validity of the allegations against respondent was not at issue in this proceeding.

Ms. Orosco personally served the Letter of Intent on respondent on September 13, 2018. The Letter of Intent stated, in relevant part:

You are hereby notified that the administrative direct action . . . conducted by the [CDCR] Office of Internal Affairs into allegations of your misconduct has been completed. . . . Pursuant to Government Code section 3304(d), you are hereby notified that a decision has been made to take disciplinary action against you. The recommended penalty is Dismissal.

7. Ms. Orosco explained that at CDCR, a "dismissal" is tantamount to termination. Technically, respondent has yet to be dismissed from his position because he has been out on workers' compensation leave, and CDCR cannot properly serve him with a Notice of Adverse Action, which is necessary to establish a dismissal, until he returns to his position. As a result, his Internal Affairs disciplinary matter remains open, but only because he remains out on leave. If and when he returns to his CDCR position, he will be served with the Notice of Adverse Action and immediately dismissed. Following his dismissal, respondent would have standard employee appeal rights, and if successful, he could reapply for industrial disability retirement. But at present, he will be terminated for cause upon his return, which means he currently lacks standing to apply for industrial disability retirement.

### **Respondent's Evidence**

8. Respondent described being injured by an inmate in February 2018 and going on workers' compensation leave. He underwent facial surgery and dealt with psychological issues, including severe depression and post-traumatic stress disorder.

He has not returned to work and believes his condition precludes him from ever returning to his job. If he returns to work, he must face the allegations of alleged misconduct because his disciplinary matter is "still pending."

## **Analysis**

9. As further described below, the holdings in *Haywood* and its progeny, particularly *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*), establish respondent has a pending adverse action that will lead to separation. This pending discharge is neither the ultimate result of a disability nor preemptive of a valid claim for disability retirement.

10. Government Code section 21154 states that disability applications shall be made only while the member is in state service, absent on military service, within four months after the discontinuance of the member's state service, while on an approved leave of absence, or 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. (Govt. Code, § 21154.) The *Haywood* court expressly "reject[ed] a construction of section 21154 that would establish eligibility for disability retirement whenever a timely application is submitted." (*Haywood, supra*, at 1307.) More specifically, the court stated:

section 21154 specifies that, when a timely application is filed, the employee must be both "otherwise eligible to retire for disability" and "incapacitated for the performance of duty" in order to be granted disability retirement. In this respect, the section provides a procedural time limit within which an application for disability retirement must be filed,

but does not provide for substantive eligibility whenever a timely application is filed.

*(Ibid.)*

11. It does not matter that an impending ruling on a claim for disability pension has been delayed. Respondent's pending dismissal has the effect of permanently terminating his employer-employee relationship with CDCR; his return to work will terminate the employer-employee relationship, extinguishing any right he had to reinstate to his former position. There is no evidence that his pending 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 various disabilities 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 matter was dispositive on this issue. (*Smith, supra*, 120 Cal.App.4th 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)].)

12. Moreover, the propriety of respondent's termination is not at issue; similarly, the fact that he will be terminated in the regular course of CDCR business should he ever return to work was established by the evidence and not in dispute. Accordingly, respondent is not eligible to apply for industrial disability retirement.

## **LEGAL CONCLUSIONS**

1. CalPERS has the burden of proving respondent's submission of an Industrial 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. 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. The Board concluded 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* 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.)

8. Similar to the facts of *Vandergoot*, respondent did not initiate the process for receiving industrial disability benefits until after CDCR determined to dismiss him from his position with CDRC without reemployment rights; and there was no evidence that he was eligible for disability retirement at the time his pending dismissal was established “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].)

9. CDCR has determined to permanently terminate its employer-employee relationship with respondent pending his return to work; thus, he will retain no right of reemployment for reasons unrelated to any disability he may have been suffering at the time. Although he has not returned to work, he was capable of working in his position at the time his pending dismissal was established, and work-related incidents led to the pending dismissal. No evidence was submitted to show that the pending termination of the employment relationship was the ultimate result of a disabling medical condition. Nor did the evidence establish that the pending termination of that relationship preempted an otherwise valid claim for an industrial disability pension.

10. Cause does not exist to overturn CalPERS’ determination that respondent is ineligible to apply for industrial disability retirement, as set forth in Findings 2 through 6. Respondent’s application and eligibility for industrial disability retirement are 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 industrial disability retirement is denied.

## **ORDER**

The appeal of Dustin E. Morgan to be granted the right to file an application for industrial disability retirement is denied.

DATE: March 5, 2020

DocuSigned by:  
*John DeCure*  
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**JOHN E. DeCURE**

**Administrative Law Judge**

**Office of Administrative Hearings**