

ATTACHMENT A

THE PROPOSED DECISION

**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:**

REGINA R. MACK, Respondent

and

**DEPARTMENT OF STATE HOSPITALS – COALINGA SECURE
TREATMENT FACILITY, Respondent**

Case No. 2019-0668¹

OAH No. 2019090472

PROPOSED DECISION

Sean Gavin, Administrative Law Judge, Office of Administrative Hearings (OAH),
State of California, heard this matter on March 3, 2020, in Fresno, California.

¹ The Statement of Issues incorrectly identifies the agency case number as 2018-0387.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED *April 29* 20 *20*

A handwritten signature in black ink is written over a horizontal line. To the right of the signature, the date "April 29 20 20" is stamped in a stylized font.

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

Regina R. Mack (respondent) appeared telephonically and represented herself.

There was no appearance by or on behalf of the Department of State Hospitals – Coalinga Secure Treatment Facility (DSH), and a default was taken pursuant to Government Code section 11520.

Oral and documentary evidence was received, and the record was held open for the submission of additional evidence and written closing arguments. Respondent timely submitted additional documents, which were marked as Exhibits A, B, and C, and complainant timely filed written hearsay objections. Complainant's objections were overruled, and Exhibits A, B, and C were admitted into evidence pursuant to Government Code section 11513, subdivision (d).² Respondent did not object to any of CalPERS's evidence. Consequently, Exhibits 1 through 6 were admitted as jurisdictional documents, Exhibit 7 was admitted for all purposes, and Exhibits 8 and 9 were officially noticed. Complainant also timely submitted a closing brief, which was marked for identification as Exhibit 10. Respondent did not submit a written closing argument. The record was closed and the matter submitted for decision on March 27, 2020.

² Government Code section 11513, subdivision (d), provides: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration."

ISSUE

Is respondent precluded from filing an application for disability retirement by operation of *Haywood and Smith*?

FACTUAL FINDINGS

1. Respondent was employed by the DSH and last held the position of a Clinical Social Worker (CSW). By virtue of this employment, respondent became a state safety member of CalPERS subject to Government Code sections 21151, 21154, and 21156.

2. On or about March 4, 2019, the DSH served respondent by mail with a Notice of Nonpunitive Action (NONA), which notified her that effective March 14, 2019, she would be nonpunitively terminated from her position. The DSH's stated basis for the NONA was respondent's "failure to meet a requirement for continuing employment as prescribed in the class specifications for the position of Clinical Social Worker (Health Facility)."

3. On April 16, 2019, respondent submitted an application for service pending industrial disability retirement. In it, she identified the following disabilities: impingement in her left shoulder, carpal tunnel syndrome in both hands, cubital tunnel syndrome in both elbows, bulging discs in her back, arthritis in both knees, and a crush injury to her left foot. She indicated her injuries occurred between October 2014 and November 2018 as a result of a client running over her foot with a wheelchair, a slip and fall, and cumulative trauma due to repetitive motion and activity.

4. On May 31, 2019, CalPERS sent a letter to respondent stating that she is not eligible for disability retirement because her employment ended for reasons not related to a disabling medical condition. On June 25, 2019, respondent appealed CalPERS's determination that she is not eligible for disability retirement. This hearing followed.

CalPERS's Evidence

5. Andrea Broaddus is an Employee Relations Manager at the DSH. She reviewed the NONA and its supporting documents before they were sent to respondent. She explained the NONA was sent because respondent did not meet the minimum qualifications to be a CSW for the DSH. Specifically, respondent did not obtain a Licensed Clinical Social Worker (LCSW) license within time specified by the State Personnel Board, which provides that the minimum qualifications for a CSW in a health facility are:

Possession of a valid license as a Licensed Clinical Social Worker issued by the California Board of Behavioral Science. [Individuals who do not qualify for licensure by the California Board of Behavioral Science may be admitted into the examination and may be appointed but must secure a valid license within four years of appointment; however, an individual can be employed only to the extent necessary to be eligible for licensure plus one year. An extension of the waiver may be granted for one additional year based on extenuating circumstances, as provided by Section 1277(e) of the Health and Safety Code.]

6. Respondent began working as a CSW at the DSH in March 2014. On November 21, 2016, Erich Leslie, the Chief of Social Work at the DSH, sent respondent a letter advising her she "must obtain licensure by March 2, 2018."

7. On November 28, 2017, the Department of Public Health (DPH) granted a one-year extension of time for respondent to obtain licensure, pursuant to its statutory authority to license and regulate health facilities, including the DSH facility where respondent worked. The DPH provided respondent a new deadline of March 13, 2019, to obtain her LCSW license.

Respondent's Evidence

8. Respondent obtained her Associate Clinical Social Worker (ACSW) license from the Board of Behavioral Sciences on March 18, 2014. She has not obtained her LCSW license. To obtain an LCSW license, a candidate must, among other things, pass two separate exams. Respondent took and passed the first exam in June 2019. As of the date of the hearing, she had not taken the second examination.

9. At hearing, respondent explained her disabilities prevented her from taking and passing the LCSW exams. Her carpal tunnel syndrome and leg and back injuries cause her pain, and her "concentration is off." She cannot focus on studying for the exams, and has not taken the second exam because she knows she is "not ready to pass." She believes the second exam consists of 170 questions over four hours, and she "needed to obtain more knowledge to pass that test."

Discussion

10. CalPERS determined respondent was precluded from applying for disability retirement under *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*).

11. *Haywood* and *Smith* hold that civil service employees are precluded from applying for disability retirement if they have been dismissed from their civil service employment. *Haywood* and *Smith* recognized two exceptions to this preclusion: (1) when the employee established that the dismissal was the ultimate result of a disabling condition; and (2) when the employee established that the dismissal preempted the employee's otherwise valid claim for disability retirement.

12. Respondent did not establish she should be allowed to apply for disability retirement under either of the two exceptions recognized in *Haywood* and *Smith*: (1) her separation from state service was not the ultimate result of a disabling condition; and (2) her separation from state service did not preempt an otherwise valid claim for disability retirement. Respondent's failure to obtain her LCSW license in the required time, not her physical condition, caused the DSH to serve the NONA. Respondent's testimony that her disabilities prevented her from taking and passing the LCSW exams is not persuasive. She took and passed the first exam, and she has not attempted to take the second exam.

13. Respondent also did not establish that her separation from state service preempted an otherwise valid claim for disability retirement. There was no indication in the NONA or any other evidence that the DSH instituted dismissal proceedings to preempt respondent from filing an application for disability retirement based upon a disabling physical condition.

14. When all evidence and arguments are considered, respondent did not establish that she should be allowed to file an application for disability retirement. Consequently, respondent's appeal must be denied.

LEGAL CONCLUSIONS

Burden of Proof

1. CalPERS has the burden of proving that respondent was terminated for cause prior to seeking disability retirement. (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"]; *Haywood, supra*, 67 Cal.App.4th 1292.) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And 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.) If CalPERS meets its burden, the burden then shifts to respondent to show whether either of the *Haywood* exceptions apply.

Applicable Law

2. An individual may apply to the CalPERS Board for disability retirement on her own behalf. (Gov. Code, § 21152.)

3. By virtue of her employment with DSH, respondent became a state safety member of CalPERS subject to Government Code sections 21151, 21154, and 21156. Section 21154 provides, in relevant 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.

4. When 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, supra*, 67 Cal.App.4th at p. 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.*)

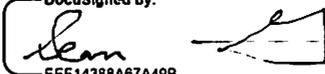
5. CalPERS met its burden of proof by establishing that respondent was dismissed for cause, and that the dismissal did not preempt an otherwise valid disability claim. Respondent did not establish that any of the *Haywood* exceptions apply. Thus under the criteria set forth in *Haywood* and its progeny, respondent was

properly precluded from applying for disability retirement. Accordingly, respondent's appeal from CalPERS's cancellation of her application must be denied.

ORDER

The appeal of respondent Regina R. Mack to be granted the right to file an application for disability retirement is DENIED.

DATE: April 28, 2020

DocuSigned by:

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SEAN GAVIN

Administrative Law Judge

Office of Administrative Hearings



OFFICE OF ADMINISTRATIVE HEARINGS

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Governor Gavin Newsom

Notice Regarding Hearing Exhibit Availability

The proposed decision in this case is being sent without the hearing exhibits. Due to the current public health emergency, the exhibits will be delayed.

If the agency decision-maker has an urgent need to receive the hearing exhibits, please contact the OAH office.

Sacramento: 916-263-0550

Oakland: 510-622-2722

Los Angeles: 213-576-7200

San Diego: 619-525-4475

Thank you for your understanding.

OFFICE OF ADMINISTRATIVE HEARINGS