

ATTACHMENT E

THE PROPOSED DECISION

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

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

**CHARLIE MARTINEZ and VALLEY STATE PRISON,
CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, Respondents**

Agency Case No. 2020-0085

OAH Case No. 2020060717

PROPOSED DECISION

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on January 6, 2021, from Sacramento, California.

Dustin Ingraham, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Charlie Martinez (Martinez) represented himself and testified at hearing.

Nancy Clark (Clark), Personnel Officer, Valley State Prison (VSP), California Department of Corrections and Rehabilitation (CDCR), represented respondent VSP and CDCR, and testified at hearing.

Evidence was received and the record left open until January 22, 2021, to allow for submission of supplemental evidence. On January 22, 2021, CalPERS' counsel, as a courtesy, filed the following proposed exhibits on Martinez's behalf: Exhibits A – Martinez's opening statement; B – Kroll Non-Federal Custody and Control Form; C – Correctional Officer Report of Performance; D – Notice of Personnel Action Report of Separation; E – Employee Position History; F – Employment Development Department (EDD) Notice of Determination; G – Report by Craig R. MacClean, M.D.; H – Report by Peter J. Mandell, M.D.; I – Decision from Social Security Administration (SSA); and J – Substance Abuse Program and Testing Policy. That same day, CalPERS' counsel also filed objections to some of respondents' proposed exhibits, marked for identification as Exhibit 14. After careful review of the objections, Exhibit 14 is admitted as argument; Exhibits A through F, I, and J are admitted for all purposes; and Exhibits G and H are admitted as administrative hearsay.

On January 22, 2021, CalPERS' counsel, pursuant to Martinez's request, further filed an unredacted version of Exhibit 7-1, page two, marked for identification as Exhibit 12, and an unredacted version of Exhibit 7-2, page two, marked for identification as Exhibit 13. Exhibits 12 and 13 were admitted for all purposes and are subject to a protective order issued on January 25, 2021.

On January 22, 2021, the record was closed and the matter submitted for decision.

ISSUE

Is Martinez eligible to apply for industrial disability retirement (IDR)?

FACTUAL FINDINGS

Martinez's CDCR Work History

1. Martinez was employed by CDCR as a correctional officer (CO) at VSP. He first started employment with CDCR on April 25, 1989. By virtue of his employment, Martinez is a state safety member of CalPERS.

2. On March 16, 2010, Martinez was randomly selected for a drug and alcohol test. That same day, Martinez submitted to testing at the Madera Community Hospital Laboratory in Madera, California. On March 28, 2010, the laboratory reported that Martinez tested positive for tetrahydrocannabinol (THC), a marijuana metabolite.

On April 2, 2010, Medical Review Officer (MRO) Fred J. VonStieff, MD, interviewed Martinez regarding whether Martinez had taken any prescription drugs or over-the-counter drugs, undergone any medical procedures, or ingested specific types of food. Following that interview, on April 5, 2010, Dr. VonStieff concluded that there was no alternative explanation for the positive THC test and verified the test result. Martinez declined an opportunity to have his sample sent to a second laboratory for reconfirmation.

3. On April 19, 2010, VSP Warden Velda Dobson Davis issued a Notice of Adverse Action (NAA), which Martinez received on April 20, 2010. The NAA sought to discipline Martinez for the positive THC result, which violated CDCR's rules and

regulations, including its substance abuse policy. The proposed discipline was Martinez's dismissal from VSP and CDCR, effective at the close of business on April 27, 2010. The NAA advised Martinez of his rights to a *Skelly* hearing¹ with CDCR and file an appeal to the State Personnel Board (SPB).

4. On April 23, 2010, Martinez signed and submitted an application for service retirement to CalPERS. Martinez retired for service effective April 26, 2010, and has been receiving his service retirement benefits since.

5. On April 26, 2010, a *Skelly* hearing was conducted at which Martinez appeared, represented by counsel. Martinez explained that he had attended a party where he consumed some cookies and a few beers. He heard from others at the party that the cookies had "something in them," but by then he had already eaten several. He never felt any effect from the cookies. Martinez indicated that he wanted to leave state service with a "clear name."

6. On April 26, 2010, following the *Skelly* hearing, the proposed adverse action of dismissal was sustained, with an effective date of April 27, 2010. However, because Martinez service retired effective April 26, 2010, personnel records currently reflect his "separation type" as "retirement."

¹ A *Skelly* hearing is a pre-disciplinary hearing with the state employee's appointing power, as required by the California Supreme Court's decision in *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

7. On August 23, 2011, the SPB dismissed Martinez's appeal from the NAA and related dismissal.² The SPB concluded that it lacked jurisdiction, because Martinez had retired from state service on April 26, 2010, prior to the NAA's April 27, 2010 effective date. Martinez did not appeal or seek further review of the SPB's decision, which became final.

Martinez's IDR Application

8. On December 21, 2016, Martinez signed and submitted an application for IDR to CalPERS (IDR Application). The IDR Application alleged disability on the basis of orthopedic (knees and feet) conditions.

9. On March 14, 2017, Anthony Suine, Chief of CalPERS' Benefit Services Division, notified Martinez that he was ineligible to apply for IDR, because Martinez had been dismissed from state employment and thus "left employment for reasons which were not the result of a disabling medical condition." Consequently, Martinez's IDR Application was cancelled. By letter dated June 29, 2017, Martinez appealed CalPERS' determination.

10. On June 15, 2020, Keith Riddle, Chief of CalPERS' Disability and Survivor Benefits Division, filed the Statement of Issues for purposes of the appeal. The matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

² The record does not indicate when Martinez had filed an appeal with the SPB.

Martinez's Evidence

11. Martinez testified and offered evidence concerning: (1) the NAA; and (2) his medical history, election to retire for service, and reasons for later pursuing IDR. Each category of evidence is addressed separately below.

THE NAA

12. Martinez has worked for CDCR for 21 years, without any work discipline. In his final performance evaluation as a CO, dated January 31, 2010, he received an "above standard" overall rating. Additionally, he had been drug tested annually for many years, and never tested positive for any drugs or alcohol prior to March 2010.

13. Martinez admitted attending a party on Saturday, March 13, 2010, but denied consuming any marijuana at the party. Although there had been "contaminated cookies" at that party, Martinez found out that those were in a separate area of the party and were not the cookies that he had consumed.

14. Martinez believes his March 16, 2010 drug test was improper for two reasons:

First, he should not have been required to submit to random drug testing, because the "Substance Abuse Program and Testing Policy - Bargaining Unit 6 Correctional Peace Officer Random Testing" states: "Effective April 15, 1998, all newly hired Bargaining Unit 6 (BU 6) Peace Officers and reinstated Peace Officers with a break in service of more than twelve months, will be subject to random drug and alcohol testing." Because Martinez was hired prior to April 15, 1998, he contends he should not have been required to drug test in the first instance.

Second, Martinez claims that the laboratory tested the wrong employee's sample. Martinez submitted his own copy of the drug testing custody and control form, which listed a Specimen ID Number of 32421282, the name "Charlie Martinez," and an Employee ID Number ending in 6307. He compared that to the drug test results offered by CalPERS, which listed an identical Specimen ID Number of 32421282, the name "Charlie Martinez," but a different Employee ID Number ending in 9078.

15. Martinez did not raise the alleged drug testing improprieties at his *Skelly* hearing, because he had already retired. He attended the *Skelly* hearing only because he was "curious to see what they were going to do."

16. After the *Skelly* hearing, Martinez filed for unemployment benefits with the EDD. The EDD found that Martinez was not disqualified for unemployment benefits on the alleged basis that he was discharged for misconduct. That finding was based on CDCR's failure to appear at an EDD hearing and provide information proving misconduct.

MARTINEZ'S MEDICAL HISTORY, ELECTION TO RETIRE FOR SERVICE, AND REASONS FOR PURSUING IDR

17. Martinez has suffered from right foot plantar fasciitis since July 29, 1999; left foot plantar fasciitis since May 27, 2007; and a right knee medial meniscus tear since October 29, 2008. Martinez explained that those conditions resulted from work-related injuries sustained during cell searches and while responding to prison alarms. In April 2009, Martinez also developed pain and swelling in his left leg and knee, which required physical therapy and several weeks off work. However, in either late September or early October 2009, he returned to full-duty work, because there were "no more excuses from the doctor not to work." Although Martinez continued to

experience pain in his knees and feet, he worked consistently with no further absences until April 2010, when he retired for service.

18. Martinez testified that his decision to retire for service was unrelated to the NAA. He decided to retire for service in December 2009, long before issuance of the NAA, and picked up the required paperwork from CalPERS just after Christmas Day of 2009. In late January or early February 2010, he turned in the completed paperwork to CalPERS. However, CalPERS staff informed Martinez that his ex-wife also had to sign the paperwork, because their divorce proceedings were still pending at the time. After some delay, his ex-wife agreed, and they both signed and submitted the paperwork to CalPERS on April 23, 2010.

19. When Martinez retired for service in April 2010, he believed that he could no longer perform CO work. He did not apply for IDR at the time, because he "did not know it existed." However, in late 2016, after he learned about IDR and gathered more medical evidence from his pending worker's compensation matters, he applied for a change to IDR.

20. In support of his IDR Application, Martinez offered the following evidence:

(a) A December 11, 2012 Orthopedic Agreed Medical Re-Evaluation report from Craig R. MacClean, M.D., who examined Martinez for purposes of his worker's compensation claims. Dr. MacClean noted that "no medical reports whatsoever" post-dating November 10, 2009 were available for review. However, based on Dr. MacClean's physical examination in December 2012, he assessed work restrictions of "no prolonged walking over any uneven ground, no repetitive climbing, and no jumping."

(b) A February 7, 2018 Comprehensive Agreed Medical-Legal Evaluation report from Peter J. Mandell, M.D., who examined Martinez for purposes of his worker's compensation claims. Based on his review of Martinez's medical records and a physical examination, Dr. Mandell opined that Martinez could not return to his former job as a CO and should not be on his feet for more than half an hour, run, walk on hard surfaces, or lift more than 10 or 20 pounds. Dr. Mandell further noted that such permanent restrictions probably started "six months after he last worked, which would make it 10/25/10."

(c) A March 12, 2020 decision by the SSA that Martinez had been "under a disability as defined in the Social Security Act since January 30, 2012, the alleged onset date of disability....."

21. Martinez enjoyed working as a CO and "would love to return to work." However, he does not believe his medical conditions would permit a return to work. According to Martinez, CalPERS' improper denial of his IDR application has delayed the benefits to which he is entitled by years. The "debacle" also cost him "years of stress and anxiety, defamation of character, and tarnished [his] long standing and positive career with CDCR."

Analysis

APPLICABLE LAW

22. Government Code section 21154 provides the following with respect to disability retirement applications:

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. . . .

23. However, if 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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed.” (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1297, 1307 [*Haywood*].) For a dismissal for cause to be preemptive of an otherwise valid claim for disability retirement, the right to a disability retirement must have matured prior to the dismissal. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206 [*Smith*].) A right to disability retirement matures “when there is an unconditional right to immediate payment.” (*Ibid.*) Additionally, based on principles of equity, an employee’s right to a disability retirement may be deemed matured under appropriate circumstances, such as if resolution of the claim was delayed

through no fault of the dismissed employee or a favorable decision “would have been a foregone conclusion.” (*Id.* at pp. 206-207.)

24. For purposes of applying *Haywood* and *Smith*, an employee is deemed dismissed for cause even if the employee resigns or retires for service prior to the effective date of the dismissal. (*In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland* (2015) CalPERS Prec. Dec. No. 16-01 [*MacFarland*].) That is because an employee’s relationship with his employer is severed when the NAA is served on the employee. (*Ibid.*)

WAS MARTINEZ DISMISSED FOR CAUSE?

25. Martinez was served with the NAA on April 20, 2010. The NAA indicated that he would be dismissed effective April 27, 2010. Even though Martinez retired for service on April 26, 2010, and his personnel records currently reflect a retirement separation, *MacFarland* dictates that the employment relationship was severed on April 20, 2010, when Martinez was served with the NAA. Stated differently, Martinez would have been terminated on April 27, 2010, but for his voluntary retirement for service the previous day. Consequently, for purposes of applying *Haywood* and *Smith*, Martinez was dismissed for cause.

26. Martinez’s arguments challenging the legitimacy of his drug test results or the requirement to submit to drug testing are untimely. Such arguments should have been raised in Martinez’s appeal of the NAA to the SPB. Instead of pursuing such an appeal, Martinez elected to retire for service, thereby depriving SPB of jurisdiction over the appeal. Similarly, this court now lacks jurisdiction to revisit the propriety of a final, over-a-decade-old disciplinary decision in the context of Martinez’s appeal concerning IDR benefits.

27. Finally, any determination by the EDD concerning Martinez's eligibility for unemployment benefits is irrelevant to a determination of his eligibility for IDR. Whether CDCR failed to present evidence of dismissal for cause in another proceeding, before a different state agency, involving a different benefits scheme, does not govern CalPERS' determination of Martinez's IDR Application.

IS MARTINEZ INELIGIBLE FOR IDR UNDER *HAYWOOD AND SMITH*?

28. Because Martinez was dismissed for cause, he is ineligible for IDR unless his dismissal: (1) was the ultimate result of a disabling medical condition; or (2) preempted an otherwise valid claim for disability retirement. Here, the evidence does not support either exception.

29. There is no evidence that Martinez was dismissed as a result of a disabling medical condition. Indeed, the NAA was issued solely based on Martinez's positive drug test.

30. Additionally, the evidence does not establish that Martinez's dismissal preempted an otherwise valid claim for disability retirement. More specifically, the evidence does not show that Martinez had a matured right to disability retirement, i.e., an unconditional right to immediate payment, prior to his dismissal.

Martinez was cleared for full duty by his doctors and worked consistently from late September or early October 2009 until April 2010, when he retired for service a day before his dismissal's effective date. No application for IDR was filed, let alone granted by CalPERS, prior to the dismissal. Additionally, the subsequent opinions of Drs. MacClean and Mandell, and the SSA's decision, at best show that Martinez may have become disabled at some point *after* his dismissal. Thus, on this record, it is not a

foregone conclusion that Martinez had a matured right to a disability retirement prior to his dismissal.³

31. In sum, Martinez is ineligible for IDR under *Haywood* and *Smith*. As such, his IDR Application was properly cancelled.

LEGAL CONCLUSIONS

1. CalPERS has the burden of proving by a preponderance of the evidence that Martinez is ineligible to apply for IDR under *Haywood*, *Smith*, and *MacFarland*. (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"]; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

2. Government Code section 21154 provides the following with respect to disability retirement applications:

³ Nothing in this Decision should be construed as making any binding determinations concerning the medical evidence or substantial incapacity. Discussion of the medical evidence is for the limited purpose of explaining why the medical evidence presented by Martinez does not unequivocally show that his right to a disability retirement should be deemed to have matured prior to his dismissal under principles of equity.

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. . . .

3. Based on the Factual Findings as a whole, and specifically, Factual Findings 22 through 31, Martinez is ineligible for IDR under the holdings in *Haywood*, *Smith*, and *MacFarland*. Thus, his IDR application was properly cancelled.

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ORDER

The appeal of respondent Charlie Martinez is DENIED. CalPERS' decision to cancel Martinez's application for industrial disability retirement is AFFIRMED.

DATE: February 11, 2021

Wim van Rooyen
Wim van Rooyen (Feb 11, 2021 09:17 PST)

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings