

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Statement of Issues Against:

JASON J. BEMOWSKI, Respondent

and

CITY OF CHINO, Respondent.

Agency Case No. 2020-0160

OAH No. 2020070063

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on July 26, 2021, in Los Angeles, California.

Dustin Ingraham, Staff Attorney, represented Keith Riddle (complainant), Chief, Disability and Survivor Benefits Division, Board of Administration (Board), California Public Employees' Retirement System (CalPERS).

Abraham L. Niman, Attorney at Law, represented Jason J. Bemowski (respondent).

Respondent City of Chino (City) did not appear at the hearing, even though it was properly served with a Notice of Hearing. Therefore, this matter proceeded as a default hearing against the City pursuant to Government Code section 11520, subdivision (a).

Oral and documentary evidence was received. The record remained open until August 23, 2021, for both parties to submit simultaneous closing briefs, and until September 7, 2021, for reply briefs, if any.

On July 30, 2021, CalPERS and respondent, by stipulation, waived written closing briefs. The record was closed, and the matter was submitted for decision on the same date.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant filed the Statement of Issues in his official capacity.
2. CalPERS is the state agency responsible for the administration of the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq.
3. The City is a local agency that contracts with CalPERS for retirement benefits for its eligible employees. The City is subject to the provisions of the PERL.
4. Respondent was employed by the City as a Police Officer, effective December 24, 2001. By virtue of his employment, respondent became a local safety member of CalPERS subject to Government Code sections 21154 and 21156.

5. On April 3, 2019, CalPERS received respondent's application for industrial disability retirement (IDR) dated the same date. In his application, respondent claimed disability on the basis of left and right shoulder dislocations/back injury.

6. In a letter dated December 4, 2019, CalPERS notified respondent and the City of its determination to cancel respondent's IDR application. CalPERS asserted that respondent's IDR application is barred by operation of law based on *Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292 (*Haywood*), *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*), *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Decision 13-01 (*Vandergoot*), and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland* (2016) CalPERS Precedential Decision 16-01 (*MacFarland*). The denial letter stated in relevant part:

We have determined that your employment ended for reasons which were not related to a disabling medical condition. Therefore, you are not eligible for disability retirement. For that reason, CalPERS cannot accept your application for disability retirement.

(Ex. 6, PERS 50.)

7. On December 30, 2019, CalPERS received respondent's letter requesting an appeal of the denial. This hearing ensued.

Termination of Respondent's Employment

8. In January 2019, the Roseville Police Department initiated a criminal investigation of respondent based on an allegation that on December 23, 2018,

respondent engaged a minor to perform acts of prostitution.¹ After a two-month investigation, on March 7, 2019, respondent was arrested and booked at San Bernadino County Central Jail for violations of Penal Code sections 261.5, subdivision (a), unlawful sexual intercourse with a minor, and 647, subdivision (b), prostitution.

9. Prior to his arrest on March 7, 2019, the City served respondent with a Notice of Relief from Duty. This Notice stated, in relevant part:

You are immediately relieved from duty as a City employee and pending the results of an investigation for acts, or failures to act, which may be grounds for disciplinary action. The relieving of an employee from duty is not a disciplinary action. You will be on a Leave of Absence, with pay, for purposes of salary, benefits and service time, until further notice.

(Ex. 9-1, PERS 67.)

10. On March 11, 2019, the City issued a memorandum advising respondent that he was the subject of a personnel complaint. This memorandum notified respondent: "[T]he investigation being conducted concerning allegations that you have engaged in conduct that, if found true, could violate sections of the Chino Police

¹The factual findings regarding the City's investigation of respondent are based on an Investigative Summary (Ex. 9-6), which was received into evidence not for the truth of the matter asserted, but only to show the events leading to the City's termination of respondent.

Department Operations Manual....." (Ex. 9-2, PERS 69.) Respondent acknowledged receipt of this memorandum on March 13, 2019.

11. On March 11, 2019, respondent filed a workers' compensation claim against the City, asserting that he had suffered dislocated shoulders and lower back pain since October 2002. (Ex. 9-3, PERS 73.)

12. On April 3, 2019, respondent signed and filed an IDR application, which was received by CalPERS on the same date. (Ex. 5.) In his IDR application, respondent claimed disability on the basis of left and right shoulder dislocations/back injury, and he noted that Arrowhead Orthopedics was his treating physician. (*Id.* at PERS 37.)

13. On September 17, 2019, the City's Chief of Police issued a Notice of Intent to Discipline (Notice of Intent), advising respondent of the City's intent to terminate his employment. This Notice of Intent stated eight separate alleged grounds for discipline, six of which were sustained. The sustained grounds included violations of Chino Police Department Manual policies regarding conduct, performance, and discriminatory conduct. The Notice of Intent cited respondent's alleged commission of criminal sex acts with a minor on December 23, 2018, and respondent's alleged inappropriate communications with other Chino Police Department personnel as acts in support of the proposed termination. (Ex. 9-4.)

14. On October 1, 2019, the City's Chief of Police issued a Notice of Discipline, which stated, in part:

On September 17, 2019, I issued you a Notice of Intent to Discipline wherein I informed you of my intent to terminate you from your position. You received this notice on September 17, 2019. The Notice of Intent contained the

specific grounds and bases for the issuance of this level of discipline. Additionally, the Notice provided you with information on how to exercise your procedural rights pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. At your request, the *Skelly* meeting was scheduled for October 1, 2019. On September 30, 2019, your attorney, Mr. Goldwasser informed me via email that you would not be appearing for the prescheduled October 1, 2019 *Skelly* meeting. As a result, you have waived your right to appeal at the *Skelly* level. Therefore, please consider this notice of the Department's decision to sustain the termination, effective today October 1, 2019.

(Ex. 9-5)

15. Nancy Franklin, police sergeant at the Chino Police Department, Professional Standards Unit, submitted an affidavit stating that respondent was permanently separated from the City effective October 1, 2019. Sergeant Franklin further declared that the City's decision to terminate respondent was based entirely on the Notice of Intent and its supporting facts. She reiterated that the City "did not terminate [respondent] as a result of any alleged disabling medical condition, or to prevent or preempt [respondent] from filing a claim for disability retirement." (Ex. 9, PERS 64.)

16. In considering respondent's IDR application, CalPERS reviewed the *Haywood* and *Smith* cases and found that respondent was terminated for cause and that his termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. Thus, in a letter

dated December 4, 2019, CalPERS notified respondent and the City of its determination to cancel respondent's IDR application under *Haywood* and *Smith*. (Ex. 6.)

Respondent's Evidence

17. Since January 2001, respondent has been employed as a police officer for the City, starting as a cadet and moving up the ranks to sergeant. Respondent claimed that he sustained injuries to his left and right shoulders in 2002 during training. He reported that in 2015, his left shoulder was injured again when he dislocated the shoulder during a foot chase. Respondent testified that he also suffers from back injuries. According to respondent, he spoke with the City's Human Resources (HR) department about these injuries and attempted to apply for IDR on March 8, 2019. However, the City's HR department misinformed him, and respondent believed that only the City could initiate the IDR process for him. Sometime in April 2019, respondent realized that he could apply for IDR on his own, and he submitted his IDR application to CalPERS on April 3, 2019.

18. Respondent presented a treating physician's report from Arrowhead Orthopedics, showing that he was evaluated as a patient on May 9 and June 12, 2019, for left shoulder instability, right shoulder rotator tendinitis, and for low back pain. (Ex. C.) This report indicates that the date of respondent's injury was March 7, 2018.

19. Respondent emphasized that on March 7, 2019, he was placed on administrative leave, which is not a disciplinary action. During his administrative leave, respondent received his pay and benefits, and he also made contributions towards his CalPERS benefits. Respondent testified that he did not receive the Notice of Intent until September 17, 2019, more than five months after he submitted his IDR

application to CalPERS on April 3, 2019. Respondent's employment with the City was terminated on October 1, 2019, but he has appealed the termination.

Issue on Appeal

20. The issue on appeal is whether respondent is eligible to apply for IDR based on an orthopedic (bilateral shoulders, back) condition, or whether his eligibility for IDR is precluded by operation of *Haywood* and *Smith*.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) In this case, respondent has the burden of establishing by a preponderance of the evidence that he is eligible to apply for IDR. Respondent has met this burden.

Statutory Framework

2. Government Code section 21152 identifies 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 that an IDR application “[s]hall 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.....”

Case Law

4. CalPERS contends that under *Haywood* and *Smith*, the controlling date for determining eligibility to apply for IDR is the date of the underlying conduct giving cause for respondent’s dismissal. Accordingly, respondent lost his right to apply for an IDR application after December 23, 2018, the date on which respondent allegedly engaged a minor in acts of prostitution. Respondent, however, contends that *Haywood* and *Smith* do not apply in this case because he filed his IDR application on April 3, 2019, while he was placed on administrative leave, which does not constitute termination, and he was not terminated for cause until October 1, 2019. CalPERS’ argument is not convincing as it misreads the applicable case law in this matter.

5. In *Haywood*, a firefighter applied for disability retirement after he was terminated for cause following a series of increasingly serious disciplinary actions against him. (*Haywood, supra*, 67 Cal.App.4th at p. 1295.) *Smith* involved a firefighter who filed a backdated application for disability retirement on the effective date of the termination of his employment. (*Smith, supra*, 120 Cal.App.4th 194 at p. 198.) The

central holding in *Haywood* and *Smith* is that the termination of a member's employment for cause, where the dismissal is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, renders the member ineligible for disability retirement. (*Haywood, supra*, 67 Cal.App.4th at pp. 1306-1307 ["[A] firing for cause constitute[s] a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement — the potential reinstatement of [the employment relationship] if it is ultimately determined that he no longer is disabled"]; *Smith, supra*, 120 Cal.App.4th at p. 208 [employee's "dismissal for cause . . . extinguished his right to a disability retirement"].)

6. The CalPERS precedential decisions, *Vandergoot* and *MacFarland*, extend the holding in *Haywood* and *Smith* to situations where the employee resigns or retires before the effective date of the termination for cause. In *Vandergoot*, the Board found an employee's resignation was tantamount to a dismissal for cause when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and he agreed to waive all rights to return to his former employer. (*Vandergoot, supra*, CalPERS Precedential Decision 13-01 at p. 7, ¶ 18.) In *MacFarland*, the employee retired two days before his termination for cause became effective. He subsequently filed an application for disability retirement. CalPERS denied the employee's disability retirement application, asserting that the employee had been terminated for cause. The Board upheld the denial, noting that the employer-employee relationship had been severed upon the service of a Notice of Adverse Action, prior to the filing of the employee's disability retirement application. (*MacFarland, supra*, CalPERS Precedential Decision 16-01 at p. 8, ¶ 29.)

7. Contrary to CalPERS' assertion, none of these cases provide that the controlling date for determining eligibility to apply for IDR is the date of the underlying conduct giving cause for an employee's dismissal. The court in *Smith* specifically states:

Neither the facts nor the briefing in the present case require us to decide whether the event extinguishing a right to a disability retirement is the effective date of the dismissal, the date of the decision to dismiss the employee, or the date of the underlying conduct giving cause for the dismissal.

(*Smith, supra*, 120 Cal.App.4th at p. 208, fn. 11.)

8. Furthermore, none of these cases, *Haywood, Smith, Vandergoot*, and *MacFarland*, involved an employee, such as respondent, who filed for IDR while on administrative leave, but months before he was even notified of the City's intent to dismiss him for cause. The employees in the *Haywood* line of cases all applied for IDR *after* they were terminated for cause or received a notice of termination for cause. The facts of this case, where respondent applied for IDR while he was on administrative leave, are analogous to those in another disability retirement case, *Willens v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 451 (*Willens*). In *Willens*, a judge ran unopposed in the primary for a new term on the San Joaquin County Superior Court starting January 1971. (*Id.* at p. 453.) In June 1970, a grand jury indicted the judge for bribery, which suspended him automatically from office with pay. (*Ibid.*) A write-in candidate defeated him in the November 1970 general election, and the judge filed for a disability retirement on the same day before the end of his term. (*Ibid.*) The judge also provided evidence that he suffered physical and emotional

disabilities at the time of his disability retirement application. (*Id.* at p. 455.) The Commission on Judicial Qualifications denied the judge's application based on his suspension from office. (*Id.* at p. 454.) However, the Supreme Court held that the judge's suspension from office did not include a forfeiture of salary until his conviction was final, and his salary included his disability benefits. (*Id.* at pp. 453, 456, 458–459.) The Supreme Court also noted that if it concluded that the judge was to be deprived of the benefits of a disability retirement pending the outcome of his criminal case, such a holding "would ignore the fundamental precept that an accused is presumed innocent until proven guilty." (*Id.* at p. 456.)

9. The Court of Appeal in *Smith* distinguished the facts of its case from *Willens*, noting that the firefighter in *Smith*, unlike the judge in *Willens*, was not suspended, but terminated, from his job at the time he applied for a disability retirement. (*Smith, supra*, 120 Cal.App.4th at p. 205.) The Court of Appeal further stated, "The principles in *Willens* otherwise involve the subject we took pains to exclude from our holding in *Haywood*: a party otherwise entitled to a disability retirement before a dismissal for cause." (*Id.* at p. 205.)

10. In this case, at time of the filing of his IDR application (April 3, 2019), respondent was not terminated from his employment. He was not notified of the City's intent to dismiss him until almost six months later, on September 17, 2019, and he was terminated for cause effective October 1, 2019. At the time of respondent's filing of the IDR application, he was relieved from his duties and placed on a leave of absence or administrative leave, which is similar to, although less severe in nature than, the suspension received by the judge in *Willens*. According to the City's Notice of Relief from Duty, placing respondent on administrative leave is not considered a disciplinary action, and he received his salary, benefits, and service time. (Factual Finding 9.) Like

the judge in *Willens*, respondent paid into the CalPERS system while he was on administrative leave, and his salary and benefits included his disability benefits. Respondent also presented evidence from Arrowhead Orthopedics of his disability antedating his application. (Factual Findings 17 and 18.) Additionally, applying the reasoning of the court in *Willens*, if respondent were to be deprived of his disability benefits while he was placed on administrative leave, pending the outcome of his personnel complaint, such a conclusion would violate the fundamental principle that respondent cannot be presumed to be guilty of the underlying conduct until the personnel complaint was completed.

Disposition

11. Because the placement of respondent on administrative leave does not constitute termination, respondent, like the judge in *Willens*, is a party otherwise entitled to a disability retirement before a dismissal for cause. The facts of this case warrant its exclusion from the holding in *Haywood*,² and respondent’s IDR application is not barred by operation of law-based *Haywood* and *Smith*.

² As in *Smith*, the facts of this case do not require a determination of whether the event extinguishing a right to a disability retirement is the effective date of the dismissal, the date of the decision to dismiss the employee, or the date of the underlying conduct giving cause for the dismissal. (*Smith, supra*, 120 Cal.App.4th at p. 208, fn. 11.)

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ORDER

The appeal of respondent Jason J. Bemowski's is granted. Respondent is not barred from applying for disability retirement by operation of *Haywood* and *Smith*.

DATE: 08/26/2021

Ji-Lan Zang

JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings