

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Amended Statement of Issues Against:

AARON M. PEREZ,

Respondent,

and

DEPARTMENT OF STATE HOSPITALS ATASCADERO,

Respondent.

Agency Case No. 2021-0248

OAH Case No. 2021080058

PROPOSED DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on January 27, 2022. Charles H. Glauberman, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS). Bradley Stevens, Attorney at Law, represented respondent Aaron M. Perez, who was present. No one appeared and represented respondent Department of State Hospitals Atascadero (DSH-A).

Perez appeals a CalPERS determination denying his Disability Retirement Election Application for an industrial disability retirement. The sole issue for determination is whether Perez is precluded from filing the application having entered a stipulated settlement agreeing to resign from his employment with DSH-A for personal reasons.

Testimony and documents were received in evidence. The record closed and the matter was submitted for decision at the conclusion of the hearing. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order denying Perez's appeal and affirming CalPERS's denial of the application. Perez's resignation is tantamount to a termination of employment, thereby extinguishing his right to apply for a disability retirement.

FACTUAL FINDINGS

Jurisdictional Matters

1. On June 30, 2020, Perez filed a Disability Retirement Election Application with CalPERS.
2. By letter dated February 3, 2021, CalPERS informed Perez he was found not eligible for disability retirement benefits and denied his application.
3. Perez timely requested a hearing appealing CalPERS's denial of his application for disability retirement benefits.
4. On July 11, 2021, in its official capacity, CalPERS filed a Statement of Issues.

5. On January 24, 2022, in its official capacity, CalPERS filed an Amended Statement of Issues.

6. All jurisdictional requirements are satisfied.

Background

7. DSH-A is a maximum security forensic facility for housing disordered criminal offenders. On June 4, 2001, Perez commenced employment at DSH-A, where he has held several positions, including Psychiatric Technician Trainee, Pre-licensed Psychiatric Technician, Psychiatric Technician, Psychiatric Technician (Safety), and Senior Psychiatric Technician (Safety), before ultimately becoming a Unit Supervisor (Safety) on October 1, 2018.

8. During his career, on two separate occasions, Perez left DSH-A to work at the Department of Corrections and Rehabilitation Salina Valley State Prison (SVSP)- Psychiatric Inpatient Program. Perez worked as a Medical Technical Assistant (Psychiatric) at SVSP between March 2007 and February 2013, and as a Unit Supervisor (Safety) between April 2016 and September 2018. Perez returned to DSH-A after each period of employment at SVSP.

9. Perez's duties and responsibilities as Unit Supervisor (Safety) at DSH-A included directing routine nursing activities of the unit staff; coordinating the work of a unit and working as a liaison between unit staff on different shifts; training and developing shift leads and instructing level of care nursing personnel in nursing techniques for assisting individuals to recover; maintaining good working relationships with forensic patients, visitors, and members of the treatment team; providing continuous management and supervision of a unit that offers routine and supportive nursing services; developing and maintaining effective lines of communication and

promoting positive morale; providing a safe and therapeutic environment for patients and staff assuring a uniform administration of policies and procedures at all times; and providing effective leadership and maintaining effective interpersonal relationships in order to achieve the hospital's missions and goals for performance improvement, among other things.

10. By virtue of his employment with DSH-A, Perez became a state safety member of CalPERS subject to Government Code section 21154.

Notice of Adverse Action, Stipulation for Settlement, and Disability Retirement Application

11. In June 2019, DAH-A's Equal Employment Opportunity Office received complaints against Perez alleging multiple incidents of discrimination. An investigation ensued, and investigative reports substantiating the allegations were submitted to the Executive Officer of DSH-A.

12. On June 30, 2020, Perez filed a Disability Retirement Election Application for an industrial disability retirement, in which he listed his specific disability as "Severe Anxiety Depression, PTSD, Insomnia, Fatigue, lack of motivation, nightmares, physical reaction to places, loud sounds and other things associated with assaults, Intrusive memories, nightmare that don't fade but have only increased intensity. Decreased in daily activities. Have continued to hide in my home as a safe place." (Exh. 3.)

13. At hearing, Perez testified he filed the Disability Retirement Election Application because he was the target of violent acts at DSH-A. He recounted how he was "almost thrown down a stairwell" and "almost thrown over a railing." He explained being subjected to attempted assaults and having bodily fluids thrown at him on several occasions. He also described observing incidents that have affected his ability

to work and have caused him to be "always seeking safe haven." He testified he is currently under the care of a psychotherapist.

14. On October 19, 2020, DSH-A served Perez with a Notice of Adverse Action (NOAA) dismissing him for cause from his position as a Unit Supervisor (Safety), effective the close of business on November 6, 2020. The NOAA details the multiple incidents of Perez's inappropriate physical contact with and sexual harassment of female staff between October 1, 2018 and July 1, 2019, in violation of certain state and facility policy prohibiting workplace sexual harassment. The NOAA specifies several causes for Perez's dismissal including inexcusable neglect of duty; dishonesty; discourteous treatment of public or other employees; willful disobedience; and other failure of good behavior either during or outside of duty hours, which is of such a nature that it causes discredit to the appointing authority or the person's employment.

15. Perez appealed the NOAA with the State Personnel Board (SPB).

16. On January 25, 2021, at a settlement conference, DSH-A and Perez entered a Stipulation for Settlement, in which Perez agreed to resign DSH-A effective the close of business November 6, 2020. In pertinent part, the Stipulation for Settlement provides:

1. [Perez] hereby voluntarily resigns from his position as a Unit Supervisor with [DSH-A], effective close of business November 6, 2020, for personal reasons. [Perez] agrees to waive any right to back pay that may have arisen as a result of this Stipulation for Settlement.
2. [DSH-A] accepts [Perez's] resignation effective the close of business November 6, 2020.

3. [Perez] agrees if he applies for or seeks employment with [DSH-A] in the future, that he will attach to any application a copy of this Stipulation for Settlement. Should [Perez] fail to attach this Stipulation for Settlement to his employment application, and subsequently obtain employment with [DSH-A], [Perez] agrees that [DSH-A] may summarily dismiss [Perez], [Perez] hereby waives any right to appeal that dismissal in any forum whatsoever.

4. [Perez] agrees to and hereby voluntarily withdraws, with prejudice, [his] appeal from the [NOAA], effective November 6, 2020, SPB Case No. 20-1453. [Perez] agrees not to appeal the NOAA at any time or in any forum in the future.

5. [DSH-A] agrees to withdraw the NOAA, effective November 6, 2020. [DSH-A] agrees to remove the NOAA, its attachments, any documents related to the NOAA, and any related Notice of Personnel Action (NOPA) from [Perez's] official personnel file (OPF). [DSH-A] agrees it will not place a copy of this Stipulation for Settlement or the SPB's Decision approving the settlement into [Perez's] OPF.

6. [Perez] understands and acknowledges that this Stipulation for Settlement and the SPB's Decision approving the settlement will be kept in a confidential file in [DSH-A's] Human Resources office indefinitely.

(Exh. 7.) The SPB Administrative Law Judge incorporated the Stipulation for Settlement into a Proposed Decision.

17. By letter dated February 3, 2021, CalPERS acknowledged its receipt of Perez's application for industrial disability retirement and informed Perez he was ineligible for a disability retirement benefits having voluntarily resigned in lieu of termination. In pertinent part, the February 3, 2021 letter states:

[W]e have found you are not eligible for disability retirement benefits at this time. You will not be eligible to apply for disability retirement in the future unless you return to work for a CalPERS-covered employer and subsequently become unable to perform your job duties because of a physical or mental condition.

We have determined that your employment ended for reasons which are not related to a disabling medical condition. When an employee is separated from employment as a result of disciplinary action or the employee enters into a settlement agreement where the employee chooses to voluntarily resign in lieu of termination, and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination and/or a mutual understanding of separation from employment due to a pending adverse action renders the employee ineligible to apply for disability retirement.

(Exh. 4.)

18. On February 17, 2021, the SPB adopted the Proposed Decision incorporating the Stipulation for Settlement as its Decision Approving Stipulation for Settlement in *Aaron Perez v California Department of State Hospitals, Atascadero*, case number 20-1453.

19. In a March 9, 2021 letter to CalPERS, Perez asserts, "There is no Adverse Action pending. I did not separate as a result of adverse action and I did not resign in lieu of termination but rather for personal reasons." (Exh. 5.)

20. At hearing, Perez maintained his resignation does not preclude his application for disability retirement. For reasons set forth in Legal Conclusions 1 through 16, Perez's contention is rejected. His resignation extinguished his right to apply for a disability retirement.

LEGAL CONCLUSIONS

1. The well-established purpose of public employee pension programs is to induce persons to enter and continue in public service and to provide subsistence for disabled or retired employees and their dependents. (See *Wheeler v. Board of Administration* (1979) 25 Cal.3d 600, 605.) The California Public Employees' Retirement System (PERS) Law addresses situations where a public employee requires subsistence because a medical disability incapacitates him or her from performing his or her usual duties. In those situations, the employee applies for and, if found eligible, is granted a disability retirement.

The *Haywood* Court

2. Notably, a disability retirement does not terminate the employer-employee relationship. The Third Appellate District in *Haywood v. American River Fire Protection* (1998) 67 Cal.App.4th 1292, 1305, has made clear disability retirement laws contemplate the potential reinstatement of an employer-employee relationship.

Until an employee on disability retirement reaches the age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues. ([Gov. Code,] § 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.)

3. In *Haywood*, after a series of increasingly serious disciplinary actions, the employer terminated the employee for cause. At the time of the for-cause-termination, there was no evidence of any physical or mental disability resulting in the employee's dismissal. The employee subsequently filed an application for disability retirement claiming he suffered from a major depression as a result of the disciplinary actions, from which he recovered with residual impairments, but if he were to return to work for the employer, he risked future depression should antagonisms with his supervisors recur. In other words, the employee's claimed incapacity was specific to his employer; he claimed no inability to perform his duties with other hypothetical or prospective employers.

4. The *Haywood* court first notes an employee unwilling to discharge his or her obligation of faithful performance of duty can find no succor in the disability retirement laws for they offer no “refuge from disgrace.” (*Id.*) It is absurd to provide disability retirement benefits to an employee dismissed for misbehavior. The *Haywood* court then concludes 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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed.” (*Id.* at 1307.)

5. Thus, *Haywood* articulates the general rule that a government employee loses the right to claim disability benefits when terminated for cause. *Haywood* also articulates exceptions to the general rule. First, a terminated employee may qualify for disability retirement when the employee’s disability prompted the conduct resulting in the termination. Second, termination for cause cannot preempt a valid claim for disability retirement.

6. On the facts before it, the *Haywood* court held the employee’s termination for cause severed the employment relationship, thereby rendering employee ineligible from receiving disability retirement benefits.

The *Smith* Court

7. Subsequently, in *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the Third Appellate District clarified the second exception to the general rule noting if an employee “were able to prove that a 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.” (*Id.* at 206.) The focus

of the second exception to the general rule is whether the employee had a mature right to a disability retirement before his or her separation from service.

8. The *Smith* court additionally articulated a third exception to the general rule. "Conceivably, there may be facts under which a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause." (*Id.* at 206-207.)

9. In *Smith*, the employer dismissed the employee after he failed certain remedial competency tests. The employee filed an application for a disability retirement on the effective date of his dismissal. While the disability application was pending, the dismissal of his employment was affirmed. Citing *Haywood*, CalPERS eventually denied the employee's disability claim on grounds the employer-employee relationship no longer existed. CalPERS informed the employee, "You were terminated from employment for reasons that were not the result of a disabling medical condition. Additionally, the termination does not appear to be for the purpose of preventing a claim for disability. Therefore, under the *Haywood* case, you are not eligible for disability retirement." (*Id.* at 202.) Thereafter, the employee filed a petition for a writ of mandate in Superior Court to direct the employer and CalPERS to consider the merits of his disability retirement application.

10. The *Smith* court noted the employee "did not even initiate the process [for applying for a disability retirement] until after giving cause for his dismissal" and his "medical evidence was not unequivocal" before ultimately holding the employee's dismissal defeated his right to a disability retirement. (*Id.* at 206-207.)

The *Vandergoot* Decision

11. An employee applied for disability retirement after termination for cause. The employee was denied a disability retirement because the termination was neither the result of a disabling medical condition nor preemptive of any otherwise valid claim for disability retirement. While the employee's appeal of the termination to the SPB was pending, the employee and employer entered a Stipulation and Settlement Agreement, whereby the employee agreed to resign and waive all rights to reemployment.

12. In the 2013 precedential decision titled *In the Matter of the Application for Disability Retirement of Vandergoot*, CalPERS Precedential Dec. No. 12-01, *Haywood* and *Smith* were applied to deem the employee's resignation "tantamount to a dismissal" because "a necessary requisite for disability retirement is the potential reinstatement of the employment relationship" in the event it is ultimately determined the employee is no longer disabled. (*Id.* at p. 7, ¶ 18.)

The *Martin* Court

13. An employee settled a pending cause-for-termination action by resigning and agreeing not to reapply for employment. CalPERS denied the employee's application for disability retirement. In *Martinez v. Public Employers' Retirement* (2019) 33 Cal.App.5th 1156, the employee and labor union challenged the soundness of *Haywood* and *Smith* in the First Appellate District, which was not compelled to follow those decisions because there is no horizontal stare decisis in the California Courts of Appeal. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §498, pp. 558-559.) The *Martin* court found no compelling reason "for clouding 21 years of precedent" under *Haywood* and declined to disavow *Haywood* and *Smith*. (*Id.* at pp. 1175-1176.) The

Martin court intuit the CalPERS's Board of Administration presumably bestowed the precedential designation on *Vandergoot* "because employees leaving state service with a settlement of a pending termination for cause were becoming sufficiently common to merit a statement of policy." The *Martin* court declared, "*Vandergoot* is eminently logical: resignation in these circumstances does indeed appear to be 'tantamount to a dismissal for purposes of applying the *Haywood* criteria.'" (*Id.* at 1176.)

Analysis

14. Applying *Haywood*, *Smith*, *Vandergoot*, and *Martin* to the facts and circumstances of this case, Perez has no valid claim for an industrial disability retirement. Whatever employee-employer relationship existed between Perez and DSH-A, that relationship was completely severed when Perez "voluntarily resigned from his position as a Unit Supervisor with DSH-A, effective close of business November 6, 2020, for personal reasons," as set forth in his Stipulation for Settlement with DSH-A. (Factual Finding 16 [paragraph 1]). DSH-A accepted Perez's resignation, effective November 6, 2020. (*Ibid.* [paragraph 2].)

15. Perez's voluntary resignation is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise mature or valid right to a disability retirement antedating the resignation. There was no competent medical evidence of physical or mental substantially incapacitating disability at the time of Perez's voluntary resignation. Perez possessed no right to a matured disability retirement at the time of his voluntary resignation.

16. No provision for reinstatement of Perez to his employment at DSH-A is indicated by the terms of the Stipulation for Settlement. The phrase "if he applies for

or seeks employment with [DHS-A] in the future” in the Stipulation for Settlement merely contemplates Perez entertaining the possibility of submitting an application for future employment with DSH-A and the conditions under which he may do so. Reinstatement is about restoration to a previously held position, which is distinct from applying for employment in the future. By its terms, the Stipulation for Settlement conclusively terminates or severs Perez’s employee-employer relationship with DSH-A without any recourse for reinstatement. The continuing existence of an employee-employer relationship is a necessary requisite for any claimed disability retirement. In the absence of any continuing employee-employer relationship between Perez and DSH-A after Perez’s voluntary resignation from DSH-A, Perez is precluded from applying for a disability retirement.

17. By reason of Legal Conclusions 1 through 16, Perez’s voluntary resignation from DSH-A, effective the close of business November 6, 2020, is tantamount to a dismissal precluding him from filing a Disability Retirement Election Application.

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ORDER

1. The appeal of Aaron M. Perez is denied.
2. CalPERS's determination Aaron M. Perez is ineligible to apply for an industrial disability retirement is affirmed.

DATE: 2/28/2022

Jennifer Russell

JENNIFER M. RUSSELL

Administrative Law Judge

Office of Administrative Hearings