

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:

JOSEPH A. LUJAN,

Respondent,

and

CALIFORNIA STATE PRISON –
SACRAMENTO, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2014-0400

OAH No. 2014060526

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on March 4, 2015, in Sacramento, California.

Elizabeth Yelland, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Attorney Ronald M. Metzinger of Metzinger and Associates represented respondent Joseph Lujan, who was present throughout the hearing.

No one appeared on behalf of respondent California State Prison – Sacramento, California Department of Corrections and Rehabilitation.¹

¹ Respondent California State Prison – Sacramento, California Department of Corrections and Rehabilitation was duly served with the Statement of Issues and Notice of Hearing, and this matter was called for hearing on the date and at the time and location specified in the Notice of Hearing. Therefore, this matter proceeded as a default proceeding against that respondent pursuant to Government Code section 11520, subdivision (a).

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 4-8-2015
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Evidence was received, and the record was left open for the parties to submit written closing briefs. Respondent filed his closing brief, which is marked as Exhibit E, by the specified deadline. Shortly after that deadline, CalPERS filed its closing brief and a cover letter explaining why its brief was late. Both of CalPERS's documents are marked as Exhibit 10. Respondent filed correspondence stating that he has no objection to the late filing of CalPERS's closing brief. That letter is marked as Exhibit F.

The record was closed and the matter submitted for decision on March 17, 2015.

SUMMARY

The sole issue to be decided on appeal is whether Mr. Lujan is eligible to apply for industrial disability retirement, and the answer to the following question is outcome-determinative: Can an employer dismiss a member from state service after that member has permanently separated from state service by retiring for service? The answer to that question is "no." Therefore, Mr. Lujan is eligible to apply for industrial disability retirement, and his appeal should be granted.

FACTUAL FINDINGS

Factual Background

1. Mr. Lujan began his employment as a correctional officer with California State Prison – Sacramento, California Department of Corrections and Rehabilitation in or around October 1999. He became a state safety member of CalPERS by virtue of his employment.
2. On March 14, 2013, California State Prison – Sacramento, California Department of Corrections and Rehabilitation served Mr. Lujan with a Letter of Intent notifying him that an investigation into his misconduct had been completed.
3. Mr. Lujan signed, and CalPERS received, an application for service pending industrial disability retirement on April 5, 2013. He claimed disability on the basis of an orthopedic (left knee) condition, which occurred on March 14, 2012.
4. On April 12, 2013, California State Prison – Sacramento, California Department of Corrections and Rehabilitation served Mr. Lujan with a Notice of Adverse Action. The Notice of Adverse Action stated, in part: "You are hereby notified that you are dismissed from State service in your position of Correctional Officer at California Department of Corrections and Rehabilitation (CDCR) at California State Prison Sacramento (CSPSAC)." The effective date of his dismissal was April 30, 2013.
5. Mr. Lujan retired for service, effective April 26, 2013, and has been receiving his retirement allowance since that date.

6. On April 30, 2013, Tim D. Virga, Warden of California State Prison – Sacramento, wrote the following letter to Mr. Lujan confirming his retirement:

This will confirm that you service retired from employment with the California Department of Corrections and Rehabilitation (CDCR) effective April 26, 2013.

I have reviewed the circumstances present at the time of your retirement and have determined that your retirement was “under unfavorable circumstances.” Should prospective employers contact the CDCR and request the circumstances of your retirement, the above information shall be relayed to them (Labor Code §1053).

If you should apply for or accept employment or re-employment with Prison Industry Authority (PIA), Department of Corrections and Rehabilitation (CDCR), Youth and Adult Correctional Agency (YACA), and/or Board of Parole Hearings (BPH), CSP-Sacramento would seek to reinforce the Adverse Action which was pending at the time your retirement occurred.

In addition, a copy of this letter will be placed in your Official Personnel File.

7. On November 5, 2013, Anthony Suine, Chief of the Benefit Services Division of CalPERS, wrote a letter to Mr. Lujan canceling his application for industrial disability retirement. Mr. Suine wrote, in pertinent part:

Following a review of your application and file, it has been determined that the facts of your case fit within the *Haywood* case. You were dismissed from employment for reasons which were not the result of a disabling medical condition. Additionally, the dismissal does not appear to be for the purpose of preventing a claim for disability retirement. Therefore, under the *Haywood* case, you are not eligible for disability retirement. For that reason, CalPERS cannot accept his application for disability retirement.

The application has been canceled. 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.

8. Mr. Lujan timely appealed CalPERS's cancellation of his application for disability retirement.

9. On May 19, 2014, Mr. Suine, acting solely in his official capacity, signed the Statement of Issues in this matter. The sole issue to be determined on appeal is whether Mr. Lujan is eligible to submit an application for disability retirement.

Application of Haywood, Smith, and Vandergoot

10. CalPERS contends that this matter is controlled by the appellate decisions in *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*), as well as the precedential decision *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (Precedential Decision 13-01) (*Vandergoot*). According to CalPERS, those three decisions support its conclusion that Mr. Lujan's dismissal from state service renders him ineligible for industrial disability retirement benefits.

11. In *Haywood*, the employee "was terminated for cause following a series of increasingly serious disciplinary actions against him. After his discharge, the employee applied for disability retirement, claiming that stress from the disciplinary actions caused him to suffer a major depression, which rendered him incapable of performing his usual duties with the [employer]." (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. 1295.) The appellate court concluded that the employee was not entitled to disability retirement, stating the following:

As we shall explain, there is an obvious distinction in public employment retirement laws between an employee who has become medically *unable* to perform his usual duties and one who has become *unwilling* to do so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. Nor are they intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. In addition, while termination of an unwilling employee for cause completely severs the employer-employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled.

In this case, Haywood challenged his employer's authority and lost when, after a series of disciplinary actions, he was terminated for cause. The behavior which resulted in Haywood's firing – his unwillingness to faithfully perform his duties – was not caused by a physical or mental condition, and

Haywood had no valid claim for disability retirement which could've been presented before he was fired.

Haywood's firing for cause 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 no longer is disabled. Moreover, to award Haywood a disability pension would interfere with the District's authority to discipline recalcitrant employees. Such an award in effect would compel the District to pension-off an employee who has demonstrated unwillingness to faithfully perform his duties, and would reward Haywood with early retirement for his recalcitrance. In other words, granting Haywood disability retirement would override Haywood's termination for cause despite his inability to set aside determination through the grievance process.

It follows that where, as here, 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.

(*Id.* at pp. 1296-1297; italics original; footnote omitted.)

12. Here, Mr. Lujan was never terminated by California State Prison – Sacramento, California Department of Corrections and Rehabilitation. While the process to terminate his employment had begun, the effective date of his service retirement (April 26, 2013) occurred prior to the effective date of the termination of his employment (April 30, 2013). Warden Virga acknowledged as much in his April 30, 2013 correspondence to Mr. Lujan. And since Mr. Lujan's service retirement constituted a permanent separation from state service (see, Cal. Code Regs., tit. 2, §§ 446; 599.826), there was no "State service" from which the Notice of Adverse Action could dismiss him, effective April 30, 2013. Accordingly, the decision in *Haywood* is inapposite.

13. In *Haywood*, the appellate court made it clear that its holding does not apply to those instances where a disabling condition is the cause for termination or the termination would preempt "an otherwise valid claim for disability retirement." (*Haywood v. American River Fire Protection District*, *supra*, 67 Cal.App.4th at p. 1307.) The appellate court in *Smith* analyzed this exception. (*Smith v. City of Napa*, *supra*, 120 Cal.App.4th at pp. 205-208) Therefore, for the same reasons that *Haywood* is not applicable, *Smith* is not applicable either.

14. In *Vandergoot*, the employee applied for industrial disability retirement after he had been served with a Notice of Adverse Action notifying him that his employment was being terminated, but before he appealed the termination to the State Personnel Board. While his appeal was pending before the State Personnel Board, the employee and his employer reached a settlement agreement, whereby the employer agreed to withdraw the Notice of Adverse Action in exchange for the employee's agreement to resign and not to seek, transfer to, apply for, or accept any employment in any capacity with his employer at any time in the future. CalPERS determined that the employee was ineligible for disability retirement because he was terminated for cause and the termination was neither the ultimate result of a disabling medical condition nor preemptive in any otherwise valid claim for disability retirement. The employee appealed that decision.

In denying the employee's appeal, the Administrative Law Judge concluded that the applicability of *Haywood* does not depend on whether the employee's employment was terminated for cause or was terminated pursuant to a written agreement whereby the employee voluntarily resigned and permanently waived any future right to reinstatement or reemployment.

15. Mr. Lujan's service retirement did not foreclose the possibility of future reinstatement. An employee who has retired for service may be reinstated under certain circumstances. (Gov. Code, § 21190 ["A person who has been retired under this system for service may be reinstated from retirement by the board as provided in this article, and thereafter may be employed by the state or by a contracting agency in accordance with the laws governing that service, in the same manner as a person who has not been so retired."]) Therefore, the decision in *Vandergoot* is inapposite.

Respondent's Arguments Are Moot

16. Respondent argued that the termination of his employment with California State Prison – Sacramento, California Department of Corrections and Rehabilitation was effectuated in a manner that violated his rights under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). He also argued that since his termination was invalid, he still retains all appellate rights if and when his employment is in fact terminated. Those arguments are moot in light of the above findings that Mr. Lujan retired for service, effective April 26, 2013, and there was no "State service" for the Notice of Adverse Action to dismiss him from on April 30, 2013.

LEGAL CONCLUSIONS

1. Government Code section 21152 provides, 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.

2. Government Code section 21154 provides the following deadlines by which a member must file his application for disability retirement benefits:

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.

3. Mr. Lujan filed his application for service pending industrial disability retirement on his own behalf while still in state service. (Factual Findings 3 through 5.)

4. The termination for cause of a member's employment renders him ineligible for disability retirement so long as his termination is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1297.) The appellate court explained that termination for cause "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. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the same appellate court reiterated the principles of the *Haywood* decision. The court further explained that a disability claim must have "matured" in order to find that a disciplinary action preempts the right to receive a disability retirement pension, and this maturation does not occur at the time of the injury, but rather when the pension board determines that the employee is no longer capable of performing his duties. (*Id.* at p. 206.) The *Smith* court further allowed

consideration of equitable principles to “deem an employee’s right to a disability retirement to be matured and thus survive a dismissal for cause.” (*Id.* at p. 207.)

6. The Administrative Law Judge in *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (Precedential Decision 13-01) concluded that the principles of the *Haywood* decision apply when a member's termination for cause is withdrawn in exchange for his resignation and permanent waiver of future reinstatement. The Administrative Law Judge 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.


7. Mr. Lujan's employment with California State Prison – Sacramento, California Department of Corrections and Rehabilitation was never terminated. Instead, he separated from state service when he retired for service, effective April 26, 2013. (Factual Findings 4 and 5.) Therefore, *Haywood*, *Smith*, and *Vandergoot* are inapposite.

8. No cause exists to uphold CalPERS’s determination that respondent is not eligible to file an application for industrial disability retirement for all the reasons discussed above.

ORDER

The appeal of Joseph A. Lujan to be granted the right to file an application for industrial disability retirement is GRANTED.

DATED: April 3, 2015


COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings