

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:

SCOTT A. CASADONA,

Respondent,

And

CALIFORNIA STATE UNIVERSITY, SAN
MARCOS

Respondent.

Case No. 2013-0740

OAH No. 2014010082

PROPOSED DECISION

Alan S. Meth, Administrative Law Judge, State of California, Office of
Administrative Hearings, heard this matter on November 10, 2015, in San Diego, California.

Preet Kaur, Staff Counsel, represented the California Public Employees' Retirement
System.

Respondent Scott A. Casadona represented himself.

Respondent California State University San Marcos did not appear at the hearing.

The matter was submitted on November 10, 2015.

FACTUAL FINDINGS

Jurisdiction

1. Anthony Suine, Chief, Benefit Services Division of the California Public
Employees' Retirement System (CalPERS), filed Statement of Issues No. 2013-0740 in his
official capacity on January 2, 2014.

2. On July 11, 2012, respondent Scott A. Casadona (respondent) signed a Disability Retirement Election Application and submitted it to CalPERS. Respondent sought a disability retirement. He indicated on his application that his retirement date was "end of benefits" and his last day on payroll was March 31, 2012. Respondent had been employed by California State University, San Marcos (CSUSM), as a police officer, beginning on November 19, 2007. Respondent claimed a disability on the basis of cumulative trauma to his lower back occurring between March 9, 2010, and March 9, 2011, causing disc bulge at L5-S1 with nerve compression on the left side, and lumbar arthritis. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21154.

By letter dated April 4, 2013, CalPERS informed respondent that it refused to accept his application for disability retirement because he was not eligible for a disability retirement. CalPERS explained that because respondent had been dismissed from his employment for reasons which were not the result of a disabling medical condition and that the dismissal did not appear to be for the purpose of preventing a claim for disability retirement, under the case of *Haywood v. American River Fire Protection District* (1999) 67 Cal. App. 4th 1292, he was not eligible for a disability retirement. Respondent appealed.

Respondent's Dismissal

3. Respondent was hired as a police officer on November 19, 2007, at CSUSM. Prior to that, he was a police officer in New York from 1984 to 2005. He moved to California and in 2006, he was hired as a police officer by California State University San Diego. He then transferred to CSUSM.

4. During his employment at CSUSM, respondent experienced back pain and in March 2011, the pain became worse. He consulted with a chiropractor on March 4, 2011.

5. On March 9, 2011, respondent reported to CSUSM Risk Management Services that he was experiencing severe back pain. He was directed to go to Palomar Pomerado Corporate Health Services (PPH) in Poway for a medical examination.

A nurse practitioner conducted an initial examination of respondent that evening. Respondent told her this his pain was debilitating, he could not stand for more than ten minutes, and this condition had lasted for approximately six months. He told the nurse practitioner that his pain was the worst he had experienced, and this was the first time that he reported it. He said the pain on his left side was constant and he experienced numbness down to the back of his left leg. He added that he walked with a limp, he was unable to sleep, and medication did not provide relief. Respondent told her he believed that the pain was an industrial injury caused by his work as a police officer.

The nurse practitioner wrote a report describing the visit and based on respondent's representations, she placed him on work restrictions that included: no prolonged sitting,

standing, walking; no repetitive climbing, bending, or twisting; and no lifting more than 25 pounds.

6. On March 11, 2011, respondent submitted a completed workers' compensation claim form to Sedgwick, CSUSM's workers' compensation coordinator. He indicated he suffered from a progressively degenerative lower back injury and that the pain was made worse by prolonged standing. He described the present pain as severe and debilitating, causing numbness down his left leg, and that it was a nine on a scale of 1 to 10. CSUSM placed respondent on temporary modified work duty and as part of his modified duties, he could use a golf cart and he had the option of wearing his duty belt. Respondent was also told to comply with his work restrictions. Respondent returned to work on March 14, 2011.

7. Sedgwick served as CSUSM's third party workers' compensation administrator and made the final determination whether a workers' compensation claim was accepted or denied. Angela Crossley was assigned by Sedgwick to investigate respondent's workers' compensation claim. Respondent spoke to Ms. Crossley by telephone on March 14. After the conversation, she became suspicious of respondent's veracity regarding his alleged injury. On March 15, Ms. Crossley retained J.D. Wesson & Associates to conduct an investigation regarding the circumstances surrounding respondent's workers' compensation claim. J.D. Wesson then retained DigiStream San Diego to conduct a sub rosa investigation into respondent's physical activities. Three investigators conducted video surveillance of respondent's activities on five different dates between March 17 and April 14, 2011.

8. On March 16, 2011, Dr. Donald Herip of PPH examined respondent. Respondent told him his pain had become excruciating during the weeks earlier, but he had not filled the prescriptions for pain medications and was not using any pain medications. Respondent said his pain increased after prolonged standing and he was able to tolerate his modified work duties. Dr. Herip in his report wrote that respondent was able to move freely about the clinic and arise from a chair without difficulty or hesitation. Dr. Herip performed clinical tests for radiculopathy on each leg, but the results were negative. He advised respondent to remain on the work restrictions and prescribed physical therapy.

Dr. Herip became suspicious of respondent's claims regarding the severity of his injuries and told the workers' compensation coordinator that his examination of respondent raised red flags. He believed respondent was misrepresenting the nature of his injury and suggested the coordinator report the concern to Sedgwick.

9. On March 17, 2011, a DigiStream investigator followed respondent to a baseball field and observed and videotaped respondent while he coached a Little League baseball game. Respondent was recorded crouching, squatting, bending at the waist, lifting a bucket, raising and waving his arms, jogging, jumping, kneeling and so forth. The investigator observed no visible signs from respondent of pain, stiffness or difficulty of movement.

10. Dr. Herip reviewed the videotape of respondent's activities on March 17 and believed that the video revealed no limitation of movement of his spine and the findings were consistent with his physical examination that showed respondent was able to move freely and without difficulty. He reviewed videos taken of respondent's activities on other occasions as well and expressed the same conclusion

11. The DigiStream investigators observed and recorded respondent performing similar activities on other occasions. On another occasion, an investigator observed respondent assisting two others who were moving a pool table and then lifting a piece of plywood without assistance for about 15 to 20 feet. The plywood weighed approximately 50 to 70 pounds.

12. During March 2011, respondent continued to complain that he was experiencing pain. On either March 28 or 29, 2011, he called in sick, stating that his back was hurting.

13. On March 30, 2011, Sedgwick denied respondent's workers' compensation claim. That same day, CSUSM retained Paul Coble, an attorney, to conduct an administrative investigation into allegations that respondent was dishonest and displayed unprofessional conduct during the processing of his workers' compensation claim. Respondent was temporarily suspended with pay from his job while Mr. Coble conducted his investigation.

14. On several occasions during March and April 2011, respondent told Ms. Crossley that he believed his injury was the result of wearing a 40 pound police belt for more than 20 years, and after standing for several minutes, he would experience numbness and pain in his back. Respondent characterized his pain as 9 on a scale of 1 to 10.

Ms. Crossley and her supervisor spoke to respondent by telephone on April 5, 2011. They asked respondent if he had lifted anything weighing more than 25 pounds. Respondent said he had not and that he had not been physically involved in coaching activities except to tell kids what to do.

On April 6, respondent sent an email to Ms. Crossley and wrote that none of the minor back issues he had experienced in the past compared to the pain and numbness he was experiencing from standing and that it was debilitating.

15. On May 16, 2011, respondent was examined by Dr. Phillip Balikian. Respondent told him that his lower back pain radiated to his left thigh, that standing aggravated his symptoms, and that exercise, heat, ice, physical therapy and rest relieved the symptoms. Dr. Balikian prescribed ibuprofen and ordered an MRI. On May 26, respondent told Dr. Balikian that his lower back radiated into his left calf, left foot and left thigh, and that his symptoms were aggravated by sitting or standing.

16. On June 24, 2011, Dr. John Qian, a qualified medical examiner, examined respondent and respondent's records. He concluded respondent was not capable of performing his usual and customary work based on clinical findings and the MRI, especially with radicular pain in his left leg. He left the work restrictions in place.

17. Respondent's deposition was taken relating to his workers' compensation claim on July 18, 2011. He said that his pain level was a nine of 10 on March 9. He admitted that he was involved in moving a pool table but he had hired two workers to move it and do the heavy lifting while he helped to balance it. He also said his back had improved since his suspension because he no longer wore the gun belt and he was able to limit the time he was on his feet.

18. Mr. Coble interviewed respondent on September 15, 2011. Respondent reiterated that he had described his back pain as nine on a scale of 1 to 10 on March 9, and that if he had described it as a 10, that meant he would have had to have someone take him to an emergency room. Respondent also denied that Ms. Crossley had ever asked him whether he had lifted anything heavier than 25 pounds since March 9, and he denied that he had lifted anything heavier than 25 pounds since that date.

19. Ellen Cardoso is the human resources director at CSUSM. She learned of respondent's workers' compensation claim and that his case raised red flags because his representations describing his physical condition were not demonstrated by his activities. After respondent received work restrictions on March 9, she and others in the police department decided that they could not accommodate him and instead reassigned him to issue parking citations and ride in a golf cart.

Ms. Cardoso brought in Mr. Coble as an outside investigator. Mr. Coble told Ms. Cardoso that respondent had been dishonest with him. She was also aware of the video surveillance of respondent's activities.

On January 30, 2012, Ms. Cardoso prepared a Notice of Proposed Discipline, Dismissal, and mailed it to respondent. It contained a summary of the information obtained by CSUSM since March 9 and a notification to respondent that he would be dismissed from his position as a police officer. The notice indicated that the action was taken against respondent for unprofessional conduct, insubordination, dishonesty, and failure or refusal to perform the normal and reasonable duties of the position in violation of Government Code section 89535 and several provisions of CSUSM's Police Department Policy Manual in connection with misrepresentations as to his physical condition he made following his filing of a claim for workers' compensation.

20. Respondent appealed the termination. A *Skelly* review was conducted by Commander Kirk M. Gaston of the CSU East Bay Police Department on March 13, 2012. He found there was sufficient and reasonable cause to believe respondent engaged in the misconduct alleged and that termination was warranted.

21. On March 30, 2012, CSUSM issued a Final Decision Regarding Disciplinary Action upholding respondent's dismissal effective March 31, 2012.

22. The decision to dismiss respondent from his position as a police officer at CSUSM is final. He does not have any right to return to his job. The relationship between respondent and CSUSM has been severed

State Personnel Board Proceedings

23. Respondent appealed his dismissal from CSUSM to the State Personnel Board. A hearing was held before an administrative law judge that last six days between February 19 and April 19, 2013. The administrative law judge wrote a Proposed Decision dated June 27, 2013. The administrative law judge determined that respondent committed acts of dishonesty in his representations of the pain and severity of his back injury, although she dismissed two alleged instances of dishonesty. She found that respondent, by intentionally misrepresenting the severity of his back injury and by making other dishonest statements in relation to his workers' compensation claim, committed unprofessional conduct. She sustained the charge that respondent failed or refused to perform the normal and reasonable duties of a police officer by failing to act honestly in connection with his workers' compensation claim. She dismissed respondent's affirmative retaliation defense. Finally, she determined the penalty of dismissal was just and proper. Accordingly, the administrative law judge sustained the dismissal.

24. On August 22, 2013, the State Personnel Board made and adopted a Board Resolution and Order in which it adopted the Proposed Decision.

Writ of Mandate

25. Respondent filed a petition for writ of mandate in the Superior court of California, County of San Diego, seeking to set aside and vacate the decisions of the State Personnel Board and CSUSM. A hearing was held on May 15, 2015. On June 9, 2015, the court denied the petition and issued a written decision. The court determined that substantial evidence supported the Board's findings.

Respondent's Testimony

26. Respondent testified at the hearing as follows: He became a police officer in New York and served in that capacity until he came to California and began working as a police officer at San Diego State University. He was never disciplined and he had an exemplary career. He then transferred to CSUSM. He did not have to take a physical fitness test.

In 1997, respondent first saw a chiropractor for back pain he suffered when playing golf. He saw the chiropractor for three months. Thereafter he sought treatment from a

chiropractor about once a year because his pain was increasing. The chiropractor took x-rays but nothing was found. The treatments were basically adjustments.

In 2011, respondent's back pain worsened. It became more serious and regular, and he experienced numbness down his left leg and into his foot. He did not submit a workers' compensation claim because he did not believe he could show it was work related. He then learned of the presumption that all lower back injuries experienced by police officers were work related.

When respondent's pain reached the level of nine on a scale of 1 to 10 and pain medication did not work, he filed his workers' compensation claim. On the day he was examined by the nurse practitioner, he went to the office with excruciating pain but it seemed to subside while he waited in the waiting room, and by the time he was examined, the pain was a six on a scale of 1 to 10. He told both the nurse, and then a doctor a week later, that his back pain resulted from wearing his police vest and belt. His pain varied over time and was relieved by physical therapy and rest.

Respondent was a union representative and believed his termination was related to his union activities. He pointed out that within six days of filing his workers' compensation claim, there was video surveillance, and that made no sense to him. He did not believe the videos proved anything.¹ He claims that he was charged with fraud and placed on suspension without justification and in retaliation for his union activities. An MRI was not ordered, and there was no proper diagnosis or treatment of his condition. His workers' compensation benefits were terminated. He went to his own doctor who ordered an MRI that showed nerve impingement. He obtained an examination by a qualified medical examiner, Dr. Qian, who examined him in August 2011 and found injury and the need for treatment. He alleged CSUSM still did not approve workers' compensation benefits until October 2011, ignored his lower levels of pain, and only focused on his higher levels in its effort to show he committed fraud. He finally obtained a report that he was permanent and stationary in February 2012 just before he was terminated.

Respondent alleged there were problems in the police department as shown by the fact that five police officers were terminated within a three-year period. He alleged that CSUSM hired a firm to make a criminal case for fraud, and depose him for three hours. He claimed that the attorney who deposed him said that there was no fraud, but the university ignored the attorney. He believed the officer who performed the *Skelly* review was not impartial and simply rubber-stamped the decision by Ms. Cardoso and the police chief.

Respondent denied that he committed any misrepresentations regarding his back pain, and that he in fact experienced it. He claims that he has severe spinal stenosis. He believes that Dr. Herip considered him a malingerer.

¹ Respondent offered a portion of the videotapes taken by Digistream into the evidence at the hearing. The evidence was excluded on the ground it was not relevant.

LEGAL CONCLUSIONS

1. Government Code section 21151 provides in part:

(a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

2. Government Code section 21152 provides in part that an application for retirement for disability may be made by the member or any person in his or her behalf.

3. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state service, or ... (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence 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.

4. Government Code section 21156 provides in part:

(a)(1) If the medical examination and other available information show to the satisfaction of the board...that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability...

(2) In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

5. CalPERS refused to accept respondent's application for a disability retirement because it concluded that respondent's dismissal, which was not the result of a disabling medical condition or was not for the purpose of preventing a claim for disability retirement,

rendered him ineligible for a disability retirement under the case of *Haywood v. American River Fire Protection District* (1999) 67 Cal. App. 4th 1292.

6. In this proceeding, respondent has the burden of proving by a preponderance of the evidence that he is eligible for a disability and therefore CalPERS should proceed with a determination as to whether he is entitled to a disability retirement and whether the is industrial causation. Preponderance of the evidence means that the evidence on one side outweighs the evidence on the other side, “not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.” (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325, fn. omitted.) The term refers to “evidence that has more convincing force than that opposed to it.” (*People ex rel. Brown v. Tri-Union Seafood, LLC* (2009) 171 Cal.App.4th 985, 994.)

7. Respondent was dismissed from his position as a police officer for CSUSM effective March 31, 2012. The Notice of Proposed Discipline, Dismissal dated January 30, 2012, the Final Decision Regarding Disciplinary Action, the decision by the State Personnel Board, and the ruling by the superior court in the writ of mandate proceeding, all show that respondent was dismissed because of misrepresentations he made as to his physical condition at or about the time he filed his workers’ compensation claim. Respondent did not file his application for a disability retirement until July 11, 2012, more than three months after his dismissal became effective.

In *Haywood*, an employee was terminated for cause, and after his discharge, he applied for a disability retirement claiming the stress of the disciplinary action caused him to suffer a depression that rendered him incapable of performing his usual duties. The court concluded the employee was not entitled to a disability retirement. The court reasoned that where an employee is discharged for cause and the discharge is not the ultimate result of a disabling condition and was not preemptive of an otherwise valid claim for a disability retirement, the discharge rendered the employee ineligible for disability retirement. The court made it clear that a necessary requisite for a disability retirement is the potential reinstatement of the employment relationship with the employer if the employee is later to be determined to be no longer disabled.

8. Respondent offered no proof in this proceeding and therefore failed to establish that his discharge was the ultimate result of a disabling condition. Rather, the evidence established that his discharge was based on the misrepresentations he made regarding his physical condition in connection with his workers' compensation claim.

In order to establish that a dismissal was preemptive of an otherwise valid claim for disability, the employee must establish that there is an unconditional right to immediate payment, typically when a pension board determines that the employee was no longer capable of performing his or her duties. *Smith v. City of Napa* (2004) 120 Cal. App. 4th 194, 206. Respondent did not file his application for disability retirement until well after his dismissal was final. Respondent points to a PQME report in July 2011 and a Permanent and Stationary Report in February 2012 as evidence that it had been established that he was not

able to perform his job duties. The report is not in the record. Even if it showed what respondent claims it showed, it was simply evidence of an injury that rose to a certain level in the view of the examining physician. It was not a determination by a pension board that respondent was not capable of performing his job duties and it did not show that such a determination was a foregone conclusion. Accordingly, respondent did not establish that his right to a disability retirement had matured prior to his dismissal or that CalPERS had determined that he was entitled to a disability retirement.


On the other hand, CSUSM established respondent's employment relationship with CSUSM was severed and he has no right to return to his former position.

Under these circumstances, respondent is ineligible to file an application for a disability retirement and his application is therefore precluded by operation of *Haywood*.

ORDER

The appeal of respondent Scott A. Casadona to be granted the right to file an application for industrial disability retirement is denied.

DATED: November 25, 2015

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ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings