

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Cancellation of the
Application for Industrial Disability
Retirement of:

KEITH BROWN

Respondent,

and

CALIFORNIA HIGHWAY PATROL

Respondent.

Case No. 2012-0487
(Statement of Issues)

OAH No. 2015050740

PROPOSED DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, heard this matter on January 19, 2016, in San Bernardino, California.

Elizabeth Yelland, Senior Staff Counsel, represented California Public Employees' Retirement System, State of California (CalPERS).

Keith Brown, respondent, did not appear and was not represented at the hearing.

California Highway Patrol (CHP), respondent, was not represented at the hearing.

The matter was submitted on January 19, 2016.

FACTUAL FINDINGS

CalPERS Functions

1. CalPERS is the state agency responsible for the administration of the Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et. seq.) Under the PERL, CalPERS members and their employers contribute to pension and health funds under defined

benefit plans. CalPERS members receive health and retirement benefits based upon their contributions and status as employees. CalPERS manages the pension and health benefits for public employees, retirees, and their families. CalPERS's Board of Administration is responsible for determining who qualifies as an employee under the PERL and who is eligible for CalPERS membership.

Jurisdictional Matters

2. Respondent was hired by CHP as a Patrol Officer in July 1998. By virtue of his employment, respondent was a state safety member of CalPERS.

3. On October 24, 2011, respondent signed a Disability Retirement Election Application (application) in which he sought industrial disability retirement based upon a claim that he sustained psychological trauma as a result of a fatal, officer-involved shooting of a suspect. Respondent stated that he "can no longer carry a firearm, which is required for my employment, due to the PTSD I suffer from." CalPERS received the application on October 25, 2011.

4. In response to respondent's application, CalPERS received information from CHP that respondent had been terminated for cause effective June 27, 2011. The grounds for respondent's termination were: inexcusable neglect of duty; dishonesty; discourteous treatment of the public or other employees; violation of prohibitions in Government Code section 19990; and other failure of good behavior either during or outside of duty hours of such nature that it caused discredit to the appointing authority of the person's employment.

5. By letters dated April 11, 2012, CalPERS advised respondent that his application had been cancelled because he was terminated for cause.

6. By letter dated May 3, 2012, respondent appealed the cancellation of his application.

7. On May 6, 2015, Anthony Suine, Chief Benefit Services Division, signed the Statement of Issues in Case No. 2012-0487. The Statement of Issues sought a determination of whether respondent was eligible to receive an industrial disability retirement.

8. On June 1, 2015, three years after respondent appealed the cancellation of his application, CalPERS served respondent with notice that a hearing would be held on his appeal on January 19, 2016 at 10:00 a.m. at 650 Hospitality Lane, Suite 330, San Bernardino, CA 92408. CalPERS counsel represented that notice was mailed to respondent's address of record. The Notice of Hearing contained the telephone and facsimile numbers of CalPERS's General Counsel and Senior Staff Attorney.

Respondent's Failure to Appear

9. On January 19, 2016, at 10:00 a.m., Administrative Law Judge Susan J. Boyle called the matter of the Statement of Issues in Case No. 2012-0487 for hearing at 650 Hospitality Lane, Suite 330, San Bernardino, CA 92408. Respondent was not present in the hearing room when the case was called. The matter trailed to provide respondent sufficient time to appear or communicate with either CalPERS or the Office of Administrative Hearings.

The matter was called again at 10:30 a.m. Respondent failed to appear. Neither CalPERS nor the Office of Administrative Hearings received any communication from respondent.

10. As demonstrated by the Notice of Defense, and the proof of service of the Notice of Hearing, respondent was properly notified of the hearing date. Good cause for respondent's failure to appear at the noticed hearing was not shown. Complainant's request to proceed with a default prove-up hearing pursuant to Government Code section 11520 was granted. Respondent failed to appear at any time during the hearing.

Respondent's Termination

11. On June 6, 2011, CHP personnel personally served respondent with a Notice of Adverse Action and a copy of the investigative file upon which the Notice of Adverse Action was based. The Notice of Adverse Action alleged that on November 18, 2010, respondent inflicted corporal injuries on a person he lived with during a domestic dispute; failed to advise his chain of command that he was involved in an ongoing criminal investigation; and provided "dishonest and evasive statements" to internal affairs investigators.

12. On June 28, 2012, the State Personnel Board approved a Stipulation for Settlement (Stipulation) between respondent and CHP. In the Stipulation, CHP agreed to withdraw the Notice of Adverse Action, and respondent agreed to withdraw his appeal of the Notice of Adverse Action upon certain terms and conditions, including: respondent voluntarily resigned for personal reasons from his position as a CHP officer; CHP accepted respondent's voluntary resignation; and respondent agreed not to seek or accept future employment with CHP.

LEGAL CONCLUSIONS

Legal Authorities

1. In the absence of a statutory provision to the contrary, the applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed entitlement or benefit. (*Glover v. Bd. of Retirement*, (1989) 214 Cal.App. 3d 1327, 1332.)

2. The applicable standard of proof in this case is a preponderance of the evidence. (*McCoy v. Bd. of Retirement*, (1986) 183 Cal.App. 3d 1044, 1051.) The phrase “preponderance of evidence” is usually defined in terms of probability of truth, e.g., “such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.” (*Utility Consumers’ Action Network v. Public Utilities Commission of State of California* (2010) 187 Cal.App.4th 688, 698.)

3. Government Code section 21151, subdivision (a) provides that a state safety member who is “incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . . regardless of age or amount of service.

4. Government Code section 21152, subdivision (d), provides that an application for disability retirement can be filed by a CalPERS member.

5. Government Code section 21154 provides, in part, that an application for disability retirement “shall be made only . . . while the member is in state service”

6. Government Code section 21192 provides, in part, that an employer may require a recipient of disability retirement to undergo medical examinations under certain circumstances, including to determine if the recipient is still disabled.

7. Government Code section 21193 provides, in part, that if, after a medical examination, it is determined that the recipient of disability retirement is no longer disabled, to undergo medical examinations under certain circumstances, including to determine if the recipient is still disabled. If the recipient is found to be no longer disabled, the recipient shall be reinstated.

8. In *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1307, the court held that a firefighter who had been terminated for cause was not eligible to file for disability retirement benefits because his termination constituted a complete severance of the employer-employee relationship. The complete severance of employment meant that Mr. Haywood was no longer in state service. (Gov. Code § 21154.) Additionally, as an employee terminated for cause, Mr. Haywood could not be reinstated to his position if it were to be later determined he was no longer disabled. (Gov. Code § 21192, 21193.)

9. In the CalPERS Precedential Decision of *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot*, February 19, 2013, made Precedential effective October 16, 2013, Mr. Vandergoot was served with a Notice of Adverse Action in which the employer sought to terminate his employment. He and his employer entered into a stipulated settlement in which the employer agreed to withdraw the Notice of Adverse Action in exchange for Mr. Vandergoot’s withdrawal of his appeal and agreement to never apply for, or accept, employment with the employer again. Mr. Vandergoot subsequently filed an application for industrial disability retirement benefits. The application was rejected on the basis that Mr. Vandergoot had been terminated for cause.

Mr. Vandergoot appealed the rejection of his application and requested a hearing. The matter was heard before an Administrative Law Judge. The Administrative Law Judge's proposed decision was adopted by CalPERS and designated as a precedential decision. In *Vandergoot*, CalPERS rejected Mr. Vandergoot's argument that he was eligible for disability retirement benefits because, in accordance with the stipulated settlement, he had not been terminated for cause but resigned. CalPERS concluded that the severance of the employment relationship evidenced by the stipulated settlement barred Mr. Vandergoot's eligibility to apply for disability retirement because he was no longer in state service, no longer had an employer who could require him to undergo a medical examination under Government Code section 21192, and could not be reinstated to his position under Government Code section 21193.

Evaluation

10. Respondent failed to sustain his burden of proving that CalPERS erred when it cancelled his application for industrial disability retirement. Respondent entered into a stipulated settlement while disciplinary charges that would have resulted in termination of his employment were pending against him. The stipulated settlement terminated respondent's employment relationship with CHP, and he forfeited any ability to apply for, or accept, employment with CHP in the future. Pursuant to the authority of *Haywood v. American River Fire Protection District, supra.*, and *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot, supra.*, respondent is ineligible to receive disability retirement benefits.

ORDER

CalPERS's determination that respondent Keith Brown's application for industrial disability retirement benefits is precluded by operation of law and that he is ineligible to receive disability retirement benefits is upheld.

DATED: February 17, 2016

DocuSigned by:
Susan J. Boyle
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SUSAN J. BOYLE
Administrative Law Judge
Office of Administrative Hearings