ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Cancellation of the Application for Industrial Disability Retirement of :	
JOSHUA P. DESMARAIS,	Case No. 2014-0366
Applicant,	OAH No. 2015031084
and	
CALIFORNIA HIGHWAY PATROL,	
Respondent.	

PROPOSED DECISION

Stephen J. Smith, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California heard this matter in Sacramento, California, on January 7, 2016.

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

Joshua P. Desmarais (applicant) appeared and was represented by Kenneth M. Sheppard, Attorney at Law, of Jones Clifford, LLP, Attorneys.

Respondent California Highway Patrol did not appear.

The record was left open to receive written closing argument and Points and Authorities from the parties. Closing arguments and Points and Authorities submitted by the parties were received February 16, 2016, were marked and made part of the record. The record was closed and the matter was submitted on February 16, 2016.

ISSUES

Did applicant's entering into a binding Settlement Agreement (Agreement) to resolve his appeal of his employer's (the California Highway Patrol (CHP)) action to terminate his

employment as a State Traffic Officer (TO) for cause preclude him as a matter of law from filing an application for industrial disability retirement (IDR) with CalPERS?

Do the terms of the Agreement, which preclude applicant's return to CHP employment, legally preclude applicant from applying for IDR?

Does applicant's medical condition at the time of his application for IDR relieve applicant from the effect of any legal preclusion against filing for IDR as a result of the CHP termination for cause action or the terms of the Agreement?

Does there exist, as applicant contends, a "second exception" to the legal bar created by the *Haywood*[1] case, and the several cases that follow its authority, for circumstances where the medical condition that resulted in the claim to entitlement to IDR was a medical condition that "caused the discharge" action by the CHP?

CONTENTIONS

CalPERS contends applicant's filing for IDR is legally precluded because his employment relationship with the CHP was permanently severed, as a result of the Agreement because in the Agreement applicant agreed that he cannot ever be reinstated.

CalPERS contends the authorities of *Haywood v. American River Fire Protection District*[2], *Smith v. City of Napa,*[3] CalPERS Precedential Decision *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot and Department of Forestry and Fire Protection (CalFire),*[4] and a recent judgment *In the Matter of the Petition for a Writ of Mandate of Sergio Garcia v. CalPERS*[5] preclude consideration of the member's application for IDR because his employment status following execution of the Agreement is permanently severed, and the fact that he cannot ever be reinstated to employment with CHP if he recovered from his claimed disabilities prevents him from being eligible for IDR.

Applicant primarily contends that his medical condition at the time of the termination action, caused by undisputed work-related injuries, was such that he was permanently incapacitated, and that the effects of his incapacity, confirmed by his medical evidence, was the reason for and explains the CHP termination action against his employment. Applicant reasons that his medical condition was such that the exception made in *Haywood* and *Smith*

---

[1] *Haywood v. American River Fire Protection District* (*Haywood*) (1988) 67 Cal. App. 4th 1292, 1305.

[2] *Id.*

[3] *Smith v. City of Napa* (2004) 120 Cal.App. 4th 194, 205.

[4] *In the Matter of the Application for Industrial Disability of Robert Vandergoot and the Department of Forestry and Fire Protection*, CalPERS Precedential Decision 13-01, effective October 16, 2013.

[5] *Sergio Garcia v. Board of Administration of CalPERS*, Los Angeles Superior Court, Case No. BS 152305, October 16, 2015.

applies and permits his application, because his termination and entry into the Agreement was "the ultimate result of a disabling medical condition,"[6] and that the termination action was "preemptive of an otherwise valid claim for disability retirement."[7] Applicant here takes the contention regarding the exception in *Haywood* a step further, contending that his medical condition caused the CHP termination action against him, ultimately resulting in his entry into the Agreement.

Applicant also contends *Haywood, Smith, Vandergoot* and *Garcia* do not apply because his resignation from the CHP was for "personal reasons" did not constitute a termination of his employment for cause, and was contingent upon CalPERS denying his application for IDR. Claimant reasons that since the denial of his IDR application did not occur, the terms of the Agreement render his resignation ineffective, and since CHP withdrew its Notice of Adverse Action (NOAA) terminating him as part of the Agreement, and his resignation was for personal reasons, he was not terminated, and thus not legally precluded from applying by the authorities cited by CalPERS.

Applicant also reasons that if his application for IDR was granted, and he were later found medically fit to return to work, he would be able to do so because the CHP changed his work status to "Resignation-Personal reasons" as a result of the Agreement, which would permit him to return to work.

DISPOSITION OF CONTENTIONS

Applicant is ineligible to file the application for IDL as a result of the legal bar created in *Haywood*, and elaborated and extended in *Smith, Vandergoot* and *Garcia*. Applicant's eligibility to file for IDR was defeated by his execution of the Agreement on May 14, 2012, in which he agreed to permanently and irrevocably sever his employment relationship with CHP. Applicant entered into a covenant in the Agreement that he can never be reinstated to CHP employment, causing him to fall squarely within the prohibition to file for IDL announced by those authorities.

Applicant's intentions or personal reasons for entry into the Agreement, not specifically expressed in the Agreement, are excluded and irrelevant by the terms of the Agreement itself, his medical condition at the time or presently notwithstanding.

Applicant failed to raise the medical condition/disability exceptions carved out in *Haywood* and *Smith* as a defense to the CHP termination action or when he entered into the Agreement. Applicant was represented by counsel in his entry into the Agreement resolving the CHP termination action against him, and his medical condition/disability exception claims, which could have been a defense to the CHP termination action, or at least required CHP to retire him for disability on its own application, were not raised. Applicant entered into the Agreement, rather than raising and pursuing his medical condition/disability claims

---

[6] *Haywood, supra,* p. 1305.
[7] *Smith, supra,* p. 205.

at the time, or, if those claims were raised and not reflected in the Agreement, those claims were merged and subsumed into the Agreement.

Applicant's raising the medical condition/disability exceptions in *Haywood* and *Smith* in these IDR proceedings is untimely, and constitutes an improper collateral attack upon the termination action to which CalPERS was not a party and had no opportunity to appear or defend. Applicant's failure to timely raise or pursue his medical condition exception claims, particularly his claim that his medical condition "resulted in the discharge," or that the termination action "preempted an otherwise valid claim for disability retirement," do not constitute defenses to the effectuation of the terms of the Agreement and are untimely raised here.

Applicant's testimony regarding his intentions in entering into the Agreement, and his understanding of certain of the terms of the Agreement, seeking to explain and impeach the text of the terms of the Agreement as written, is statutorily inadmissible parol evidence, and is excluded.[8]

Applicant failed to carry his burden to prove that he is eligible to file an application for IDR. CalPERS's action to prohibit the filing of the member's application for IDL was correct and shall be sustained.

STANDARD AND BURDEN OF PROOF

"As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence."[9] An applicant for a CalPERS disability retirement bears the burden of proof and the burden of going forward with the evidence.[10] Applicant bears the burden of proving that he is eligible to file the application for IDR, and for overcoming the potential bars to that filing posed by the *Haywood, Smith,* and *Vandergoot* decisions.

FACTUAL FINDINGS

APPLICATION, DENIAL AND APPEAL

1. Applicant applied for IDR on April 9, 2012. Applicant claimed in his application that he was permanently disabled from the performance of his duties as a TO

---

[8] Evidence Code section 1523, subdivision (a), precludes oral testimony offered to prove the content, or to explain, impeach or deny terms or provisions of a writing, where the original of the writing exists.

[9] *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051.

[10] *Id., Harmon v. Board of Retirement* (1976) 62 Cal.App. 3d 689, 691, *In Re: Theresa V. Hasan*, Board of Administration of the California Public Employees' Retirement System Precedential Decision No. 00-01.

with the CHP as a result of a solo rollover collision on November 12, 2008 on State Route 4 near Franklin Canyon Road. Applicant wrote, "I have neck damage to disc, three 'blown' discs in lower back, left shoulder, both hips, cognitive head injury, memory loss, and PTSD." Applicant wrote that his injury has affected his ability to perform his job as a TO with the CHP because he has, "multitasking problems, cognitive problems, memory issues, pain in neck and back (severe), shoulder and hips, depression, anxiety and PTSD issues."

2. CalPERS's Benefits Services Division (BSD) began an evaluation of the application, part of which was to contact applicant's employer, the CHP, to obtain information regarding applicant's employment history. CalPERS's BSD received information and documents from CHP from which CalPERS's BSD concluded that applicant had been terminated from his employment. CalPERS's BSD determined that applicant was ineligible for IDR due to the termination, that the termination was for cause, and that there was no indication that applicant's discharge was the ultimate result of a disabling medical condition. CalPERS's BSD concluded that settled law precluded granting the application.[11]

3. CalPERS's BSD notified applicant in writing, dated December 2, 2013, of CalPERS's BSD's determination to preclude his IDR application. Applicant timely filed an appeal and requested an evidentiary hearing before an independent ALJ.

4. Anthony Suine, acting in his official capacity only as Chief of CalPERS's BSD, made the allegations contained in the Statement of Issues on March 24, 2015, and caused it to be filed and served on applicant and his counsel. Applicant timely requested an evidentiary hearing. This hearing followed.

EMPLOYMENT HISTORY

5. Applicant became employed by the CHP as a TO, assigned to the CHP Oakland, California, office, in 2004. Applicant was reassigned to the CHP Contra Costa Office in September 2009, after he recovered from injuries suffered in the November 2008 roll-over collision (below) and returned to work, first on light duty, then later as medically released to full duty. Applicant continued to perform his duties as a TO for the CHP until June 15, 2011, at which time the CHP action to terminate his employment was effective. Applicant's employment between the time he was medically released to full duty after recovering from his injuries and the effective date of his termination was punctuated by a few periods of medical leave.

6. Applicant was a safety member of CalPERS at all times relevant to this Decision as a result of his employment as a TO with CHP. Applicant had approximately eight years of service with the CHP at the effective date of his termination. Applicant was 33 years old at the time of his termination.

---

[11] *Haywood, supra, Smith, supra and Vandergoot, supra.*

TERMINATION ACTION

7. The Commissioner of the CHP filed and served applicant with a Notice of Adverse Action (NOAA), terminating applicant's employment for cause, on May 18, 2011, effective June 15, 2011. The CHP alleged causes for termination including Inefficiency, Inexcusable neglect of duty; Dishonesty; 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. The NOAA detailed a primary cause for discipline, and within it, described a series of allegedly inappropriate acts surrounding a March 2010 collision. Applicant was alleged to have rear-ended a civilian's vehicle, and failed to report the collision, which caused minor damage to the civilian's vehicle. The NOAA alleged that the collision was almost identical to a previous collision applicant caused while on duty on September 16, 2008.[12] Applicant was also alleged to have solicited a bribe from the civilian whose vehicle was damaged in order to dissuade the civilian from reporting his involvement in the collision, and that he later responded dishonestly to commanding officers questioning him when the misconduct was discovered.

"OTHER MATTERS"-FACTORS IN AGGRAVATION

8. The NOAA alleges under the heading "Other Matters" four additional enhancing allegations, based upon previous disciplinary actions against applicant for similar violations of the rules and procedures governing a TO employed by the CHP. These separate allegations include:

- Applicant was issued a formal written reprimand for demonstrating a lack of judgment on May 3, 2010, for driving recklessly in a marked CHP patrol car through the streets of Oakland. Applicant explained his conduct by stating that he was driving as he did to retrieve documents to prepare for a pre-disciplinary hearing in connection with a separate adverse action, and that he was trying to do everything in his power to stay out of trouble, and if he were late to work, that would just get him in more trouble.

- Applicant was suspended for 20 working days for participating in a pursuit with a civilian ride-along in his marked patrol vehicle in April 2009. Applicant was alleged to have used poor tactics and failed to adhere to Departmental policy in the pursuit, which included passing other CHP units without coordinating radio traffic, inappropriately using the Pursuit Immobilization Technique (PIT) on four separate occasions, driving the wrong way into oncoming traffic, and failing to clear nine intersections. Applicant was alleged to have continued to exercise inappropriate tactics at the conclusion of the pursuit while apprehending the suspect (it was alleged that the suspect was injured by applicant's use of force in apprehending him).

[12] The previous September 16, 2008, collision occurred approximately two months before the roll-over collision that resulted in applicant's injuries at issue here.

Applicant was also alleged to have furnished incorrect information when he was questioned about his conduct when a San Rafael Police Department officer documented the event, and when he was later questioned by CHP commanders about his conduct.

- Applicant was suspended for 20 working days on September 9, 2009, after becoming involved in a fourth preventable on-duty patrol vehicle collision. Applicant was alleged to have failed to maintain a high visual horizon and recognize hazards during high-stress driving situations, and was determined to be at fault for the traffic collision which resulted in total destruction of his CHP patrol vehicle, and major injuries to himself.[13]

- Applicant received a censure on September 16, 2008, for being involved in a preventable traffic collision on August 18, 2008, alleged to have been his third such preventable traffic collision while on duty in the previous 22 months.

9. Applicant timely appealed the termination action and requested a hearing. The CHP appointed an Assistant Chief to conduct a pre-disciplinary *Skelly* hearing. Applicant was afforded an opportunity to contest and review the propriety of the termination action on June 8, 2011. The Assistant Chief concluded that she was satisfied the offenses alleged in the NOAA occurred, and that reasonable evidence existed to believe that applicant committed the offenses. The Assistant Chief sustained the termination action without modification.

10. Applicant timely appealed his termination to the State Personnel Board (SPB) and sought an evidentiary hearing.

11. The SPB scheduled an evidentiary hearing on applicant's appeal of his termination and a Settlement Conference. SPB's assigned ALJ conducted a Settlement Conference that took place on May 14, 2012.

12. The CHP and applicant, both represented by counsel, reached a Settlement Agreement (Agreement) during the Settlement Conference. The Agreement was fully incorporated into a Proposed Decision issued by the ALJ on May 17, 2012, and submitted to the full SPB for review and adoption. The SPB adopted the Proposed Decision on May 25, 2012, approving the Agreement.

13. CalPERS was not a party to the termination action before the SPB, or to the Agreement. CalPERS was not consulted, nor did CalPERS participate in any of the negotiations or drafting of any of the terms of the Agreement. CalPERS first received notice of the existence of the Agreement almost a year after it was fully executed, when applicant

[13] Applicant appears here to have been suspended for his reckless driving during the pursuit on the night of November 12, 2008, that resulted in the rollover collision that caused his serious injuries that are the subject of his application for IDR under review in this matter.

applied for IDR, and, in the course of the investigation, CalPERS received a copy of the Agreement along with applicant's employment records from the CHP.

SETTLEMENT AGREEMENT TERMS

14. The Agreement between CHP and applicant contains the following provisions:

> Respondent[14] agrees to and hereby does withdraw the Notice of Adverse Action, effective June 15, 2011 (NOAA), and to remove any/all supporting documents from appellant's[15] Official Personnel File (OPF).
>
> Appellant hereby agrees to and does voluntarily resign for personal reasons from his position as a California Highway Patrol officer, effective May 14, 2012. Appellant hereby agrees to waive reimbursement of any/all back pay and benefits accruing as a result of his resignation.
>
> The parties hereto acknowledge that appellant has an outstanding disability retirement application pending with CalPERS, a decision on which has not yet been issued.[16] Appellant hereby agrees, as part of the consideration and inducement for entering into this settlement, that in the event his disability retirement application with CalPERS is denied, he agrees to waive any/all reinstatement rights to his employment was CHP.[17]
>
> In addition, appellant agrees to never apply for or accept employment with CHP or its successors in interest. If CHP inadvertently offers appellant a position, appellant breaches this agreement by accepting the position with CHP. Appellant shall be terminated at such time as it is convenient to CHP and appellant hereby waives any right appellant may have to appeal

---

[14] The CHP in this particular action.

[15] Appellant in that action is the Applicant here.

[16] Applicant filed the application for IDR approximately one month before the Settlement Conference where the Agreement was reached, approximately 10 months after the pre-disciplinary *Skelly* hearing and the effective date of the termination, and approximately 11 months after being served with the NOAA.

[17] The Agreement is silent regarding what happens if CalPERS rejects the application for IDR because applicant was terminated from his employment. It does not appear that the omission was inadvertent, due to the well-settled authority regarding the effect of an employment termination on eligibility for IDR expressed in *Haywood*, et. al., *supra.*

that termination and/or exclusion in any form, administrative body, and/or court of law.

Appellant agrees to withdraw his appeal currently pending before SPB and agrees to waive any appeal rights set forth under Government Code section 19575.

The parties agree that this is a compromise of a highly disputed matter, and that entering into this stipulated settlement agreement is not, nor is it construed as, an admission of liability, guilt or fault of either party.

Appellant agrees and enters into the terms of this stipulated settlement agreement freely and voluntarily, by and with the advice of his representative, and hereby waives any right of appeal he may have in this matter and waives any claim in federal or state court or any other administrative form that may arise out of this matter which he may now have or hereafter acquire related to this matter or the facts underlying this matter, with the exception of the appellant's currently pending disability retirement application or any claim for workers compensation benefits, if any.

The stipulated settlement agreement sets forth the entire understanding of the parties in connection with the subject matter herein. None of the parties have made any statement, representation, or warranty in connection here with which has been an inducement for the other to enter into this stipulated settlement agreement, except as is expressly set forth herein. It is expressly understood and agreed that the stipulated settlement agreement may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a writing duly executed by authorized representatives of the parties hereto. The parties agree that they will make no claim at any time or place that this stipulated settlement agreement has been orally altered or modified or otherwise changed by oral communication of any kind or character.

Appellant enters into this stipulated settlement agreement without reliance upon any statement or representation by CHP or its representatives, except as set forth herein. ... After having been advised and having the opportunity to discuss the settlement terms thoroughly with appellant's representative, appellant understands its provisions and enters into the

settlement voluntarily, knowingly, willingly, and free from any duress or coercion whatsoever.

WORK INJURY AND TREATMENT

15. The fact that applicant was severely injured while on duty as a TO for the CHP on November 12, 2008, is not disputed. Applicant was involved in a high-speed pursuit (in excess of 85 miles per hour) on State Route 4 near Martinez, California. Applicant first drove on the shoulder, then crossed over and drove on the median strip in pursuit of a fleeing suspect. Applicant's vehicle hit a dip and a patch of mud, causing his vehicle to flip and end-over-end six times. Applicant's vehicle was totally demolished. Applicant was pulled from his vehicle by a passing motorist. Applicant was rushed by Life Flight helicopter to the John Muir Medical Center, where he was hospitalized, had surgery to repair his injuries, was treated for two to three days, then released.

16. Applicant sustained a significant closed head injury with a concussion, temporary coma, and a large scalp laceration that required a number of staples to close as a result of the collision. Applicant also sustained a severe injury to his tongue when he bit through it, and injuries to his neck, cervical and low back, with pain into his legs, left shoulder, and overall bruising from blunt force trauma. Applicant lost consciousness as a result of the collision and when he came to, he had no memory of what happened after his vehicle flipped. Applicant's amnesia included what happened after the collision until he woke up in the hospital.

MEDICAL TREATMENT POST ACCIDENT BUT BEFORE NOTICE OF INVESTIGATION OF MISCONDUCT

17. Applicant was evaluated by Johanna Opperschall, M.D., on November 14, 2008, two days after the collision. Dr. Opperschall noted that applicant had a temporary amnesia in that he did not remember anything until three hours before the accident, and had no recollection of the accident. She diagnosed him as having multiple injuries, in physical distress, with the loss of consciousness, amnesia, and postconcussion syndrome. She took applicant off work, with a follow-up in a week, and noted, "Due to the postconcussion syndrome and amnesia, recovery will be slow and take a long time, most likely this patient will need several referrals to the neurologist for evaluation of postconcussion syndrome as well as a neurocognitive evaluation."

18. David L. Green, Ph.D., Q.M.E., performed a neurocognitive evaluation of applicant on January 13, 2009, upon the referral and recommendation of Dr. Opperschall. Dr. Green referred to a follow-up appointment with Dr. Opperschall that took place on December 8, 2008, during which applicant complained of poor memory, amnesia and nausea for two weeks, a constant headache that was getting better, and constant neck and low back pain radiating to his thighs. Dr. Opperschall noted at that time that applicant continued to have an open wound on his scalp and head, and had suffered a concussion that caused a brief coma.

19. Dr. Green noted in his evaluation that applicant denied present cognitive difficulties, but that for the first month following his injury his short-term memory faltered, causing him difficulty with recall of recent conversations. Applicant also told Dr. Green that his memory and concentration abilities had recovered, and that he had no difficulty recalling conversations, following narratives in television or movies, understanding what he reads, or expressing himself verbally or through writing.

20. Dr. Green's observations during his clinical evaluation of applicant reflected in his report confirmed applicant's reports appeared to be accurate. Dr. Green noted that applicant denied feeling he needed psychological treatment, that his stress was manageable, and that he was having difficulty with diminished sleep. Dr. Green also noted that applicant reported being involved in an amicable divorce.

21. Dr. Green conducted a mental status examination as part of his clinical evaluation in which he found that applicant presented himself in an unremarkable fashion, not indicative of any cognitive disorder or limitation.

22. Dr. Green ordered psychological testing, conducted by an examiner, and included in his report the examiner's comment after testing that:

> This patient is likely to view his situation negatively and to emphasize his distress. Depression could erode his adaptive energy and undermine his ability to tolerate frustration. Because this effectively reduces his pain threshold, he may exhibit a reduced capacity to tolerate pain or other symptoms. His overall perceived level of suffering may be partly attributable to his physical pain and partly to his emotional distress.

23. Dr. Green also noted that applicant appeared to meet all the criteria for a diagnosis of posttraumatic stress disorder (PTSD). This diagnosis was carried in all subsequent medical evaluations.

24. Dr. Green diagnosed applicant as suffering from an adjustment disorder with depressed mood and occupational problems, as well as work stress. Dr. Green's "Summary and Conclusions" include the following:

> Applicant presented himself to the interview in a frank and serious manner. Medical notes from November and early December 2008 reflect cognitive complaints of poor memory following a concussion, in which he sustained both brief retrograde and posttraumatic of (sic) amnesia in the interview, however, he presents himself as a highly focused individual, who quickly grasped what was essential and nonessential during

> the interview questioning. A very brief mental status examination did not reveal cognitive difficulties. More importantly, he reported no difficulties with reading, writing or remembering recent or remote information. He demonstrated normal mental energy, and above average level of focus, and unimpaired speech. He comes across as possessing at least high average intelligence. He states that during the past month he has recovered his ability to remember and concentrate, and he has resumed his love of reading. He states that he had recently moved away from his wife, but he feels that the decision to divorce has been a good decision. He states that since separating from his wife, as part of his divorce, he has been feeling relieved. He states that he sees his children daily. He mentioned that he is been stressed about the way his new bosses put him under investigation for a work incident, and arrest. The work investigation will conclude in April. He expects to be given a minor punishment for breaking protocol. He states that up until the time he had a new boss, he experienced himself as a prized member of the Oakland Police Force. However, having been placed under investigation, he feels that his superiors view him with suspicion. He states that his peers, however, offer him ample support.

25. Dr. Green concluded that although psychological testing suggested applicant was experiencing mild depression, Dr. Green noted that applicant said he was not seeking treatment, and that there was no demonstration of a "blatant need" for psychotherapy. Dr. Green offered to recommend a brief course of psychotherapy if applicant changed his mind, and made the same offer in the event that applicant had difficulty dealing with PTSD symptoms, which Dr. Green described as "mild" at the time of the interview. Dr. Green concluded that applicant's psychological condition did not impair his overall ability to participate in employment.

26. Applicant returned to full duty after Dr. Green's report was issued.

MEDICAL TREATMENT POST ACCIDENT BUT JUST BEFORE AND AFTER NOTICE OF INVESTIGATION OF MISCONDUCT

27. Applicant offered approximately 50 medical reports in support of his contentions, all but four of which reflect treatment after the time that the CHP investigation of applicant's driving behavior became more extensive and serious, and later took action to terminate his employment. One of the four was a key support for applicant's contentions, Dr. Newkirk's February 25, 2011, report. Applicant argued with respect to that report:

> In a follow-up visit with Dr. Newkirk on February 25, 2011, [applicant's] condition had clearly deteriorated. In fact, Dr.

> Newkirk noted that [applicant] was accompanied to the appointment by two supervisors and stated the following: 'He went back to duty December 2010. In retrospect, this was a mistake as he is having major problems with his duties ... He is still making mistakes such as taking the wrong exits from the highway. He is having serious problems completing reports in a timely fashion, especially if multiple tasks are pending or if he has to meet deadlines.' Dr. Newkirk took [applicant] off work at that time, noting that he was 'not capable of safely performing his duties at this time and has restricted memory concentration and focus.'[18]

28. The ellipsis in the quotation above omits Dr. Newkirk's recitation of applicant's report to him during this February 25, 2011 office visit and assessment, that applicant reported he was under investigation for alleged misconduct where he "allegedly" rear-ended someone on duty and then attempted to bribe them, allegations applicant said are not true. Dr. Newkirk actually described what applicant said in the "Interim History" section of his February 25, 2011 report where Dr. Newkirk reported what applicant told him about having problems after going back to duty. Dr. Newkirk wrote in part:

> His supervisors think he is not doing well. Last March there was a problem. He was accused of bribing someone. He thought he was doing everything correctly and yet he was told that he rear-ended someone and then allegedly bribed the people he hit. He says this is not true at all. Yesterday he had to go to a funeral for one of his police officer buddies and this was devastating. Someone said he was not driving well at all. He does not think that was true either.

29. A. Michael Wolfe, Ph.D., Q.M.E., a Neuropsychological and Clinical Psychologist, evaluated applicant on July 14, 2011, on referral from Dr. Newkirk. Dr. Wolfe wrote at page 16 of his report the following:

> By far his biggest problem is dealing with the emotional sequelae of the injury. He is very depressed and anxious and continues to experience considerable difficulty with managing his anger. These consistent symptoms are consistent with a TBI.[19]

---

[18] Applicant's Closing Argument and Points and Authorities, 2:27-3:8.

[19] Traumatic Brain Injury. Dr. Wolfe fails to discuss whether those symptoms, especially that of extreme depression and anxiety, are also consistent with being accused, as applicant told Dr. Newkirk, of serious misconduct, such as taking a bribe, that could lead to loss of his job, and perhaps even criminal prosecution.

30. Dr. Wolfe also noted that, "it appears that he is totally temporarily disabled as far as Dr. Newkirk was concerned," as of the date of his examination of February 25, 2011. Dr. Wolfe commented that applicant's testing was highly suggestive of brain impairment, that applicant's memory and attention are "at least mildly impaired" and he has difficulty with divided attention, experiencing posttraumatic headaches, and is irritable, very depressed and has considerable difficulty with managing his anger. Dr. Wolfe described as, "relatively mild," applicant's cognitive symptoms, which he thought would improve from treatment, and his opinion that emotionally and functionally, applicant will continue to improve over time with adequate treatment. Dr. Wolfe concluded:

> The results of testing indicate that he is experiencing neurocognitive symptoms, which are relatively mild at this time, but could certainly interfere with his job performance as a CHP officer. Of greater concern are the severe emotional sequelae of his TBI, which preclude his ability to work in any capacity without further treatment.

31. Applicant first saw Dr. Newkirk, a neurologist, on October 25, 2010, for complaints of "severe cognitive problems" such that it "he could not return successfully to work as he could not recall all the steps required to do his duties as a Highway Patrol officer." Dr. Newkirk claimed that applicant's reported inabilities were "observed and verified by his fellow officers and supervisors."[20] Applicant reported he has been seeing a therapist for a couple of years not necessarily authorized by the Worker's Compensation system, and that seeing the therapist had been slightly helpful.

32. Dr. Newkirk also noted that applicant complained of frequent headaches that become throbbing with nausea and vomiting, and sensitivity of to light requiring him to wear sunglasses at all times. Applicant reported the headaches lasted an hour or two and occurred at a rate of one or two a week, but the occurrence of the nausea had diminished.

33. Dr. Newkirk summarized, and editorialized by endorsing as factually accurate, what applicant told him, as follows:

> He has had continuous problems with his work since returning. He is overwhelmed by the work and cannot keep up. He is having anger issues that are new or much heightened. These have been serious at home and had (*sic*) work. He has been out of control once or twice in the last two years. He has been seeing a therapist for a couple of years not necessarily authorized by the comp system. This has been slightly helpful. He is having short-term memory loss since the incident and now

[20] Dr. Newkirk's report does not identify these other officers and supervisors claimed to be able to "verify" applicant's claim that he "could not recall all the steps required to do his duties as a Highway Patrol officer."

thinks that the problem has become worse, proved by his incapacity to handle stress and to keep track of multiple ideas are assignment simultaneously. He has missed some stops for highway exits four or five times before making the right turn to exit. He forgets where he parks his vehicle.

He is only amnesiac for the accident itself. Since the accident his general memory seems to be intact but his attention span, organizational skills and decision-making are all impaired. He is misplacing objects. He has had some writeups at work since the accident. He feels overwhelmed all of the time. He used to do 100 arrests a month and now cannot do the paperwork for a much smaller number. Once he completes his report it is correct but he can only do one at a time. Ordinarily he might be working on eight or nine reports all at once. He has had to testify in court but only about incidents that predated the accident. He thinks he performed in a satisfactory manner in those situations. He has no driving issues but often misses his exits. He has had some chases and did well.[21]

34. Dr. Newkirk noted that applicant had treatment from North Bay Worker's Compensation Clinic (referring to Dr. Opperschall and Dr. Green). "He saw a neurologist there who released him as he was not complaining about his intellectual limits because he did not fully understand his limits."[22]

35. Dr. Newkirk noted later in his report the results of his mental status examination, finding that applicant was fully alert, oriented and cooperative with no sign of any intellectual deficit, right left disorientation, confusion or misperception, with his abstract thinking intact. He noted speech and language were normal and the ability to follow instructions and think creatively was normal. He noted, "even though there are no signs of aphasia, he did have concentration problems and hesitated in following simple instructions, but he was nonetheless accurate in his actions and responses."

36. Dr. Newkirk noted in his assessment that applicant sustained a closed head injury with loss of consciousness, a concussion and post consent concussion syndrome, not treated at this point. "This is minimal brain injury." He recommended a variety of treatments, including more neuropsychological testing to determine the extent of any cognitive deficits, and medication therapy using Aricept and Namenda, and perhaps

---

[21] Dr. Newkirk's report presents the above as fact, based evidently upon taking applicant's reports of symptoms and effects as completely accurate, without any extrinsic verification or corroboration. Few of these "facts" were confirmed by Captain Cahoon's testimony (below).
[22] This comment is hearsay upon hearsay, and his speculating about applicant's state of mind at the time he was evaluated by Dr. Wolfe is the essence of incompetent evidence. These comments were disregarded except to the extent that they reflect examiner bias.

neurocognitive retraining. Dr. Newkirk noted "certainly he needs help with stress management and work with improving his ability to handle complex situations and well as rapid decision-making an appropriate risk assessment and management of complex issues as well as anger and impulse management."

DR. STEVENSON

37. Dr. Stevenson is an occupational medical specialist who has treated applicant and works in close association with Dr. Newkirk. Dr. Stevenson testified in support of applicant's contentions.

38. Dr. Stevenson first saw applicant on August 9, 2011. Dr. Stevenson referred applicant to Dr. Wolfe for the evaluation referenced above. Dr. Stevenson also completed an April 24, 2012, Physician's Report to CalPERS regarding applicant's disability status, finding that applicant was unable to do his job since the time that he "first saw him," evidently a reference to his first office evaluation of applicant on August 9, 2011.

39. Dr. Stevenson testified that he, "took applicant off work and did not think that he could make it back to regular duty as a CHP officer," and that is why he suggested vocational rehabilitation. Dr. Stevenson testified that his opinion was supported by, "the severity of his head injury," depression, and "serious neck and back injuries where he tore out several joints." He testified "I would have expected poor judgment at work and angry and frustrated acting out, it is a dangerous situation." "I pulled him off work because of his impaired concentration."

40. Dr. Stevenson's assessment of applicant on August 9, 2011 was:

Closed head injury, post traumatic headaches.

Cervical whiplash injury.

Thoracic whiplash injury.

Lumbar sprain with left lower extremity radiculopathy, probable facet arthropathy, symptomatic with extension pain.

Left shoulder sprain with probably (*sic*?) internal derangement.

Bilateral hand upper extremity numbness, tingling.

Right olecranon contusion with possible neuroma.

Dizziness and balance impairment.

Reactive anxiety/depression secondary to the closed head injury.

Dr. Stevenson noted earlier in his report of the same evaluation, in recording applicant's report of the details of his November 2008 roll-over crash and its aftermath;

> He was ultimately discharged, and he was motivated to return to work partly because of potentially adverse administrative action that he did not want unfolding in his absence, and he wanted the results of the action on full duty. He was 4 years in the Marines with an honorable discharge, and as can be seen from the accident tended to be assertive in his responses to situations.[23] One of the adverse actions involved witness credibility according to Mr. Desmarais.

Dr. Stevenson concluded his August 2011 report by commenting:

> The patient does have a significant head injury as well as the orthopedic lumbar and left shoulder injury. The head injury with full fitness for duty probably would have precluded him from doing his usual and customary job.[24] Given the injury and the nature of this I am impressed that he made it back to work as long as he did, and the administrative actions do not particularly surprise me, at least as would be attributable to irritability, forgetfulness and impaired judgment.

CAPTAIN CAHOON

41. Captain Cahoon is a retired CHP Station Commander. Captain Cahoon first became aware of applicant when he was called to respond to the collision scene where applicant was severely injured in 2008. He later became applicant's Station Commander when applicant was transferred to the Contra Costa County Station he commanded in 2009.

42. Captain Cahoon testified that when he was summoned to the scene of the accident where applicant was injured, a CHP Sergeant gave aid after applicant had been

---

[23] The editorializing and personal comment on the circumstances and potential legal effects of the collision and the administrative actions pending against applicant in this sentence, enclosed within what is represented as applicant's reports and descriptions of the collision and its aftermath, was also evident in Dr. Stevenson's testimony, and reflected a form of patient bias and advocacy very damaging to his medical credibility.

[24] An additional example of Dr. Stevenson's unblushing patient bias and advocacy; here he speculates about what a fitness for duty examination would likely have shown made by a physician for which no foundation exists that he was qualified to perform a fitness for duty examination.

removed from his vehicle. Captain Cahoon testified that the Sergeant giving aid said that applicant had suffered, "a severe head injury that the officer's brain was exposed."[25]

43. Captain Cahoon testified that after applicant was transferred to his command, he became concerned about manifestation of personality issues exhibited by applicant. Captain Cahoon was aware of applicant's head injury and was aware that such head injuries might take a long time to properly heal. He testified that the problem with applicant's workplace that included angry outbursts that seemed inappropriate to any provocation in what appeared to be minor errors in judgment was discussed with the Sergeants who oversaw applicant's direct work. "We agreed to pay close attention, and put him on afternoon shifts under the supervision of a Sergeant who knew him." Captain Cahoon described a number of "minor issues and incidents," that were "puzzling," but he believed were due to poor judgment. He reported that applicant took offense to benign comments and angrily replied, and when confronted with his behavior, he acknowledged that his response was inappropriate, but could not explain why. Captain Cahoon's testimony was remarkable in his failure to mention any driving or other performance issues such as missing exits, failure to complete paperwork timely or other non-behavioral related tasks as concerns stemming from his concern about applicant's head injuries.

44. Captain Cahoon testified that applicant's behavior became such a concern over the next approximately 12 months (2009-2010) that "we told/asked him to get treatment," and that he and his supervisors were considering starting proceedings to have applicant subjected to a fitness for duty evaluation. Captain Cahoon explained that a fitness for duty evaluation is performed by a professional who assesses whether applicant is physically and mentally fit and safe to continue to serve the public, to drive a police vehicle and carry a gun. He confirmed that if applicant were ordered to submit to a fitness for duty evaluation, he would be removed from duty until such time as the evaluator concluded that he was physically and mentally fit and safe to continue with his duties.

45. Captain Cahoon acknowledged that he was able to order applicant to submit to a fitness for duty evaluation, but did not do so. He testified, "I did have concerns," but did not initiate the fitness for duty process. There was thus never a determination that applicant was not fit for duty. He affirmed that he would not and could not let applicant continue working if he believed that applicant was a danger to himself or the public. He confirmed that he permitted applicant to continue on full duty, expressing the desire of the CHP to "resolve performance problems at the local level if possible." He expressed concerns about applicant's ability to make good judgment calls, but those concerns were not sufficient to initiate the process of ordering fitness for duty evaluation or remove him from duty, as he noted "most of the incidents were minor." He confirmed that the reason he did not take applicant off work was that in his opinion, and that of the Sergeants who directly supervised applicant, that applicant did not appear to be unsafe to himself or the public.

---

[25] Such was not the case, and Captain Cahoon's intent in mentioning this embellished "fact" without prompting highlighted the conflicted, dichotomous nature of his testimony.

46. Captain Cahoon also acknowledged that he was the initiator of the NOAA, seeking applicant's termination. He retired before that process was completed. He acknowledged that it would have been unlawful for him to hold applicant's medical condition or any disability due to his injuries from the 2008 collision against him as part of seeking his termination. He confirmed that when he filed the NOAA, applicant's medical condition was not a reason or a cause for his termination.

APPLICANT'S TESTIMONY

47. Applicant testified about his collision, the aftermath and effect of his injuries on his work performance, the disciplinary action against him and his understanding of certain terms of the Agreement. Applicant's testimony was largely disregarded. Applicant's testimony about the effects of his injuries was offered to prove that he is substantially incapacitated. His testimony was not persuasive and sought to offer his own opinion regarding a subject that is exclusively the province of medical expertise. Applicant's testimony regarding the disciplinary actions against him was self-serving, unpersuasive, lacking credibility and constituted improper collateral attack on matters fully resolved through the Agreement. Applicant's effort to explain his understanding of the terms of the Agreement was similarly improper and was disregarded. Applicant's personal understanding or opinion about the legal and factual implications of the terms of the Agreement constitutes impermissible parol evidence,[26] and seeks to add to or modify a fully executed agreement via oral testimony, in direct violation of an express term of the Agreement:

> The stipulated settlement agreement sets forth the entire understanding of the parties in connection with the subject matter herein. None of the parties have made any statement, representation, or warranty in connection here with which has been an inducement for the other to enter into this stipulated settlement agreement, except as is expressly set forth herein. It is expressly understood and agreed that the stipulated settlement agreement may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a writing duly executed by authorized representatives of the parties hereto. The parties agree that they will make no claim at any time or place that this stipulated settlement agreement has been orally altered or modified or otherwise changed by oral communication of any kind or character.

[26] Evidence Code section 1523, subdivision (a), precludes oral testimony offered to prove the content, or to explain, impeach or deny terms or provisions of a writing, where the original of the writing exists.

EVALUATION OF APPLICANT'S MEDICAL EVIDENCE AND TESTIMONY

48. The testimony of Captain Cahoon set forth above was conflicted and inconsistent. Captain Cahoon sought at the same time to suggest in accordance with applicant's contentions that applicant's misconduct reflected in the NOAA was the product of poor judgment that was produced by his severe head injury suffered in the rollover motor vehicle collision in November 2008, yet at the same time testified that those injuries played no part in his filing the NOAA and were not serious enough concern to require ordering a fitness for duty evaluation. Furthermore, Captain Cahoon confirmed that whatever sequelae were evident to him and the Sergeants who supervised applicant between his return to work in 2009 and his termination in 2011 were not sufficient to raise a reasonable concern that applicant was not safe to perform his duties, drive a patrol car, carry a gun, and interact with the public. Captain Cahoon was aware that he has a statutory duty to order applicant to be evaluated for his fitness for duty if he had a reasonable suspicion that applicant had sustained injuries such that his professional judgment as a police officer was impaired to such an extent that applicant was unsafe to himself or to members of the public.

49. Applicant's medical evidence reveals a significant dichotomy between his claims and reports of impairments due to his medical condition and claimed disabilities before and after applicant became aware of investigations into his alleged misconduct and that his superior officers were viewing him with "suspicion." Applicant's medical evidence reflects a parallel development of reports and claims of increasing impairment and disability along approximately the same time line as the development of increasing jeopardy to his employment and pressure, such as he told his superiors regarding why he drove his marked patrol car unsafely through the streets of Oakland, "trying to do everything in his power to stay out of trouble." An overall assessment of applicant's medical evidence demonstrates that applicant demonstrated significant skill in enlisting physician support for his desired outcomes, whether it be his desire to return to duty shortly after his collision injuries through his presentation to Dr. Green, or later his claims of impairments and disabilities as presented to Dr. Newkirk and Dr. Stevenson. It was by no means a "foregone conclusion" that applicant was indisputably eligible for a disability retirement at the time he was terminated by the CHP, or that the termination action was "preemptive" of an indisputably valid claim for IDR.

50. Dr. Stevenson's testimony was not persuasive, as set forth in the Factual Findings above. He overstated the nature and significance of applicant's symptoms, embracing carte blanche as true applicant's reports of his performance difficulties at work, and stepped well outside his expertise as an occupational medical specialist to attempt to bootstrap Dr. Newkirk's opinions, equally tainted with unblushing patient advocacy, into his own. He did not hesitate to express opinions about a variety of orthopedic injuries without any evident assessment by an orthopedist. One can only speculate why none of these evidently favorable medical opinions endorsing applicant's claims of impairments and disabilities found their way into any defense of the allegations against applicant made in the NOAA or in his termination action, especially his speculative opinion in his August 9, 2011

report that applicant would likely fail a fitness for duty evaluation, a fact of watershed significance in this matter.

LEGAL CONCLUSIONS

TERMS OF THE AGREEMENT AND ITS EFFECTS

1. The Agreement reflects applicant's agreement he would never return to work for CHP in any capacity, regardless of the outcome of this IDR application, or any other circumstances, due to terms employed in the Agreement that express this prohibition, and regardless of any other terms in the Agreement. The expression of intention in this term of the Agreement as follows could not be more clear:

> In addition, **appellant agrees to never** apply for **or accept employment with CHP or its successors in interest.** If CHP inadvertently offers appellant a position, appellant breaches this agreement by accepting the position with CHP. Appellant shall be terminated at such time as it is convenient to CHP and appellant hereby waives any right appellant may have to appeal that termination and/or exclusion in any form, administrative body, and/or court of law. (Emphasis added).

2. One of the Agreement's effects was to permanently sever applicant's employment relationship with CHP. The Agreement does not permit applicant to ever return to work for CHP, regardless of his future medical condition, and regardless of the fate of this IDR application. The intent and rationale of the *Haywood/Smith/Vandergoot/Garcia* decisions is to preclude such an applicant from obtaining a IDR, because one of the conditions of obtaining that benefit is the preservation of the possibility that the applicant could return to work if he recovers, a condition that was indisputably not met in this matter.

As the *Haywood* court explains:

> 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. ... 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 the termination through the grievance process. [27]

3. Applicant bargained for and received, in exchange for resolution of the NOAA action seeking his termination, with advice of counsel, a settlement Agreement with the CHP that contained a term that removed a threshold mandatory condition precedent to eligibility for an IDR with CalPERS.

4. Inserting a term in the Agreement that applicant is to be deemed to have resigned from his employment with CHP for "personal reasons" is both a legal fiction embraced by the parties in order to resolve a contested case, and avails applicant not in terms of changing the operative effect of the term of the Agreement that permanently severs his employment relationship with the CHP. In the unlikely event that applicant were granted an IDR, then later found to have been restored to fitness for duty, his resignation for "personal reasons" in the Agreement, regardless of how that personnel change is reflected in CHP official personnel records, changes nothing regarding the actual effect of his agreement that he would never again seek to or work for the CHP. Clever drafting and creation of contingencies in the Agreement cannot and do not restore the mandatory employer/employee continuing relationship required by *Haywood, Smith* and the line of cases that follow them, which relationship was irrevocably severed by applicant entering into the Agreement.

5. Applicant's contentions contain an additional flaw; those contentions seek to reverse the order of analysis set forth in *Haywood, Smith, Vandergoot and Garcia.* The contentions claim an Agreement to which CalPERS was not a party can require CalPERS to determine eligibility for a medical retirement and deny that eligibility before CalPERS can contend that being required to evaluate medical eligibility for a disability retirement is absolutely legally barred. The contentions thus impermissibly seek to require CalPERS to perform a role it contends it cannot be legally required to perform, as a condition precedent to effectuation of an Agreement to which it was not a party. There is nothing in any of the controlling authorities that suggest such Agreement contingencies can legally require CalPERS to ignore the initial *Haywood* legal bar and perform a duty *Haywood, Smith* and *Vandergoot* and *Garcia* say it legally cannot, where that Agreement permanently severs the member's employment and terminates all return rights relationship with his employer.

6. The contentions also isolate certain provisions of the Agreement to the exclusion of others, diverting attention from the Agreement's overall interpretation and effect; the fact that the Agreement was drafted and implemented to resolve the termination of applicant's employment and undisputedly contemplated that applicant would never return to CHP employment, regardless of the outcome of the application for an IDR. The contention in claimant's closing argument, that if the member were granted a disability retirement, and later found to have recovered sufficiently to be in reinstated, that he could indeed be reinstated to CHP employment because he resigned for personal reasons, is wholly without merit.

---

[27] *Haywood, supra*, p. 1306.

HAYWOOD AND *SMITH* EXCEPTIONS

7. As applicant correctly points out, the *Haywood/Smith* cases create an exception to the absolute bar that termination, or in this instance, its agreed-upon de facto equivalent via the Agreement, precludes eligibility for an IDR, including the determination of medical eligibility for same. That exception operates where an employee is terminated for cause and the employee is able to prove that the discharge is either "the ultimate result of a disabling medical condition" or is "preemptive of an otherwise valid claim for disability retirement."[28] In all other circumstances, termination of the employment relationship renders the employee ineligible for disability retirement.[29]

8. The key flaw in the contention is that the proper venue for raising and proving any contention that the termination action is either the ultimate result of a disabling medical condition, or that the termination action is preemptive of an otherwise valid claim for disability retirement, is in the termination action itself. *Haywood* and *Smith* both describe defenses to the termination action that reflect the current state of the law regarding the inability of an employer to dispose of an employee who becomes disabled and can no longer perform his or her duties through the termination process. Applicant failed to raise and prevail upon the issue that his medical condition/disability explains his conduct that formed the basis for his appeal of the CHP's termination action pending before the SPB. Applicant agreed in the Agreement to waive the ability to raise any claim or defense to the termination action not specifically identified in the Agreement. Reservation in the provision of the Agreement quoted below to preserve and raise issues in this IDR action does not have the effect of reviving a claim or defense that should have and could have been raised in the termination action, and was subsumed in the Agreement resolving all claims, rights and defenses settling that termination action.

9. Applicant's contentions constitute what amounts to a collateral attack on the settlement of the termination action. If applicant's medical condition/disability is sufficient, as applicant contends, to explain his conduct that forms the basis of the CHP's termination action, it is also sufficient to demonstrate a complete or at least a partial defense to that termination action in the first place. There is no evidence in the Agreement that the medical condition/disability preclusion defense was raised in the termination proceedings, and as evident in Captain Cahoon's testimony, it was quite clear that the CHP disputed any contention that applicant's medical condition/disability adequately explained the acts and omissions leading to his termination. Applicant's contention thus seeks to provide applicant the benefit of de facto prevailing on what would have been a defense to the termination action that was not raised, litigated, or actually prevailed upon in the appropriate venue. The effect of permitting the contention here is to impeach the basis of the termination action by attempting to inject applicant's medical condition/disability as a reason for his acts and omissions cited as bases in the NOAA for his termination. The provision below does not

---

[28] *Haywood, supra*, p. 1305
[29] *Id.*

permit or preserve applicant's ability to avoid raising the "ultimate result of a disabling medical condition" (*Haywood*) or preemption of an "otherwise valid claim for disability retirement" (*Smith*) in its proper venue, the termination action, nor does it permit bootstrapping the issue into this action as a collateral attack on the reason for the settlement of the termination action reflected in the Agreement.

> Appellant agrees and enters into the terms of this stipulated settlement agreement freely and voluntarily, by and with the advice of his representative, and hereby waives any right of appeal he may have in this matter and waives any claim in federal or state court or any other administrative form that may arise out of this matter which he may now have or hereafter acquire related to this matter or the facts underlying this matter, with the exception of the appellant's currently pending disability retirement application in any claim for workers compensation benefits, if any.

10. *Smith* explains the *Haywood* exception of a termination that is "preemptive" of an otherwise valid claim for disability retirement. *Smith* addresses claims made by terminated employees that their termination was related to their alleged medical condition, such as claimant's contentions here. Smith explains:

> This caveat flows from a public agency's obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability[30] or indirectly through cause based on the disability.[31]

EMPLOYER DUTIES

11. The employer duties referred to in *Smith* are those which were inquired of Captain Cahoon in his testimony. Captain Cahoon acknowledged that CHP has a statutory obligation to file an application for IDR for any employee believed to be substantially incapacitated from his or her usual and customary duties due to the provisions of Government Code sections 21153 and 21192. CHP did not file an application for IDR with CalPERS seeking to retire applicant for disability.

12. CHP also has a statutory duty pursuant to Government Code section 1031, subdivision (f) to order any TO thought to pose an appreciable risk of harm to himself or to the public to submit to a fitness for duty evaluation, and relieve that TO from duty until such time as the CHP receives a report from the type of evaluator required by section 1031, subdivision (f)(1), assuring the CHP that the TO is fit and safe for duty. "... [T]he section

---

[30] *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206, citing *Haywood, supra*, at p. 305 and Government Code section 21153.

[31] *Id.*, citing *Patton v. Governing Board* (1978) 77 Cal.App.3d 495, 501–502.

1031 standards must also be maintained throughout a peace officer's career."[32] The CHP has a non-delegable duty to exercise the authority provided by section 1031, subdivision (f) and order a fitness for duty evaluation before allowing a TO on the road in a patrol car with a gun exercising law enforcement duties who is believed could pose a risk of harm to himself or the public.[33] The CHP did not require applicant to submit to a fitness for duty evaluation after he sustained the injuries in the rollover collision on November 12, 2008 up to and including the time of his termination effective June 15, 2011.

"MATURED" RIGHT TO DISABILITY RETIREMENT AND THE "FOREGONE CONCLUSION"

13 The *Smith* court speaks of a right to disability retirement that has "matured" before the termination:

> Our use of the term 'preempt' admittedly could lead one to the interpretation that both defendants have embraced: an intent to thwart an otherwise valid claim for disability. However, as the plaintiff has correctly attempted to argue throughout the CalPERS proceedings, even if an agency dismisses an employee *solely* for a cause *unrelated* to a disabling medical condition, this cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect.[34] Thus, if a plaintiff were able to prove that the 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.[35] Conversely, 'the right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures....'[36] The key issue is thus whether his right to a disability retirement matured before plaintiff's separation from service. A vested right matures when there is an unconditional right to immediate payment. [Citations omitted]. In the course of deciding when the limitations period commenced in a mandate action against a pension board, the Supreme Court noted that a duty to grant the disability pension (i.e., the reciprocal obligation to a right to immediate payment) ***did not arise at the time of the injury itself but when the pension board determined that the employee was no longer capable of***

---

[32] *Sager v. County of Yuba* (2007) 156 Cal.App. 4th 1049, 1059.

[33] *Id.*, citing *Pitts v. City of Sacramento* (2006) 138 Cal.App. 4th 853, 857, fn. 4.

[34] *Id.*, at p. 206, Italics in original, additional citations omitted. Emphasis in original.

[35] *Id.*, citing *In re Gray* (1999) State Personnel Bd. Precedential Dec. No. 99–08, p. 6 [disability retirement effective before dismissal does not forestall dismissal; however, dismissal does not affect receipt of disability retirement].)

[36] *Id.*, citing *Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749.

performing his duties.[37] In the present case, a CalPERS determination of eligibility did not antedate the unsuccessful certification on the ladder truck. His right to a disability retirement was thus immature, and his dismissal for cause defeated it.

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. This case does not present facts on which to explore the outer limits of maturity, however. It is not as if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal. Rather, he did not even initiate the process until after giving cause for his dismissal.

Nor, for that matter, is there undisputed evidence that the plaintiff was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb). At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers' compensation claims. But a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different.[38] And for purposes of the standard for a disability retirement, the plaintiff's medical evidence is not unequivocal. The defendants would have a basis for litigating whether this evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient.[39] Thus, an *entitlement* to a disability retirement cannot rest on the medical evidence of the plaintiff.[40] (Emphasis added)

---

[37] *Id.*, citing *Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671–672. ["the right has not come into existence until the commission has concluded that the condition of disability renders retirement necessary"].) Emphasis added.
[38] *Id.*, at p. 207, citing *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132, 139. Emphasis added.
[39] *Id.*, citing *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00–05, pp. 12–14.
[40] *Id.* at p. 207-208.

14. There is no evidence that it was "a foregone conclusion" at the time of the NOAA and termination that applicant would have been indisputably entitled to a disability retirement. The medical evidence presented by applicant selected for presentation in the Factual Findings demonstrates first that the medical evidence was far from conclusive that applicant would have been indisputably entitled to a disability retirement at the time the CHP sought to terminate him. The medical evidence reveals a dichotomous relationship between the nature of applicant's claims of impairment and disability before and after he became aware he was being subjected to "suspicions" and investigations that led to his termination. The medical evidence recited in the Factual Findings also suggests that raising the medical condition/disability defense in the termination action as an explanation or an excuse for applicant's alleged misconduct would likely have been hotly contested. The medical evidence in the Factual Findings, also reflected in Captain Cahoon's testimony, suggests that the CHP would have strongly contested any claim that applicant's termination was preempted or precluded by a matured claim for disability retirement, in that such claims would have raised issues regarding CHP's failure to fully recognize applicant's workplace disabilities and limitations and would suggest that the CHP disregarded its statutory duties to require applicant to undergo a fitness for duty evaluation and/or mandatorily retire him for disability. Such claims would also suggest that the CHP was culpable for putting an officer back on the street in a patrol car carrying a gun with knowledge that his medical condition and disability rendered him potentially unsafe to himself or the public.

15. Under these circumstances it can only be concluded that the medical evidence was far from meeting the *Smith* standard of constituting "a foregone conclusion" that applicant would have been entitled to a disability retirement at the time of the termination action. The evidence strongly suggests that such a claim would have been strenuously contested, and permitting the claim to be raised here again avoids the requirement to litigate the claim in its proper forum, and seeks to provide applicant unearned and undeserved advantage by failing to do so through clever drafting of the Agreement. The evidence reveals the member's claimed substantial incapacity was by no means a foregone conclusion, and there is no evidence that would support a conclusion that the member's right to receive a disability retirement was "matured" at the time he was terminated. *Smith* holds that such a determination cannot be made upon the applicant's evidence alone unless that evidence appears to be irrefutable, which is not the case here. The member here does not meet the exception carved out in *Haywood* and elaborated in *Smith.*

VANDERGOOT AND *GARCIA*

16. Vandergoot and Garcia entered into similar Agreements as did applicant here, in order to resolve the pending appeal of his termination before the SPB. Vandergoot and Garcia both claimed that *Haywood* and *Smith* did not control, because those cases involved employees who were terminated for cause, rather than resigned for personal reasons. Vandergoot and Garcia both claimed that because they entered into a settlement in which there employer agreed to withdraw the NOAA, in exchange for a voluntary resignation, and their agreement to never apply for or accept employment with that employer again, they were

not terminated. Both then applied for IDR, and CalPERS rejected the applications, as it did here.

17. The ALJ hearing the Vandergoot and Garcia cases found that, regardless of the terms of the settlement, the practical effect was that Vandergoot and Garcia had been terminated for cause, relying on *Haywood* and *Smith*. The ALJs recent that if either Vandergoot or Garcia were allowed to receive an IDR, there would be no employer who could require either to undergo a medical examination under Government Code section 21192. The ALJs also observed that, in addition, it was no longer possible for either Vandergoot or Garcia to be reinstated under Government Code section 21193. The ALJ in each case concluded that these necessary prerequisites for receiving a disability retirement were absent, thus CalPERS was correct in canceling the applications. Both cases pointed out that *Haywood* and *Smith* make it clear that a necessary prerequisite for disability retirement is the potential reinstatement of the employment relationship with the employer, if it is ultimately determined that the employee is no longer disabled, and that termination, whether directly, or through a stipulation, trading off withdrawal of the termination action for a resignation and an agreement to never return to work for that employer, the net effect is the same, regardless of any legal fiction employed, that the employment relationship is permanently severed. That severance creates a circumstance where granting the disability retirement sought would be wholly inconsistent with the statutory policies supporting the existence of the benefit.[41] The same result is required here for the same reasons.

CONCLUSION

18. Applicant failed to carry his burden of proving that he is eligible to file the application for IDR at issue in this matter. The practical effect of the Agreement is that applicant would never return to work for CHP in any capacity for any reason. The Agreement with CHP constituted a complete severance of the employer-employee relationship, a necessary prerequisite for IDR-the potential for reinstatement of his employment relationship with the employer if it ultimately is determined that he no longer is disabled. When the member agreed to permanently sever his employment relationship CHP in the agreement, the bar set forth in *Haywood, Smith, Vandergoot* and *Garcia* was invoked. The disability provisions of the Government Code containing PERS law contemplate a potential return to active service. In that the Agreement has made that an impossibility, CalPERS correctly determined that the member was in eligible to apply for disability retirement.

ORDER

The determination of CalPERS' Benefit Services Division that Joshua Desmarais is ineligible to file an application for disability retirement is SUSTAINED, for the reasons set

[41] *Vandergoot, supra*, p. 19.

forth in the Legal Conclusions above. The action of CalPERS' Benefit Services Division rejecting the application for an industrial disability retirement is AFFIRMED.

DATED: March 18, 2016

DocuSigned by:
25D4275E07F6483...

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearing