

ATTACHMENT E
THE PROPOSED DECISION

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

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

GLEN W. SEBRING,

Respondent

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
CALIFORNIA STATE PRISON - SOLANO

Respondent.

Case No. 2015-0498

OAH No. 2015081023

PROPOSED DECISION

Administrative Law Judge Tiffany L. King, Office of Administrative Hearings, State of California, heard this matter on April 12, 2016, in Sacramento, California.

Terri Popkes, Senior Staff Attorney, represented the California Public Employees' Retirement System.

Peter O. Slater, Attorney at Law, represented respondent Glen W. Sebring, who was also present.

Chrissie Stauss, Employee Relations Officer, represented respondent California Department of Corrections and Rehabilitation, California State Prison - Solano.

Evidence was received, the record was closed, and the matter was submitted for decision on April 12, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED May 13 20 16

FACTUAL FINDINGS

1. Anthony Suine, Chief, Benefits Services Division, California Employees' Retirement System (CalPERS), made and filed the Statement of Issues in his official capacity.
2. Glen Sebring (respondent) was employed by respondent California Department of Corrections and Rehabilitation, California State Prison – Solano (CDCR) as a Correctional Officer in October 2006. By virtue of his employment, respondent became a state safety member of CalPERS subject to Government Code section 21151.
3. On October 17, 2011, respondent submitted for the first time an application for industrial disability retirement by facsimile to CalPERS. In his application, respondent claimed he was disabled on the following bases: "heart, mitral valve release, hypertension, right knee, lower back, and a psyche [sic] injury resulting from the cumulative stress while working as a Correctional Officer." On November 9, 2011, respondent re-submitted the same application. By letter dated November 18, 2011, CalPERS notified respondent that his application could not be processed because it was incomplete.
4. In October 2012, upon reaching age 50, respondent filed for service retirement.¹ His service retirement was granted in January 2013.
5. Earlier, by letter from CDCR dated July 28, 2011, respondent was informed of a Notice of Adverse Action (NOAA) against him pursuant to Government Code section 19574. The notice advised respondent he was dismissed from his position as a Correctional Officer effective at the close of business (i.e., 5:00 p.m.) September 19, 2011. The NOAA included information advising respondent of his right to request a *Skelly* hearing. It also noticed respondent of his right to appeal the NOAA to the State Personnel Board within 30 days after the date of the NOAA.
6. Pursuant to respondent's request, a *Skelly* hearing was held on September 8, 2011. At the hearing, respondent was given an opportunity to provide mitigation evidence that would support a reduction or withdrawal of the discipline. On September 12, 2011, respondent received written notice from Warden Gary Swarthout that his dismissal would be upheld.
7. On September 18, 2011, respondent submitted a written letter to Warden Swarthout stating his voluntary resignation for personal reasons effective at 3:00 p.m. on September 19, 2011, two hours before his termination was to take effect.

¹ At hearing, respondent asserted he reapplied for industrial disability retirement sometime in 2012 prior to filing a service retirement application in October 2012. However, respondent offered no supporting evidence of his filing a reapplication or of CalPERS receiving it.

8. On May 27, 2014, respondent signed an application for industrial disability retirement, which was received by CalPERS on May 28, 2014. In his application, respondent claimed disability on the basis of orthopedic, cardiovascular, and psyche conditions.

9. CalPERS received and reviewed information and documents concerning respondent's termination from employment. CalPERS determined that respondent was barred from any entitlement to disability retirement because he was dismissed from his employment for reasons which were neither the result of a disabling medical condition nor preemptive of any otherwise valid claim for disability retirement. CalPERS notified respondent of its determination by letter dated January 22, 2015, which included notice that respondent could appeal.

10. Respondent filed an appeal by letter dated February 18, 2015, in which he asserted he remained eligible for other state employment but for his physical injuries. As noted in the Statement of Issues, the appeal is limited to the issue of whether respondent may file an application for industrial disability retirement based on an orthopedic, cardiovascular, or psyche condition, or whether his application and eligibility for disability retirement is precluded by operation of law. (See *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*).)

Employment Background and Termination

11. Respondent was employed by CDCR from October 2006 until his resignation on September 19, 2011, when a dismissal action was pending against him.

12. The circumstances underlying the NOAA occurred between April 2010 and February 2011. During this ten-month period, respondent regularly smuggled contraband cell phones and cigarettes to inmates inside the prison facility. In February 2011, CDCR discovered respondent's activities. On February 9, 2011, respondent was placed on paid administrative leave pending CDCR's internal investigation and CDCR restricted him from the prison grounds. When questioned during his administrative interrogation, respondent refused to provide to investigators the names of the inmates to whom he had supplied the contraband.

13. On July 28, 2011, respondent was served with the NOAA advising him that he was dismissed from his Correctional Officer position, effective at 5:00 p.m. on September 19, 2011. The NOAA charged respondent with violating CDCR regulations by smuggling contraband to inmates and failing to make "full, complete, and truthful statements" during an official internal investigation. Based thereon, the NOAA charged respondent of violating Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (e) insubordination, (o) willful disobedience, and (t) 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.

14. As noted earlier, on September 15, 2011, respondent submitted his voluntary resignation effective at 3:00 p.m. on September 19, 2011. At hearing, respondent admitted he resigned at that specific date and time to prevent the termination from taking effect.

Respondent's Testimony

15. Respondent testified that he smuggled contraband into the prison under duress and out of fear for his personal safety and the safety of his family. According to respondent, in April 2010, respondent's mother contacted him while he was at work and reported that a man selling meat door-to-door made her uncomfortable. After work, respondent went home where he was confronted by an unidentified African-American male. The stranger purportedly showed respondent his cell phone which depicted a photograph of respondent's mother's house. The man asked, "Did your mother have a visitor? She's dead meat." He then handed respondent a cell phone and said "we are going to contact you," then ordered respondent back into his house.

16. Respondent testified that a couple of days later, he received a call on the cell phone the stranger had provided and was instructed to smuggle cigarettes and cell phones to inmates inside the prison. If he failed to comply, the caller said, his mother was "dead meat." Respondent contended he reported the threat to a lieutenant at the institution after which respondent received another call and was asked, "Do you think we are playing?" At hearing, respondent refused to name the lieutenant to whom he reported the threat, asserting he was more afraid of the lieutenant than the inmates. After receiving the second call, respondent smuggled cell phones and tobacco into the prison "pretty regularly" until he was caught by CDCR.

17. Respondent asserted his mental state was a "constant nightmare" for the ten-month period he was smuggling contraband into the prison and that he was relieved when the ordeal ended in February 2011. In March 2011, after he was placed on paid administrative leave, respondent began treatment with Mircea Truda, Psy.D. He had five visits with Dr. Truda who then referred respondent to Penelope McAlmond-Ross, Psy.D. Respondent was treated by Dr. McAlmond-Ross from March through October 2011, during which time he was also prescribed Prozac.

18. With respect to his asserted physical injuries, respondent indicated he twisted his ankles and knees responding to alarms at different points in June 2010. Prior to his resignation in September 2011, respondent was treated by his family physician, Jayesh Patel, M.D., for pain in both knees as well as his lower back. Dr. Patel testified at hearing; however, he offered no opinion as to respondent's knees or lower back.

Discussion

19. Respondent argues he was not terminated for cause from his employment with CDCR, but that he voluntarily resigned and remains eligible to return to work at CDCR or elsewhere as a State of California employee. Because his resignation was effective prior to

the NOAA taking effect, respondent contends he was never terminated and is therefore eligible to apply for industrial disability retirement.

20. CalPERS contends that the employer-employee relationship between CDCR and respondent is permanently severed, as evidenced by the NOAA, the September 8, 2011 letter upholding the dismissal, and the testimony of Chrissie Stauss, Employee Relations Officer for the prison. Ms. Stauss testified that, had respondent not voluntarily resigned at 3:00 p.m. on September 19, 2011, he would have been terminated for cause two hours later. If respondent were to seek reemployment or reinstatement with CDCR, the NOAA would be enforced. Therefore, CDCR argues, there is no possibility of respondent reinstating to his Correctional Officer position with CDCR.

21. The termination of a member's employment in such a manner that there is no possibility of reinstating the employer-employee relationship in the future renders him ineligible for disability retirement so long as such termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. (*Haywood v. American River Fire Protection District*, *supra*, 67 Cal.App.4th at pp. 1306-1307.) It is wholly irrelevant whether the employment was terminated because the member was fired for cause or voluntarily resigned under unfavorable circumstances in which his dismissal was imminent. (*In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot (Vandergoot)*, CalPERS Precedential Bd. Dec. No. 13-01, at pp. 7-8.) Under either scenario, the termination constitutes "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 CDCR] if it ultimately is determined that he is no longer disabled." (*Haywood*, *supra*, 67 Cal.App.4th at p. 1306.)

22. The evidence established that CDCR decided to dismiss respondent from his Correctional Officer position on or before it served the NOAA on him on July 28, 2011, and advised him that his employment would be terminated at 5:00 p.m. on September 19, 2011. Respondent voluntarily resigned from his position two hours before the dismissal was to take effect, admitting he did so for the sole purpose of avoiding the dismissal. Should respondent attempt to reinstate or reemploy with CDCR, the NOAA would be enforced and thereby prohibit his return. Additionally, respondent would be barred from seeking to overturn the NOAA because the time period in which to file such an appeal has already expired.

23. In *Haywood*, the appellate court found: "Where an employee is terminated for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed." The court explained that: "A firing for cause constitutes a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement-the potential reinstatement of [the employee with the employer] if it is ultimately determined that he is no longer disabled The disability provisions of the PERS law contemplate a potential return to active service and a terminated

employee cannot be returned to active service.” (*Haywood, supra*, 67 Cal.App.4th at pp. 1306-1307.)

24. In *Vandergoot*, the Board held an employee’s resignation was tantamount to a dismissal when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and agreed to waive all rights to return to his former employer. As explained in *Vandergoot*, “a necessary requisite for disability retirement is the potential reinstatement of the employment relationship” with the employer if it ultimately is determined that the employee is no longer disabled. (*Vandergoot, supra*, p. 7, ¶ 18.)

25. The facts in this case are distinguishable from those in *Haywood* and *Vandergoot* in that respondent resigned before the dismissal took effect and did not enter into a settlement agreement with CDCR wherein he agreed never to return. These differences notwithstanding, this case does not dictate a different result. The Board considered a similar scenario in its adopted decision, *In the Matter of Application for Industrial Disability Retirement of Phillip D. MacFarland (MacFarland)*, Case No. 2014-0177. Although not precedential, the case is nonetheless instructive. In *MacFarland*, a prison psychologist was served with an NOAA for dismissal for cause. Two days before the dismissal became effective, the psychologist service retired. Thereafter, the psychologist applied for industrial disability retirement. CalPERS denied the application on grounds that the psychologist was terminated for cause. The Board agreed with CalPERS, stating:

The law does not respect form over substance. (*Pulaski v. Calif. Occupational Safety and Health Standards Board* (1999) 75 Cal.App.4th 1315, 1328.) The courts look to the “objective realities of a transaction rather than to the particular form the parties employed. Thus, we focus on the actual rights and benefits acquired, not the labels used.” (*General Mills v. Franchise Tax Bd.* (2009) 172 Cal.App.4th 1535, 1543.) Here, the evidence is persuasive that applicant retired to avoid termination from employment. His relationship with his employer had been severed prior to his retirement, when the NOAA was served on him. His severance became irrevocable when he withdrew any appeal he filed. Applicant is barred from returning to his former employment and thus the holdings in *Vandergoot* and *Haywood* render him ineligible for disability retirement, unless he meets an exception identified in *Haywood* and *Smith*.

(*MacFarland, supra*, at pp. 7-8, ¶ 29.)

26. The facts in *MacFarland* are analogous to those here. Respondent resigned two hours prior to the effective date of the NOAA for the purpose of avoiding dismissal. His relationship with CDCR was severed when the NOAA was served on him. That severance became irrevocable when the time period to appeal the NOAA expired. Accordingly, unless

an exception applies, respondent is ineligible for disability retirement pursuant to *Haywood* and *Vandergoot*.

Matured Right to Disability Retirement

27. Respondent contends he had a matured right to disability retirement at the time of his separation from employment. He claims he had not been able to work for about a year before the NOAA was issued, due to knee pain and posttraumatic stress disorder. He claims that reports from two medical evaluators connected with his workers' compensation claims establish that he had a matured right to disability retirement at the time of his separation from employment. CalPERS relies upon the holdings of *Smith* and *Haywood*, which are explained as follows. The *Smith* court held that dismissal for cause extinguishes the right to disability retirement, except if a plaintiff were able to prove that the right to 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. (*Smith, supra*, 120 Cal App.4th at 206.) The court identified the key issue as whether the right to the disability retirement matures before the date of separation from service. It found that a vested right matures when there is an unconditional right to immediate payment. And, in the case of CalPERS disability retirement, there is no unconditional right to immediate payment without a finding by CalPERS that there is a right to a disability retirement pension. (*Ibid.*)

28. Respondent contends that CDCR's NOAA was preemptive of an otherwise valid claim for disability retirement. Where an agency dismisses an employee solely for a cause unrelated to a disabling medical condition, this will still not result in the forfeiture of a matured right to a pension allowance. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206.) "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. [Citations omitted.] Conversely, 'the right may be lost upon occurrence of a condition subsequent such as a lawful termination of employment before it matures...' (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749 ...)" (*Ibid.*)

29. Respondent had a vested right to apply for industrial disability retirement upon acceptance of employment with CDCR. While the "right" to the benefits vests upon acceptance of employment, an employee would not be entitled to receive the benefit until all the conditions prescribed have been met. (*Dickey v. Retirement Board of the City and County of San Francisco* (1976) 16 Cal.3d 745.) There is a marked difference between the vesting of a pension right and the accrual of a cause of action to enforce a vested right. "The right to a pension is a vested right; the amount of the pension may not always be ascertained until the last contingency has occurred." (*Id.* at p. 750; *Brooks v. Pension Board* (1938) 30 Cal.App.2d 118, 123.) The vested right to the pension benefit may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures, or because of the nonoccurrence of one or more conditions precedent. (*Id.* at p. 749.) Thus, the issue here is whether respondent's vested interest in disability retirement "matured" prior to his separation from employment.

30. A vested right matures when there is an unconditional right to immediate payment. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 206.) Typically, this arises at the time a pension board determines that the employee was no longer capable of performing his/her duties. (*Ibid*; *Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672.) Here, respondent had no unconditional right to immediate payment at the time he was served with the NOAA. He had not applied for disability retirement and CalPERS had no opportunity to evaluate any of his disability claims. Indeed, respondent did not apply for disability retirement until four months after he was served with the NOAA.

31. *Smith* recognized that even where there has not yet been a determination of eligibility, there may be facts which a court, applying principles of equity, will deem an employee's right to a disability retirement. (*Id.* at pp. 206-207.) *Smith* then went through a number of situations where equitable principles might apply. They are also considered here. As in *Smith*, this is not a case where respondent had an impending ruling on a claim for a CalPERS disability pension that was delayed through no fault of his own. (*Id.* at p. 207.) As noted previously, he did not even initiate the process for receiving an industrial disability retirement allowance until four months after he was served with the NOAA.

32. Nor was there "undisputed evidence" that respondent 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)." (*Ibid.*) Respondent claims his physical injuries (knees and lower back) stem from responding to various alarms at work in June 2010. However, respondent did not seek disability retirement at that time. Nor is there any evidence respondent filed a workers' compensation claim related to those alleged injuries, or otherwise notified CDCR of them. With respect to his psyche condition, respondent contends he was in a "constant nightmare" during the ten-month period he smuggled contraband onto prison grounds. Yet, respondent did not seek psychiatric help until March 2011, one month after his activities were discovered by CDCR and he was placed on administrative leave pending investigation. Any mental distress suffered by respondent appears to have been the result of his having been caught engaging in misconduct and facing the consequences rather than some other reason. This is precisely the scenario which *Haywood* is meant to avoid. (*Haywood, supra*, 67 Cal.App.4th at p. 1296 ["The behavior which resulted in Haywood's firing--his unwillingness to faithfully perform his duties--was not caused by a physical or mental condition, and Haywood had no valid claim for disability retirement which could have been presented before he was fired"].)

33. When the above matters are considered as a whole, respondent has not presented unequivocal evidence of such nature that approval of his application for disability retirement was a "foregone conclusion." Any right to an industrial disability retirement allowance cannot be deemed to have matured in this case. For all these reasons, his application for disability retirement should be precluded by operation of *Haywood*.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. CalPERS has the burden of proving respondent's application for industrial disability retirement is barred by *Haywood* and its progeny. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"].) It must meet its burden by a preponderance of the evidence. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Law

2. Government Code section 20026 provides, in pertinent part:

"Disability" and "incapacity for performance of duty" as the basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion.

3. Government Code section 21151, subdivision (a), provides: "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."

4. Government Code section 21152 reads, in pertinent part:

Application to the board for retirement of a member for disability may be made by...

(d) The member or any person in his or her behalf.

5. Government Code section 21154 reads, in pertinent part:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On

receipt of any 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 on its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

6. Government Code section 21156, subdivision (a)(2), provides:

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

7. CalPERS has demonstrated that respondent's separation from employment was a dismissal for cause for purposes of applying the *Haywood* criteria. (See Findings 19 through 26.) It was also established that respondent's separation from employment was not the ultimate result of a disabling medical condition.

8. In *Smith v. City of Napa*, *supra*, 120 Cal.App.4th 194, the same court reiterated the principles of the *Haywood* decision. The court further explained that a disability claim must have "matured" in order to find that a disciplinary action preempts the right to receive a disability retirement pension, and this maturation did not occur at the time of the injury, but rather when the pension board determined that the employee was no longer capable of performing his duties. (*Id.* at p.206.) The *Smith* court further allowed consideration of equitable principles to "deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause." (*Id.* at p. 207.)

9. As noted in Findings 27 through 33, even where principles of equity are applied, this was not a case where there was undisputed evidence that respondent was eligible for a CalPERS industrial disability retirement allowance, such that a favorable decision on his claim would have been a "foregone conclusion." Respondent's vested interest in an industrial disability retirement allowance never "matured" prior to his separation from employment.

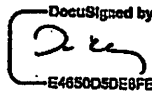
10. For all the above reasons, cause exists to uphold CalPERS' determination that respondent is not entitled to file an application for an industrial disability retirement allowance. Therefore, his application should be denied.

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ORDER

Respondent Glen W. Sebring's application for industrial disability retirement is DENIED.

DATED: May 11, 2016

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TIFFANY L. KING
Administrative Law Judge
Office of Administrative Hearings