

ATTACHMENT E
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 Disability Retirement of:

HARRY MOHAN SINGH DHESI,
Respondent,

and

DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2012-0976

OAH No. 2013030889

PROPOSED DECISION

This matter was heard before Erin R. Koch-Goodman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on March 8, 9, 21, and 22, 2016, in Sacramento, California.

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

Kevin Harris, Attorney at Law, represented Harry Dhesi (respondent).

There was no appearance by or on behalf of the Department of Corrections and Rehabilitation (CDCR). The matter proceeded as a default against CDCR pursuant to California Government Code section 11520, subdivision (a).

Evidence was received at hearing. The record remained open for submission of closing briefs. Respondent's Closing Brief was received on May 27, 2016, and marked as Exhibit XXXXX. CalPERS's Closing Brief was received on June 20, 2016, and marked as Exhibit 17. Respondent's Rebuttal Brief was received on July 5, 2016, and marked as Exhibit YYYYY. The record was closed and the matter was submitted for decision on July 5, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

August 9 20 *16*
Ruthie E. Schuetz

ISSUE

Is respondent precluded from filing an application for disability retirement in light of his for-cause dismissal from state service?

FACTUAL FINDINGS

1. Respondent was employed by the CDCR, California State Prison, Sacramento (CSP-Sac), as a Dentist from July 2, 2001, through March 16, 2009. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21154.

Respondent's Dismissal

2. On or about March 3, 2009, respondent was served with a Notice of Adverse Action (NOAA), for dismissal, effective March 16, 2009. The NOAA alleged respondent failed to properly diagnose and treat five inmate patients resulting in a gross departure from the dental standard of care; slept while at work on two occasions; and made inappropriate comments to a coworker. Respondent was charged with violations of Government Code section 19572, subdivisions (b) Incompetency, (c) Inefficiency, (d) Inexcusable neglect of duty, (m) Discourteous Treatment of the Public or Other Employees, 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.

3. Respondent appealed the NOAA. On February 22, 2010, his appeal was heard by an administrative law judge of the State Personnel Board (SPB). Respondent denied all charges and contended that he followed *Perez Policies*¹ in providing dental care to inmate patients. On August 17, 2010, the SPB approved a Decision finding respondent violated Government Code section 19572, subdivisions (b) Incompetency, because his treatment of patients A, B, C, and E fell below the standard of care; (c) Incompetency, because he failed to properly diagnose, prioritize, and timely treat patients, such that the patients had to be seen multiple times, by other dentists, to resolve their issues; (d), Inexcusable Neglect of Duty, because respondent was sleeping while at work on two occasions; (m) Discourteous Treatment of the Public or Others, because he made inappropriate comments about his supervisor, including wishing him dead, to a coworker and made inappropriate sexual

¹ On December 19, 2005, a group of inmates housed in California correctional institutions filed a class action lawsuit alleging that they were not receiving adequate dental care as required by the Eighth Amendment to U.S. Constitution. (*Perez v. Tilton*, N.D. Cal. C-05-5241-JSW.) On May 1, 2006, the Court approved a stipulation between the inmate plaintiffs and CDCR regarding the provision of dental care to inmates with serious dental care needs. As part of the stipulation, CDCR agreed to implement the Health Care Services Division Dental Policies and Procedures (*Perez Policies*).

comments to a female coworker; and (t) Other Failure of Good Behavior, because respondent's conduct caused discredit to the institution and harm to inmate patients.

4. On January 28, 2011, respondent filed a Writ of Mandate with the Sacramento Superior Court appealing the SPB Decision. On August 8, 2011, Judge Timothy M. Frawley denied respondent's petition. Judge Frawley signed the judgment on October 11, 2011.

Respondent's Application for Disability Retirement

5. On September 6, 2011, respondent filed an application with CalPERS for industrial disability retirement (Application). Respondent stated he was disabled and/or substantially incapacitated from the performance of his usual job duties as a Dentist based upon his orthopedic (lower back) condition. Respondent submitted a Physician Report on Disability by Alicia Abels, M.D. with his Application. In the Report, Dr. Abels found respondent unable to perform his duties as of July 17, 2008. On August 24, 2012, CalPERS wrote respondent informing him his Application was cancelled.

You were dismissed from employment for reasons which were not the result of a disabling medical condition. Additionally, the dismissal does not appear to be for the purpose of preventing a claim of disability retirement. Therefore, under the Haywood case, you are not eligible for disability retirement. For that reason, CalPERS cannot accept this application for disability retirement.

Respondent's Medical Conditions

LOW BACK

6. On August 18, 2003, respondent had a low back injury (disc injury at L-5) at work. He filed a worker's compensation claim. He was off work from August 18, 2003, until approximately July 28, 2004, when he was released to work with no restrictions. On August 25, 2006, respondent was deemed permanent and stationary² in his worker's compensation case for his lower back condition.

7. On October 21, 2006, respondent made a request for reasonable accommodation (RA)³ to CSP-Sac to have a dental assistant present to assist him when he is

² "Permanent and stationary" is a worker's compensation term. A "permanent and stationary" finding means that the employee's condition or injury has plateaued to the point where additional medical treatment is not likely to improve the condition or injury. It also signals the end of temporary disability payments.

³ The Fair Employment and Housing Act (FEHA) allows a "qualified" disabled employee to request reasonable accommodation of their job duties, as long as the

performing complicated medical procedures. Dr. Abels provided a letter of support for respondent's request, dated December 5, 2006. On December 11, 2006, Dr. Abels completed a CDCR RA questionnaire, and provided further clarification of respondent's RA request, indicating: "when involved in prolonged procedures requiring greater than 10 minutes of time in one position (i.e., leaning forward – bent position at waist or neck), he should be allowed assistance i.e. licensed dental assistant." On February 6, 2007, CDCR informed respondent that his limitation (i.e. not bend or lean forward for more than 10 minutes at a time) might preclude him from completing the essential functions of the job of Dentist. As a result, CDCR sent respondent an "options letter" and reviewed the duties of a Quality Management Policies and Procedures (QMAT) Dentist position, as a potential lateral transfer. On April 2, 2007, CDCR sent Dr. Abels a questionnaire regarding the QMAT Dentist job duties.

8. In June 2007, respondent reinjured his back by bending over to pick up inmate patient files on the floor. Respondent filed another worker's compensation claim. In or about August 2007, State Compensation Insurance Fund (SCIF) informed respondent he could not file a claim for re-injury or aggravation to an already existing industrial injury. SCIF closed the file.

9. On June 26, 2007, respondent filed another request for RA, to have a dental assistant present to assist him when performing complicated medical procedures. CDCR determined that the 10-minute restriction dealt specifically with patient care, and most, if not all procedures take more than 10 minutes, meaning respondent's request was for a fulltime dental assistant for all of his patient care. On August 13, 2007, CDCR informed respondent that his RA was granted, and CSP-Sac Chief Dentist Marc Weisman agreed to ensure a dental assistant was available to respondent during his patient care.⁴

CHEST PAINS

10. On November 8, 2007, respondent was temporarily reassigned from the dental clinic to the medical warehouse, while CDCR investigated complaints against respondent for poor patient care in August 2007. On November 9, 2007, respondent suffered severe chest pains. He was hospitalized for several days and remained off work for eight months. On June 12, 2008, Dr. Abels provided CDCR with limitations for respondent's return to work: from July 1 to 30 – four hours per day maximum; from July 31 to August 29 – six hours per day maximum; and return to full duty with no restrictions on August 30, 2008. Respondent returned to work in the warehouse on July 7, 2008. On July 17, 2008, respondent again

accommodation is not an undue burden on the employer. The employer and employee must engage in an "interactive process" to determine if an accommodation is reasonable and available.

⁴ Respondent asserts that he was never provided a fulltime dental assistant. However, failure to accommodate a "disabled" employee is a violation of the FEHA; jurisdiction for such a claim is in superior court or as an affirmative defense to a NOAA at the SPB.

reinjured or aggravated his low back. On October 24, 2008, CDCR transferred respondent to the mailroom.

Respondent's Medical Evidence – Alicia Abels, M.D.

11. Dr. Abels testified at hearing. Dr. Abels practices physical medicine and rehabilitation in Folsom, California. She sees worker's compensation patients, after they are deemed permanent and stationary, for their "future medicals." Respondent was referred to Dr. Abels, by SCIF, in 2004 for a second opinion consultation. She became respondent's primary treating physician for his low back industrial injury and worker's compensation claim.

12. On September 15, 2011, Dr. Abels signed a Report on Physical Disability for respondent's Application. Dr. Abels documented the following: "Date Member Unable to Perform Job Duties - July 17, 2008"; "Origin of Injury – [h]ad a severe flare-up of pain/possible re-injury doing warehouse work." Dr. Abels answered "yes" to the following questions: "[i]s the member currently substantially incapacitated from performance of the usual duties of the position for their current employer"; "[w]ill the incapacity be permanent; [w]as the job duty statement/job description reviewed to make your medical opinion"; "[w]as the Physical Requirements of Position/Occupational Title form reviewed to make your medical opinion"; and "[w]as information reviewed that the member provided?" Dr. Abels described respondent's limitations as: "unable to lift > 25 lb. without increased pain. Unable to perform repetitive bending or stooping." At hearing, Dr. Abels said, when completing the Report on Physical Disability, she has no recollection of whether she was evaluating respondent using the Dentist position or the Warehouse Worker position.

13. A review of Dr. Abels's Progress Notes indicates that in and around July 2008, she was treating and evaluating respondent in his warehouse position. For example, among other dates, Dr. Abels saw respondent on August 5 and 21, 2008 and September 25, 2008. The August 5, 2008 notes stated, in part:

SUBJECTIVE: He is here today to discuss his job in the warehouse Harry says that on the date he had the re-injury to his back in the warehouse that his immediate supervisor in the warehouse operations had not been informed that he had any restrictions or any problems requiring accommodation with his low back. Since then, the supervisor has been informed that Harry should not lift or bend and so now Harry will have help with these activities.

ASSESSMENT: Harry's job analysis will now accommodate him for his low back problem. He should not be doing repetitive lifting and bending and should always ask for inmate help with these activities. If none is available, he should not perform the task. His supervisor was not aware of any work

restrictions at the time Harry was hurt in July. He is now aware of work restrictions.

14. Dr. Abels was questioned about the different definitions of qualifying disability under the law in California, including worker's compensation,⁵ the FEHA,⁶ and CalPERS retirement. On more than one occasion, Dr. Abels supported respondent's requests for RA, because she deemed him a disabled employee under the FEHA and entitled to a RA. Respondent had a physical condition that affected his musculoskeletal system and limited a major life activity, his work. Dr. Abels identified the CalPERS standard for disability as the substantial incapacity to perform the essential duties of an occupation, with no prophylactic measures, determined by objective findings only, not subjective complaints of pain by the patient. Dr. Abels compared the CalPERS disability standard to the worker's compensation standard, which allows for a finding based on prophylactic measures, to prevent further injury and undue patient pain.

15. When completing the Physician's Report on Disability, Dr. Abels admitted using respondent's subjective complaints of pain to make her findings. She noted that she is not an orthopedic doctor and did not complete an orthopedic examination of respondent prior to completing the Report. In her practice, she believes in rehabilitation and wants her patients to continue to work as long as they can. She does not believe she is in a position to tell patients to stop working, and she noted, she never said respondent should not be practicing dentistry. Instead, she was trying to help him get back to work. In sum, at all times relevant, Dr. Abels believes respondent was able to work as a Dentist, with a RA, and therefore, he is not disabled under the CalPERS standard.

Discussion

16. This Board determines an employee's eligibility for retirement benefits. The Board is guided by the Public Employees Retirement Law (PERL) (Gov. Code § 20000 et seq.). Case law has further interpreted the PERL; relevant here, are the cases of *Haywood v. American River Fire Protection District* (1999) 67 Cal.App.4th 1292, and *Smith v. City of*

⁵ A "Qualified Injured Worker" is "[a]n employee who (1) has an injury which permanently precludes, or is likely to preclude, him or her from engaging in his or her usual occupation or the position in which he or she was engaged, and (2) can reasonably be expected to return to gainful employment through vocational rehabilitation services." (Cal. Code Regs., tit. 2, § 599.779.1.)

⁶ A "physical disability" includes having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of several body systems and limits a major life activity. (Gov. Code, § 12926, subd. (m).) An employer is obligated to provide a reasonable accommodation to an employee with a qualifying disability, unless the accommodation would represent an undue hardship to the business operation. (Gov. Code, § 12926, subd. (p).)

Napa (2004) 120 Cal.App.4th 194. The Court in *Haywood* held that a severance of the employment relationship renders the employee ineligible for disability retirement, because he has no continuing relationship with the employer and is ineligible for reinstatement. *Haywood* highlights two exceptions to the rule: (1) if the employee is discharged because of a disabling medical condition or (2) the employee's firing is preemptive of an otherwise valid claim for disability. (*Haywood, supra*, 67 Cal.App.4th at p. 1305-1306.) To be a valid claim, a vested right must be mature (i.e. when there is an unconditional right to immediate payment). (*Smith, supra*, 120 Cal.App.4th at p. 206.) However, the *Smith* Court stated that principles of equity might also deem an employee's right to a disability retirement to be mature, if (1) the employee "had an impending ruling on a claim for disability pension that was delayed, through no fault of his own, until after his dismissal," or (2) "there is 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 the loss of a limb)." (*Smith, supra*, 120 Cal.App.4th at p. 207.)

17. Here, respondent injured his low back at work in 2003. He was off work from August 2003 to July 2004, when he was released to work without restrictions. He filed a worker's compensation claim and was determined to be permanent and stationary in August 2006. In October 2006 and June 2007, respondent requested a RA, and was granted the accommodation of a dental assistant for all patient care. In August 2007, complaints surfaced regarding respondent's alleged failure to adequately diagnose and treat four inmate patients. In November 2007, he was transferred to the warehouse, pending an investigation. In October 2008, he was transferred to the mailroom. In March 2009, he was served a NOAA and terminated. He appealed, and in February 2010, his dismissal was upheld. He filed a Writ in January 2011. In September 2011, respondent filed his Application. In October 2011, the Writ was denied.

18. Respondent filed for disability retirement after he was terminated from State service. His termination was upheld. Under *Haywood*, respondent is precluded from filing an industrial disability retirement application unless he can provide evidence he meets an exception.

19. Respondent argues that CDCR failed to provide him a dental assistant as a reasonable accommodation.⁷ Without a dental assistant, respondent asserts he was unable to do his job because of his disabling medical condition.⁸ Therefore, because of his disabling

⁷ Respondent asks this Board to make a finding against CDCR for its failure to accommodate him. The Board does not have jurisdiction to make such a finding.

⁸ Respondent asks this Board to make a finding against CDCR for its failure to file a disability retirement application on respondent's behalf, under Government Code section 19253.5, subdivision (i)(1); or in the alternative, allow respondent's application under the principles of equity because of CDCR's failure. To that end, respondent alleges that CDCR knew, that without reasonable accommodation, respondent was unable to perform the work of his position and they were therefore obligated to file for disability retirement on his behalf.

medical condition, respondent was unable to properly treat the inmate patients at issue in the NOAA, and he was unlawfully terminated as a direct result of his disabling medical condition. At hearing, CSP-Sacramento Dentist John Maciel and Chief Dentist Marc Weisman testified. Maciel was respondent's acting supervisor from June through November 2007. During that time, respondent told Maciel he had back pain on some days and complained that his dental assistant was leaving early, but respondent never told Maciel he could not complete his patient care because of his back or because he was without a dental assistant. Similarly, respondent never told Weisman that he did not have a dental assistant for procedures, thereby precluding his ability to care for patients.

Statewide Dental Director Dentist William Kuykendall also testified. He opined regarding respondent's failures in treating the inmate patients at issue in the NOAA. Kuykendall testified as an expert at respondent's SPB hearing as well. Kuykendall believes that respondent's care of the five inmate patients at issue fell below the standard of care. For example, Kuykendall referenced Patient B, explaining that he had a clearly infected tooth that needed to be extracted. However, respondent failed to diagnose the infection or extract the tooth. Kuykendall opined that if respondent was unable to extract the tooth because of his back, he should have asked for assistance, or noted in the file he was unable to extract the tooth without assistance and ordered the inmate patient back immediately, because of the infection, to be treated by another dentist, but respondent did none of the above. Given the above, respondent was discharged for cause and not because of a disabling condition.

20. Perhaps most important, at hearing, Dr. Abels was clear that respondent was, at all times, capable of completing the essential functions of the Dentist job, with accommodation. Her conclusion, by definition, makes respondent ineligible for a disability retirement under the substantially incapacitated standard.

21. Given the above, respondent did not establish that he was discharged because of a disabling medical condition or that his firing was preemptive of an otherwise valid claim for disability. Respondent did not present evidence that he had a matured right to disability retirement before he was separated from service or that a favorable decision by CalPERS was a foregone conclusion. When all of the evidence and arguments are considered, respondent did not establish that his Application should be accepted by CalPERS.

First, the Board does not have jurisdiction to make a finding against CDCR. Second, assuming, *arguendo*, CDCR had filed an application on respondent's behalf, simply filing an application does not mean CalPERS would grant disability retirement to the applicant. Third, Government Code section 19253.5, subdivision (i)(1), requires an employee to be "unable to perform the work of his or her present position or any other position in the agency." There are no facts in the record to support such a conclusion.

LEGAL CONCLUSIONS

1. Respondent has the burden to prove that, by a preponderance of the evidence, he is entitled to file an application for industrial disability retirement.

2. In *Haywood, supra*, 67 Cal.App.4th at p. 1297, the Court found that, when “an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination of the employment relationship renders the employee ineligible for disability retirement.” The Court opined that the employee’s dismissal “constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement-the potential reinstatement of his employment relationship with the District if it ultimately is determined that he is no longer disabled.” (*Ibid.*)

3. In *Smith, supra*, 120 Cal.App.4th at pp. 203-204, the Court explained “the key issue” is whether the employee’s right to a disability retirement “matured” before the employee’s separation from service (i.e. CalPERS determined that the employee had an unconditional right to immediate payment). (*Id.* at p. 206.) The *Smith* Court also discussed the application 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.) For example, if the employee “had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after dismissal”; or “there is 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).”

4. Government Code section 21154, provides, in relevant part, that an application for disability retirement “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.”

5. As set forth in the Factual Findings, before filing for disability retirement, respondent was dismissed for cause from state service. Respondent did not establish either: (1) that his separation from state service was the ultimate result of his disabling condition; or (2) that his separation from state service preempted an otherwise valid claim for disability retirement. In addition, respondent did not establish there were any equitable principles that should be applied to grant him the right to seek disability retirement.

6. Pursuant to the holdings in *Haywood* and *Smith*, CalPERS properly cancelled respondent’s application for disability retirement.

ORDER

The appeal of respondent Harry Mohan Singh Dhesi is DENIED. CalPERS properly cancelled respondent's application for disability retirement.

DATED: August 4, 2016

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ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings