

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

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

PERS Case No. 2015-0748

RADU M. MISCHIU,

OAH No. 2016050666

Respondent,

and

CALIFORNIA STATE PRISON –  
SOLANO, CALIFORNIA DEPARTMENT  
OF CORRECTIONS &  
REHABILITATION,

Respondent.

**PROPOSED DECISION**

Administrative Law Judge Gene K. Cheever, Office of Administrative Hearings, State of California, heard this matter on August 17, 2016, in Sacramento, California.

Cynthia A. Rodriguez, Senior Staff Attorney, represented California Public Employees' Retirement System (complainant or CalPERS).

Steven B. Bassoff, Law Office of Steven B. Bassoff, represented Radu M. Mischiu (respondent), who was present.

There was no appearance on behalf of respondent California State Prison – Solano (CSP-SOL), California Department of Corrections & Rehabilitation (CDCR). The matter proceeded as a default against CDCR pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted on August 17, 2016.

## ISSUE

Is respondent eligible to apply for industrial disability retirement under Government Code section 21151, or is his eligibility precluded by operation of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4<sup>th</sup> 1292, *Smith v. City of Napa* (2004) 120 Cal.App.4<sup>th</sup> 194, and *In the Matter of Robert C. Vandergoot* (2013), CalPERS' Precedential Decision No. 13-01.

## FACTUAL FINDINGS

1. On December 1, 2000, CSP-SOL hired respondent as a Staff Psychiatrist. By virtue of his employment, respondent became a state safety member of CalPERS subject to Government Code sections 21151 and 21154.

2. Prior to March 20, 2012, CSP-SOL's medical staff determined that respondent's competency to deliver quality medical care was in question. CSP-SOL suspended respondent's psychiatry privileges, and on March 20, 2012, informed respondent that he was required him to attend the University of San Diego School of Medicine Physician Assessment and Clinical Education Program (PACE) as a condition to his regaining his psychiatry privileges at CSP-SOL. Respondent did not attend PACE.

3. On March 23, 2012, respondent took a leave of absence from work pending a determination of a Workers' Compensation claim. He was on leave at CSP-SOL between March 23, 2012 and July 31, 2014. He nevertheless worked as an independent contractor as a Disability Evaluator for the Department of Industrial Relations (DIR) during this time, which required him to use his knowledge and skill as a psychiatrist to evaluate Workers' Compensation claims.

### *Respondent's AWOL Resignation of Employment*

4. On July 11, 2014, CSP-SOL sent respondent a letter directing him to return to work on August 4, 2014. The letter notified him of the following: (a) CSP-SOL had no medical restrictions on file to indicate he was not able to perform the essential duties of a Staff Psychiatrist after July 31, 2014; (b) he had exhausted all of his leave credits; (c) as a "requirement" of his employment, he "must" complete the PACE program prior to returning to his position as a Staff Psychiatrist; (d) he "must" return to work on August 4, 2014 by reporting to the designated PACE program in San Diego on August 4 and 5, 2014; and (e) his failure to report to work would "be considered absent without leave (AWOL)." Respondent failed to report to work on August 4 through 8, 2014, by his not reporting to PACE on August 4 and 5, 2014, and not reporting to CSP-SOL on August 6 through August 8, 2014.

5. On August 11, 2014, CSP-SOL served respondent with a Notice of Automatic Resignation (AWOL Separation Notice), pursuant to Government Code section 19996.2 (AWOL statute), for his absence without leave from work from August 4, 2014, through

August 8, 2014. The AWOL Separation Notice advised him of his appeal rights. On August 21, 2014, he filed a reinstatement appeal pursuant to the AWOL statute with the Department of Human Resources (CalHR).

6. On October 22, 2014, a CalHR Administrative Law Judge (ALJ) heard respondent's appeal. Respondent was present and represented by counsel. The hearing addressed the following three issues: (1) did respondent have a satisfactory explanation for his absence from work for the period August 4, 2014, through August 8, 2014; (2) did respondent have a satisfactory explanation for not obtaining leave for the period August 4, 2014, through August 8, 2014; and (3) was respondent ready, able, and willing to return to work and discharge the duties of a Staff Psychiatrist. On December 16, 2014, the ALJ issued a proposed decision. On December 18, 2014, CalHR adopted the ALJ's proposed decision as its own. In denying respondent's appeal, the Decision concluded that respondent failed to prove by a preponderance of the evidence each of the following: (1) that he had a satisfactory explanation for his absence; (2) that he had a satisfactory explanation for not obtaining leave; and (3) that he was ready, able, and willing to return to work to discharge the duties of a Staff Psychiatrist.<sup>1</sup> Thus, respondent constructively resigned his employment with CSP-SOL, effective close of business July 31, 2014, and he had no right of reinstatement pursuant to the AWOL statute.

#### *Respondent's Industrial Disability Retirement Applications*

7. On November 18, 2014, while his CalHR appeal was pending, respondent filed an industrial disability retirement application (first application) with CalPERS, which CalPERS received on November 19, 2014. In filing the first application, he claimed disability on the basis of partial use of left hand, right hand, sitting difficulties, and inability to drive or concentrate. He requested August 9, 2014, as his retirement date. On January 16, 2015, CalPERS cancelled his first application due to his failure to provide required forms.

8. On January 26, 2015, respondent filed a second application for industrial disability retirement (second application) with CalPERS, which CalPERS received on January 26, 2015. In filing the second application, he claimed disability on the basis of limited use of right hand/shoulder, left shoulder, sitting difficulties, inability to drive, decreased concentration, and poor memory/attention. He requested August 9, 2014 as his retirement date.

9. After receiving the second application, CalPERS reviewed respondent's employment status with CSP-SOL and the cases of *Haywood, supra*, 67 Cal.App.4<sup>th</sup> 1292, *Smith, supra*, 120 Cal.App.4<sup>th</sup> 194, and *In the Matter of Robert C. Vandergoot, supra*,

---

<sup>1</sup> The Decision found that on July 23, 2014, respondent returned to his primary care physician, Dr. Patel, who "gave the [respondent] a doctor's note taking him off work for six weeks." The decision did not state, and there was no evidence introduced at hearing, whether respondent ever made CSP-SOL aware of this doctor's note before CSP-SOL sent its AWOL Separation Notice.

CalPERS' Precedential Decision No. 13-01. On March 25, 2015, CalPERS notified respondent by letter of its decision to cancel his second application. It stated:

[I]t has been determined that the facts of your case fit within the *Haywood* case. 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 for disability retirement. Therefore, under the *Haywood* case, you are not eligible for disability retirement. For that reason, CalPERS cannot accept this application for industrial disability retirement.

10. On April 2, 2015, respondent appealed CalPERS' decision. In his appeal and at hearing, he argued *Haywood*, *Smith*, and *Vandergoot* do not apply to his second application because he was not terminated for any "wrongdoing," but rather had resigned his position pursuant to the AWOL statute. Further, as recognized by the Supreme Court in *Coleman v. Department of Personnel Administration* (1991) 57 Cal.3d 1102, an AWOL resignation employee can be reinstated to his former state employer, unlike an employee terminated for disciplinary reasons who can be disqualified from future state employment. Thus, he argued he was eligible to return to work at CSP-SOL after his AWOL resignation. Finally, he argued that even if *Haywood*, *Smith*, and *Vandergoot* are apposite, he was still eligible to file his second application because his discharge was the ultimate result of a disabling medical condition and/or CSP-SOL's actions in sending its AWOL Separation Notice was preemptive of his otherwise valid claim for disability retirement.

### *Discussion*

#### HAYWOOD, SMITH, AND VANDERGOOT

11. In *Haywood*, *supra*, 67 Cal.App.4<sup>th</sup> 1292, a fire district terminated a firefighter for cause who manifested an insubordinate attitude throughout his career. After his termination, he filed an application for disability retirement. The fire district denied his application, and he appealed. (*Id.* at pp. 1295-1296, 1298-1299.) The *Haywood* court examined the legislative intent underlying the disability retirement laws. It concluded these laws presuppose a continuing, if abated, employment relationship where the employer can compel the disabled annuitant to return to active service if the disability is no longer continuing. The potential reinstatement of the employee with his former employer, if it is determined later that he is no longer disabled, is a necessary requirement for disability retirement. (*Id.*, at pp. 1305-1306.) The *Haywood* court rejected the firefighter's claim that he was entitled to disability retirement, despite his termination for cause, as long as he filed a timely application pursuant to Government Code section 21154. (*Id.*, at p. 1306.) It found Government Code section 21154 requires, when a timely application is filed, that the applicant is both: (1) "eligible to retire for disability" and (2) "incapacitated for the performance of duty" in order to be granted disability retirement. The *Haywood* court found the firefighter was not "eligible to retire for disability" where he had been terminated for

cause given the disability retirement laws' intent to allow the employer to require the employee to return to active service if the disability is no longer continuing. (*Id.*, at pp. 1306-1307.) To interpret this language otherwise would negate the power of a public agency to discipline employees. (*Ibid.*) The employer should not be required to make the choice of reinstating the employee after he had been terminated for cause or continuing to pay him disability retirement after he was no longer disabled. The *Haywood* court held where "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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed." (*Id.*, at pp. 1306-1307.)

12. In *Smith, supra*, 120 Cal.App.4<sup>th</sup> 194, a city terminated a firefighter because he was not able to pass a skills certification test for reasons unrelated to any alleged disability. On the effective date of his dismissal, he filed an application for service-connected disability retirement. The City and CalPERS denied his application. (*Id.*, at pp. 198-202.) The *Smith* court held that, consistent with the rationale of *Haywood*, the City's dismissal of the firefighter due to his inability to perform his duties extinguished his right to a disability retirement. The timeliness of his application and the desire of the firefighter to return to work were irrelevant. (*Id.*, at pp. 203-205, 208.) The employer should not be required to make the choice of reinstating the employee when he was not able to perform his duties as a firefighter or continuing to pay him disability retirement after he was no longer disabled.

13. The *Smith* court then addressed the firefighter's claim he fell within the stated exceptions to the *Haywood* holding. It clarified that "if a plaintiff were 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. . . . Conversely, the 'right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures...' " (Citations omitted.) (*Smith, supra*, 120 Cal.App.4<sup>th</sup> at p. 206.) "The key issue is thus whether his right to a disability retirement matured before [his] separation from service." (*Ibid.*) The *Smith* court determined that maturation does 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. (*Ibid.*) It 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. 206-207.) It suggested that such a case might arise where there is "undisputed evidence" that the applicant was eligible for disability retirement "such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb)." (*Id.*, at p. 207.) An entitlement to disability retirement, however, cannot rest on the applicant's medical evidence. (*Ibid.*)

14. In *In the Matter of Robert C. Vandergoot, supra*, CalPERS' Precedential Decision No. 13-01, an employee filed an industrial disability retirement application in April 2010 after he received a Notice of Adverse Action dismissing him on March 31, 2010. CalPERS denied his application, and the employee appealed. On February 6, 2011, the employee and his employer state agency entered into a settlement agreement. It provided

that the employee was deemed to have resigned his employment for personal reasons effective December 9, 2010; that for the time period from March 31, 2010, through December 9, 2010, the employee was deemed to be on unpaid leave status; and the employee could not be reemployed again by the employer.

15. The *Vandergoot* Board explained that under *Haywood*, a necessary requisite for disability retirement eligibility is the potential reinstatement of the employment relationship between the applicant and the employer if it is later determined the applicant is no longer disabled. That necessary requisite was not possible because of the settlement agreement. If the employee were to receive a disability retirement allowance, he could not be reinstated to work at his employer if he were later not disabled. (*In the Matter of Robert C. Vandergoot, supra*, CalPERS' Prec. Dec. 13-01 at pp. 4-8.) The Board held in these circumstances, the employee's resignation was tantamount to a dismissal for the purposes of applying the *Haywood* criteria. (*Id.*, at pp. 7-8, ¶¶ 18 & 19.) The Board also found the employee had not established eligibility pursuant to the *Haywood* exceptions and/or the *Smith* equitable principles. The Board denied the employee's appeal.

#### COLEMAN

16. In *Coleman, supra*, 52 Cal.3d 1102, the Supreme Court addressed the due process procedural safeguards required for an employee who had resigned from work pursuant to the AWOL statute and his state employer invoked the AWOL statute. The high court stated that under the AWOL statute, it is the employee, not the state employer, who severs the employment relationship by his or her absence without leave for five consecutive working days. (*Id.*, at pp. 1114-1115.) However, the absence without leave becomes a constructive resignation only if the state employer decides to exercise its discretion to invoke the AWOL statute. (*Id.*, at pp. 1117-1118.) In holding that an AWOL resignation employee has a due process right to a pre-severance hearing but not a post-severance hearing - unlike a disciplinary discharged employee who is entitled to both - the high court emphasized a distinction between a disciplinary discharge and an AWOL resignation. An employee discharged for disciplinary reasons can be disqualified from future state employment. An AWOL resignation employee, however, can be reinstated to his former employer, and is entitled to reinstatement upon a timely appeal that shows a "satisfactory explanation" for the unexcused absence and he or she is ready, able, and willing to resume the job duties. (Gov. Code §§ 19140 and 19996.2(a).) (*Id.*, at pp. 1118-1121.)

#### ANALYSIS

17. The *Coleman* decision does not support respondent's appeal. That decision addressed distinctions between an AWOL resignation and a disciplinary dismissal in the context of deciding whether an AWOL resignation employee is entitled to the same due process procedural safeguards as a disciplinary dismissal employee. Respondent's appeal involves whether he is eligible to apply for disability retirement after his AWOL resignation in light of the intent of the disability retirement statutes. Consideration of the distinctions of the two separation methods for due process purposes are not the same for addressing



respondent's eligibility for disability retirement. Further, the distinctions themselves do not benefit respondent's appeal.

18. The *Haywood*, *Smith*, and *Vandergoot* decisions apply to respondent's AWOL resignation such that he was not eligible to apply for disability retirement. Respondent choose to be absent from work for five continuous days without leave. CSP-SOL then exercised its discretion to invoke the AWOL statute. Respondent constructively resigned his employment relationship with CSP-SOL. After CalHR denied his appeal, respondent had no right to return to work at CSP-SOL. As in *Haywood*, *Smith*, and *Vandergoot*, his employment relationship with CSP-SOL was completely severed and it would be inconsistent with the intent of the disability retirement laws to find respondent eligible for disability retirement under these circumstances. If respondent were later determined to not be disabled, CSP-SOL should not be put in the position of having to reinstate him after having exercised its discretion to invoke the AWOL statute or to continue to pay his disability retirement allowance after he is no longer disabled.

19. Further, respondent is not eligible to return to work at CSP-SOL.<sup>2</sup> He did not attend the PACE program, a requirement for him to resume his job duties. Again, and similar to *Smith*, if respondent were later determined to not be disabled, CSP-SOL should not be put in the position of having to reinstate him when he cannot perform his job duties or to continue to pay his disability retirement allowance after he is no longer disabled.<sup>3</sup>

20. Respondent alternatively argues his disability for which he sought "industrial disability retirement is the reason he was unable to return to work and served as the basis for the AWOL." He failed, however, to set forth sufficient evidence to establish his AWOL resignation was the result of a disabling medical condition and/or that CSP-SOL's action in invoking the AWOL statute was pre-emptive of his otherwise valid claim for disability retirement. CalPERS set forth evidence showing the contrary. The CalHR decision, for example, established he failed to show by a preponderance of the evidence that: (1) he had a satisfactory explanation for his five day absence from work; (2) that he had a satisfactory explanation for not obtaining leave for his five day absence from work; and/or (3) that he

---

<sup>2</sup> Respondent incorrectly argued he was eligible to return to work at CSP-SOL based on the following sentence in the July 11, 2014, CSP-SOL letter sent to him: "The purpose of this letter is to inform you that you may return to full duty, to your position as a Staff Psychiatrist, Correctional and Rehabilitative Services (CRS) (Safety), at the California State Prison, Solano." The letter subsequently stated, however, that "as a requirement of your employment with [the California Correctional Health Care Services], you must complete the Physician Assessment and Competency Examination [sic] (PACE) program prior to returning to your position as a Staff Psychiatrist, CRS (Safety)."

<sup>3</sup> In *Smith*, the firefighter attempted to pass his competency test. Here, respondent did not attend the PACE program.



was ready, able, and willing to return to work and discharge the duties of a Staff Psychiatrist. That decision is binding on him here. Thus, his appeal fails on these grounds, too.<sup>4</sup>

## LEGAL CONCLUSIONS

1. "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." (*McCoy v. Board of Retirement* (1980) 183 Cal.App.3d 1044, 1054.) As the applicant, respondent has the burden of proving by a preponderance of the evidence that he is eligible to apply for industrial disability retirement under Government Code section 21151 after his AWOL resignation pursuant to Government Code section 19996.2.

2. Government Code section 21151, subdivision (a), provides that, "[a]ny 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."

3. Government Code section 21152, subdivision (d), provides that an application for disability retirement of a member may be made by, "[t]he member or any person in his or her behalf."

4. Government Code section 21154 provides in pertinent part:

The application shall be made only (a) while the member is in state service, or ... (c) within four months of discontinuance of 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 an application for disability retirement of a member... the board shall, or of its own motion it may, order a medical examination of the member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty....

---

<sup>4</sup> Respondent did not introduce any evidence that: (1) he was eligible for disability retirement before CSP-SOL sent its AWOL Separation Notice to him; (2) a physical or mental disability served as a basis for CSP-SOL to send its AWOL Separation Notice to him; and/or (3) his right to a disability retirement should be deemed to have matured and/or survived his constructive resignation as a matter of equity.

5. As addressed in Factual Findings 11 through 20, respondent's application for disability retirement is precluded by *Haywood, supra*, 67 Cal.App.4th 1292, *Smith, supra*, 120 Cal App.4th 194, and *In the Matter of Robert C. Vandergoot, supra*, CalPERS' Precedential Decision No. 13-01. Respondent's AWOL resignation and the denial of his appeal of his AWOL resignation pursuant to Government Code section 19996.2, subdivision (a), extinguished his right to file an industrial disability retirement application. Respondent's AWOL resignation was not the result of a disabling medical condition, and CSP-SOL's action in invoking the AWOL statute was not pre-emptive of an otherwise valid claim for disability retirement. In addition, there is not sufficient evidence to indicate that, based on equitable principles, respondent should be eligible to apply for industrial disability retirement.

### ORDER

CalPERS's decision to cancel respondent Radu M. Mischiu's January 26, 2015 Industrial Disability Retirement Application is **AFFIRMED**. Respondent Radu M. Mischiu's appeal is **DENIED**.

**DATED: September 13, 2016**

DocuSigned by:

*Gene Cheever*

882CCD3F038944F...

---

**GENE K. CHEEVER**  
Administrative Law Judge  
Office of Administrative Hearings